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#LOLNothingMatters

Chris Sagers
Cleveland-Marshall College of Law, Cleveland State University, c.sagers@csuohio.edu

Article

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Chris Sagers*

Abstract

Institutions matter in antitrust, at least as much as ideas. Most antitrust arguments, and especially the contretemps currently enjoying some attention in the popular press, imagine that antitrust problems are short- or medium-term matters, and that they can be corrected with local doctrinal steps. I suggest there is a deeper problem, a phenomenon more deeply inherent in the nature of competition itself. The problem will cyclically recur, so long as institutional brakes are unavailable to keep it at bay. Specifically, it seems that competitive markets are difficult to preserve without some prospective, no-fault rule to control concentration for its own sake. At least nominally, American antitrust has such a rule in its basic merger law, Clayton Act § 7, but the rest of it consists of retrospective, fault-based, law-enforcement rules that in their application are by nature somewhat piecemeal. A prospective concentration rule is needed because once markets become concentrated, situations are common in which neither disciplinary new entry nor retrospective conduct remedies can restore competition. The deeper problem inherent in competition policy, which demonstrates the significance of institutions as well as ideas, is that such a rule is also most difficult to enforce. That is so because markets in their ordinary operation are confusing and contradictory to watch, and the hardest interventions for government to defend to a skeptical public are those that are prospective. Finally, however, it so happens that one institutional correction currently on the legislative agenda could conceivably do some good in correcting for this problem—a specific plank in congressional Democrats' "Better Deal" platform.

Keywords

monopoly problem, no-fault monopoly, deconcentration, merger, Clayton Act § 7, competition as political compromise, a better deal, post-consummation merger review

> The antitrust laws have not been effective in the real world. . . . Unfortunately, all antitrust law enforcement under any plan depends on the public attitude.
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> —Thurman Arnold, 1949[1]

1. Thurman Arnold, Symposium, The Effectiveness of the Federal Antitrust Laws, 39 Am. Econ. Rev. 690, 690 (1949).

* Cleveland-Marshall College of Law, Cleveland State University, Cleveland, OH, USA

Corresponding Author:
Chris Sagers, Cleveland-Marshall College of Law, Cleveland State University, 2121 Euclid Ave. LB 228, Cleveland, OH 44115, USA.
Email: c.sagers@csuohio.edu

Such a few years it has been in America. This symposium is hardly the only thing that seems different than back when its editor first proposed it, more than a year ago. Since November 2016, antitrust debate and pretty much everything else in American policy seem, at least to me, in an upside-down limbo, in which it feels almost ridiculous to talk about day-to-day domestic affairs. Before then, "An Introspective Examination of Antitrust Fundamentals" seemed a fitting enough place to talk over the growing popular interest in America's "monopoly problem," and the promise some saw in a renewed antitrust for this new Gilded Age,[2] or maybe for some more fundamental, Brandeisian retooling from the ground up, as urged by a new coalition of mostly very young activists and think-tank personnel.[3] I guess the time would also have been as good as any to revisit whether antitrust should serve "noneconomic" goals, or which kind of error-cost is more important, or any of a dozen other hugely-written-about "fundamentals" issues that have featured in symposia every few years for a century or so. Now, as of late 2018, the hope of just preserving a stable status quo seems uncertain enough that it's hard to know what's even worth talking about.

The problem I've chosen to write about still seems fruitful. It was evident before the election and I think it will not go away even after this dark season is a memory. It is definitely "Introspective" and "Fundamental." I don't believe it has received very extended discussion, though it expands on a point that I take Professor William Kovacic to have made,[4] and it is an opportunity to consider some intriguing theoretical work by Professor Jonathan Baker.[5] It also is an opportunity to consider one of the brighter little glimmers of hope in a while, a specific plank in the midterm electoral platform introduced this summer by congressional Democrats, which they call the "Better Deal,"[6] and its partial implementation in a bill introduced by Senator Klobuchar.[7]

As it happens, I will still spend some part of this essay talking about that little group of young activists and think-tank personnel, who are hard to ignore because for the moment they have gotten a lot of attention.[8] They matter here because the current period of popular interest in antitrust, for which that group is partly responsible, is this article's inspiration, if not exactly the happiest one. I'll discuss

2. As initially proposed, the symposium was prompted by a provocative popular-media essay on these themes, Eduardo Porter, *With Competition in Tatters, the Rip of Inequality Widens*, N.Y. TIMES, July 13, 2016, at B1. For more on the rising popular interest in antitrust and monopoly, see *infra* notes 26-27 and accompanying text.
3. This symposium initially included some of those folks, but they withdrew. For their views, *see*, *e.g.*, Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).
4. Specifically, in William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989). *See infra* notes 162 and accompanying text.
5. Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175 (2013); Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605 (2010); Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483 (2006). *See infra* notes 197-99 and accompanying text.
6. *See* http://www.democraticleader.gov/abetterdeal/.
7. Merger Enforcement Improvement Act, S. 1811, 115th Cong., 1st Sess. (2017).
8. This is all pretty awkward, because to some degree I think it is important to begin discussing some criticisms of this group. But the "group" is not organized in any formal way, so far as I am aware, and many of its members are very young. For all I know it exists as a group only in the minds of journalists trying to make it into one. *See*, *e.g.*, Zach Carter, *Meet the Man Who Is Changing Washington's Ideas About Corporate Power*, HUFFINGTON POST (Sep. 2, 2016), http://www.huffingtonpost.com/entry/barry-lynn-washington-corporations_us_57c8a6a7e4b0e60d31de6433; David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION (Apr. 4, 2017), https://www.thenation.com/article/this-budding-movement-wants-to-smash-monopolies/; Steven Pearlstein, *Is Amazon Getting Too Big,* WASH. POST (July 28, 2017), https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html? utm_term=.b7ccc3d25b67. Members said to belong to it are also quite varied in background, and most are young. Moreover, because some of what I say will be critical, I want to be clear that many young people apparently affiliated with it are producing works of very good scholarship. *See*, *e.g.*, Sandeep Vaheesan, *The Evolving Populisms of Antitrust,* 93 NEB. L. REV. 370 (2014).

a misunderstanding that they and the press seem to have—their failure to grasp the issue of existential gravity that did in fact face antitrust over the past year or two, which emphatically was not some ideological sideshow over whether we follow a "consumer welfare" ideology, or reinstitute "structuralism," or any other detail of antitrust itself. It was the significance to antitrust of electing *any* Democratic president in 2016, no matter whom. Conceivable differences among them are dwarfed by changes that President Trump will likely impose in antitrust by way of his Supreme Court appointments. A lot of people in antitrust still seem not to have given that much thought, and, so, many of them are still churning out debates about other things. I will spend some time on this, though it is tangential to my main point, because it gets at something that is definitely not tangential. In antitrust, I submit, institutions matter, and they matter at least as much as ideas. These issues will all be subjects of Part II. All that said, though, the promising little antitrust component of the Better Deal that I will discuss below seems to bear the fingerprints of that same little group. So what I'll have to say about their work will hardly all be critical.

But anyway, the real problem that I think still seems worth talking about is something else entirely. This would-be New-New-Left-of-Antitrust and their abettors in the news media, the pending Supreme Court calamity, and other essentially political matters are in my mind short- or medium-term phenomena. The deeper problem I mean to discuss is long-term, and will persist even once daily realities are resolved in a way more favorable to competition enforcement. The problem will be the main subject of the article, and it is the topic of Part III.

Specifically, I will try to defend the following claim, which in some respects is a technical, doctrinal matter of day-to-day antitrust administration, but in substance is at the heart of having a competition policy at all. I believe that: (1) competition policy will not work without some sort of prospective, no-fault rule to control concentration, of the kind that at least nominally we have in our merger law; but also that (2) we do not now and are unlikely to have the political will in our country to apply such a rule adequately and consistently. I conceive this as much more than just a technical issue of merger administration. A very general but not much discussed problem is whether our government may legitimately manage concentration for its own sake, or whether it should remain agnostic about concentration and merely police specific conduct.

Anyway, if it is true, as Arnold said, that competition enforcement depends on the public attitude, then it won't work on any long-term basis unless enough of the American public can understand and support a consistent theory of market operation over a long period. I believe that for most of antitrust history that condition has not been met, and the reason is simple. Despite our historic commitment as a people to markets and individual enterprise, we don't very often recall that markets in their ordinary operation are machines for producing pain. A policy meant to make them vigorous is in tension with both the individualism that pervades our cultural tradition (and thus it generates objection from the right), and with our commitment to noneconomic values that seem jeopardized by vigorous competition (and hence objection from the left).

All this implies an interesting question, to which this essay is my own answer: How much is the latter-day crisis or lull in antitrust really just a short- or medium-term phenomenon? If the real problem in antitrust is the fundamental, political one that I've described, then I believe it is not short-term. It is a challenge inherent in having any competition policy. But maybe I'm wrong and what really matters at the moment are more immediate problems. Maybe the relative lack of antitrust vigor just reflects the general conservative turn that among other things led to President Trump's election, and to the generally quiet few years of federal enforcement it seems likely to produce. That conservative turn may not seem especially "short" term, since it's arguably been under way for forty years or more,[9] but

9. *See*, *e.g.*, Laura Kalman, Right Star Rising: A New Politics, 1974-1980 (2010); Arthur M. Schlessinger, Cycles of American History 245–55 (1986); Sean Wilentz, The Age of Reagan: A History, 1974-2008 (2009).

implicit in most agitation for vigorous antitrust is that all we really need to do is reverse a trend. It presumably won't take all that long to make the reversal effective, and presumably the improvement will not just be temporary. If so, maybe all that's needed to fix antitrust is to reverse a midcareer misdirection, and then it will work well for a good long while. Totally separately, here is another shorter-term phenomenon afoot that seems relevant, and it seems pretty alarming for anyone who would like to see more vigor in antitrust. Divisions within progressive[10] politics resurged with a vengeance during the poisonous presidential primary of 2016, and arguably have gotten only worse since then. Pretty much those same divisions have been brewing in antitrust, in microcosm, for the past year and a half or so.

Still, I think these day-to-day political issues are basically superficial to the deeper problem of having a competition policy. I think they are in some sense superficial even to whatever extent it proves true that political divisions on the left inadvertently produced a Supreme Court that will kill competition policy for a generation or more. While I will spend Part II talking about the likely consequences for antitrust of the election and the fractured left, I am more concerned about the likelihood that our politics can support any coherent economic policy at all. I fear that the problem—the lack of durable popular support for a policy of vigorous markets, that includes some no-fault, prospective control over concentration—will remain regardless how present tensions are resolved. And indeed, though it's not given much thought in contemporary policy talk, that deeper problem and the disappointing political compromise it generates did not begin with the elections of 2016 or 2008 or 1992 or 1980 or at other points in living memory. It is one of the oldest criticisms in antitrust. Part III's consideration of all these matters is followed by a short Conclusion.

I. Before We Get Going: Some Thoughts on Roscoe Pound

Before moving on to the article itself, I offer a short detour. The large amount of stuff that all found its way into the article could be pretty confusing, so I want to use this detour to explain up front how I think it fits together. My inspiration is this present season of popular interest in antitrust, the "Fundamental Introspection" of the symposium's title, and the hopes that I share with the mostly young activists and journalists driving that conversation. However, the ultimate message is that the ideas and short-term policy corrections with which they are preoccupied are unlikely to bring those hopes to life. Instead, there is a deeper, longer-term problem in having a competition policy, and failure to address it has caused recurrent disappointment. Specifically, our tool for controlling concentration before it starts needs more effective use. It is so difficult to use, however, because to a public to which competitive markets can be very counterintuitive and confusing to watch, it is especially difficult to justify prospective government interference. For reasons that I believe are captured in a theoretical model I mentioned, developed by Jonathan Baker, making those interventions more effective just tends to invite swift reversion to a political stasis in which they seem to me to have been ineffective. I will defend my view that this institutional problem is more important than political squabbles like those at present. But because ideas tend to be more intrinsically interesting, we don't attend to the institutions,

10. Probably ill-advisedly, I will use this word in its vernacular, contemporary sense, as roughly synonymous with "left-leaning." All I mean to capture by it is abstract commitments generally identified with Americans who are at all left of center, meaning concern for equality in opportunity and well-being, and a concern for private power as an appropriate target of public policy. As Professor Hovenkamp explains, the term has had a special meaning in antitrust, and I definitely do not intend that meaning, or mean to imply that I favor the specific antitrust policies he identifies as "progressive." Through much of antitrust history, progressive antitrust meant a certain kind of special-interest protectionism. *See generally* Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. Ill. L. Rev. (forthcoming 2018). Likewise, to some, "progressive" has meant essentially "conservative," insofar as Progressive-era politics were informed by classical liberalism, *see*, *e.g.*, Gabriel Kolko, The Triumph of Conservatism (1963), and obviously I don't intend that narrow meaning, either. I just mean "left-leaning," in the vernacular of the present.

and so antitrust effectiveness routinely suffers. The fighting over ideas often seems to carry distracting political freight, as in the present popular unpleasantness and its air of young against old, maverick versus establishment.

That captures everything that I will try to say in the article, but I still think digesting it all is something of a challenge. I think the following little digression helps to illustrate it better, in a way that was also fun to write, if in a bittersweet way. An additional reason for it is that the article is mostly pretty downbeat, and I wanted to start by striking a more hopeful tone. I want to be clear where I think there is promise.

The symposium's editor asked an interesting question as we talked over topics. When I told him I wasn't sure what to write about after the election, he asked how Roscoe Pound might have felt about a period like ours. I think he asked that because my email signature block includes this quote:

> From the days of the Greek philosophers, professors have been privileged to be heretics.[11]

I think there are two possible answers to the editor's question. I tend to think Pound's reaction would not be that of the brilliant young sociological critic on his rise to fame, entering a period of some years as chief legal philosopher to progressive politics. I fear instead it would be like that of his later life, during the bitter, conservative turn that estranged him from a younger generation, to whom he seemed increasingly a traitor to his own values.[12] Then, as now, America underwent wrenching change domestically and internationally, and Pound seemed unnerved by what he saw. In my encroaching senescence I have a certain soft spot for that older man, and I fear it, because during that time he did no favors for his own legacy. His extensive advocacy work conflicted quite a lot with his earlier writings,[13] and appeared to include certain very dark sympathies.[14] Some offer psychological explanations that are none too flattering,[15] and worst of all, to me, Pound arguably helped lay the foundation for today's conservative judicial orthodoxy.[16] But still, it is striking with the benefit of hindsight to compare Pound's later-life activism with the laws and policies that he attacked. The core passion of his later years—his opposition to the rising New Deal regulatory state, and the danger it posed to important values in our political tradition—turned out to have something going for it. The enthusiasms he attacked were misguided in some ways. They would eventually be embarrassed in their confidence that by bringing the blossoming social sciences to bear for society's benefit, the apolitical new technocracy would be immunized from power, greed, and serious mistakes.

Pound's example makes me wonder how much our present controversies reflect just another season of old folks telling the young to get off their lawn. Many of us on the progressive side of antitrust and

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11. Roscoe Pound, *The New Feudalism*, 16 ABA J. 553, 555 (1930).
12. *See generally* JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211–34 (2007).
13. *See*, *e.g.*, *id.* at 255–57.
14. *Id.* at 231, 233 (noting Pound's sympathy with Nazi suppression of socialism and his connections to the John Birch Society).
15. *See id.* at 229–31 (citing Willa Cather and other acquaintances as describing Pound's great need for attention, and theorizing that he changed views in midlife to appeal to conservative audiences once the younger generation of Legal Realists had "outflanked him to the left," robbing his ability to capture left-leaning attention). Those analyses seem in tension with other portraits of the later Pound, as still a person of great human warmth, beloved especially by Harvard students. *See*, *e.g.*, *Roscoe Pound Dies at 93*, *Revitalized Legal System*, THE HARVARD CRIMSON (July 3, 1964), http://www.thecrimson.com/article/1964/7/3/roscoe-pound-dies-at-93-revitalized/. Moreover, his conservatism predates the real rise of Legal Realism, during the 1930s, so it was probably not just a maneuver for shock value to regain audiences taken by the left. His criticism of the Progressive administrative state appeared as early as his 1917 essay *The Limits of Effective Legal Action*, 3 A.B.A. J. 55 (1917), which itself was a main trigger of his much-later controversy with Karl Llewellyn and other Realists. *See generally* N. E. H. Hull, *Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence*, *1927-1931*, 1987 WIS. L. REV. 921, 927 (1987).
16. *See*, *e.g.*, Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?* 65 EMORY L. J. 1705, 1706–8 (2016).

economic policy, after all, have taken our turns as radicals. Many of us know the thrill of that whole little subgenre that attacks economic theory as an ideological coup masquerading as honest science.[17] But sooner or later we typically move on, however much we might have gained by working through that critical tradition, since it turns out to consist of a comparatively small list of arguments, reiterated pretty often over many years, that never gets to the point of much positive contribution.[18] And then we bump into people who *really* understand economics, but who nevertheless seem able to maintain progressive commitments, and see price theory as a useful tool that doesn't also have to be an ideology.[19] As Professor Hovenkamp says, "today we are all marginalists, although we are not all progressives."[20] And so while a lot of us during our youth announce yet once again that property is

17. The literature is pretty vast, and I once spent a lot of time in it. In law, it has flourished as a reaction to law-and-economics. *See*, *e.g.*, Anita Bernstein, *Whatever Happened to Law and Economics?* 64 MD. L. REV. 303 (2005); Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Non-Falsfiability and Normative Bias*, 67 NOTRE DAME L. REV. 231 (1991); Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for "Critical Legal Economics,"* 2003 UTAH L. REV. 1155; Eric M. Fink, *Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics*, 55 HASTINGS L.J. 931 (2004). More familiar, older works would include Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991); Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752 (1988); Pierre Schlag, *An Appreciative Comment on Coase's* The Problem of Social Cost*: A View from the Left*, 1986 WIS. L. REV. 919 (1986); Pierre Schlag, *The Problem of Transaction Costs*, 61 S. CAL. L. REV. 1661 (1989). Now seemingly hoary old classics in this line would include Arthur Alan Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); and A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's* Economic Analysis of Law, 87 HARV. L. REV. 1655, 1671–81 (1974). Lawyers and others have also spent a fair bit of time arguing that evidence from behavioral economics undermines price theory orthodoxy. So far that work hasn't gotten very far in concrete policy applications, since it's usually hard to say how specific legal rules should change to address even those systematic irrationalities that have been proven, and it seems like doing it even if we could might pose more problems than it solves. *See*, *e.g.*, Alan Devlin & Michael Jacobs, *The Empty Promise of Behavioral Antitrust*, 37 HARV. J.L. & PUB. POL'Y 1009 (2014). Anyway, in law this sort of thought is also explicitly at the heart of critical legal studies, *see*, *e.g.*, Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1980); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?* 8 HOFSTRA L. REV. 711 (1980); *see generally* NICHOLAS MERCURO & STEPHEN G. MEDEMA, ECONOMICS AND THE LAW 157–70 (1997), and it has pretty clear echoes in legal realist writing, much of which emphasized the tendency of economic approaches to exaggerate theoretical abstraction while concealing disproportionate power; *see*, *e.g.*, BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (2001); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927). And obviously enough, work critical of economics as ideology extends quite a lot more broadly. It includes plenty of work by non-lawyer economists and others. *See*, *e.g.*, AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 1–87 (1988) (attacking the commitment of neoclassicism to individual utility maximization); *see* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970, at 106–22 (2014) (canvassing the American Institutionalists and their impact on the Legal Realists); GEOFFREY M. HODGSON, THE EVOLUTION OF INSTITUTIONAL ECONOMICS: AGENCY, STRUCTURE, AND DARWINISM IN AMERICAN INSTITUTIONALISM (2004) (same); *cf.* DIERDRE N. MCCLOSKEY, THE RHETORIC OF ECONOMICS (2d ed. 1998) (though not ultimately critical of economics' implicit ideology, raising criticisms like the literature above of its pretensions to scientific objectivity); ROBERT H. NELSON, ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND (New ed. 2014) (similar).

18. While the critiques are brilliant, and the literature includes some of the best law review articles I've ever read—*e.g.*, Bernstein, *supra* note 17—it has lacked forward movement at least in this sense: as Professor Bernstein observed, critics started predicting the very imminent death of economic influence about forty years ago. *See id.* at 303–4 & n.3 (citing Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 487 (1989); Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 245 (1989); Morton J. Horwitz, *Law and Economics: Science or Politics?* 8 HOFSTRA L. REV. 905, 905 (1980)).

19. *See*, *e.g.*, F.M. Scherer, *How Conservative Economics Has Influenced Antitrust* (JFK Sch. of Gov't, Harvard U., Fac. Res. Working Papers Ser. No. RWP07-027, 2007).

20. Hovenkamp, *supra* note 10, at 4. *See also* HOVENKAMP, *supra* note 17, at 6–7 (noting that marginalism and neoclassical economic thought generally have had adherents from across the political spectrum, including a number of famous figures who flirted with socialism).

theft,[21] we typically go on to decide that it's actually all right so long as it remains a humdrum little policy instrument that mostly does a better job of resource allocation than its alternatives. While I guess it feels a little disappointingly reactionary, and that being a radical would be more fun, there is something to be said for the fact that no one knows who first said the following famous little aphorism: One who is not a socialist at twenty has no heart, but one who is at forty has no brain. That it has been attributed to so many different people over such a long time, who may very well have been encrusted old senilities like me but nevertheless came from different perspectives and circumstances,[22] makes it seem like a "kind of democratic poetry, an emanation of genius from the masses,"[23] a crowd-sourced distillation of long and common experience.

But here's the more hopeful part, before getting to the substance of the article. I hope there is some way of looking at current circumstances not like Pound the old man, but Pound the young man. While he was still a young scholar, early in his rise to fame, Pound turns out to have had the same central preoccupation as progressives today. His nominal target was the doctrinal formalism of the common law, but his political goal was similar to those of many activists now: to attack the individualist orientation of our legal tradition, its preoccupation with formal equality and negative rights, and its resulting inability to cope with changing industrial society and unequal power. In the course of working it out, he coined a trope that would define an entire sociological tradition, and in its day was a rallying cry to the legal academic left. He sought to rehabilitate the "law in action," the law as it is actually applied by courts, even though they might still explain the "law in books" by way of strained fictions and half-truths, to preserve the law's own coherence and dignity.[24]

The reason Pound's story seems hopeful to me is that I think that young man, even one who would later become so frustrated with the next generation's wrong-headedness, also recognized that institutions matter, and that they can matter more than ideas. Getting institutions to work better can bend application of the law in practice to concrete reality. How they actually behave is what matters, not how they explain themselves or their purportedly underlying philosophy.

And that, finally, happens to be why I am optimistic about a new antitrust proposal that is all about making institutions work better. One narrow plank of the Democrats' "Better Deal" platform seems like one of the best ideas in antitrust in forty years. They propose to create a post-consummation merger review authority, that would test whether mergers approved during the Hart-Scott-Rodino (HSR) process were in fact anticompetitive. It's not a great idea because it's new. It's obvious, and people have been talking about it for decades. It's great because it's finally found a meaningful place on the legislative agenda.[25] Anyway, it is the fact that institutions matter that makes this idea important and interesting. On the one hand, the most important antitrust institution of all is the courts. I believe

21. As for me, I will always think fondly of Chris Sagers, *The Myth of "Privatization,"* 59 Admin. L. Rev. 37 (2007); and Christopher L. Sagers, *Monism, Nominalism, and Public-Private in the Work of Margaret Jane Radin*, 54 Clev. St. L. Rev. 219 (2006).
22. Two high-powered investigators—the esteemed law librarian and *Yale Book of Quotations* editor Fred Shapiro, and the editor of the website *Quote Investigator*, Garson O'Toole, whose PhD is from Yale—found evidence linking this sentiment to at least the following: Reagan-era CIA Director William Casey, Winston Churchill, Victor Hugo, the French Prime Minister and radical republican Georges Clemenceau, the Swedish king Oscar II, Clemenceau's predecessor the monarchist French premier Francois Guizot, and U.S. President John Adams. *See* Fred Shapiro, *John Adams Said It First*, Freakonomics Blog (Aug. 25, 2011), http://freakonomics.com/2011/08/25/john-adams-said-it-first/; *If You Are Not a Liberal at 25, You Have No Heart. If You Are Not a Conservative at 35 You Have No Brain*, Quote Investigator (2014), http://quoteinvestigator.com/2014/02/24/heart-head/.
23. Corey Robin, *Who Really Said That?* Chron. Higher Educ., Sept. 16, 2013.
24. Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).
25. Of course, there is no particular reason it should be limited to merger review. Some well-designed authority to study all of antitrust enforcement would be very welcome. But, since I tend to think better merger enforcement is our most promising step, postmerger review is a great place to start.

that if they can be confronted with the evidence that seems likely to emerge from a well-designed post-consummation review regime, they will no longer make it so hard for the government to show that mergers should be blocked. But on the other hand, if the review regime is poorly designed—as an institution, an outcome that seems very possible given the many, diverse cooks in the soup and our legislature's recent history—it could easily have no meaningful effect whatsoever.

II. The Near and (God Forbid) Maybe the Middle Term

A. The Dumpster Fire du Jour

American thinking on antitrust, a policy that often seems essentially forgotten or mysterious to the public, recently went through a remarkable popular reappearance, such that even now our pundits find it "everywhere in progressive thinking about economic policy."[26] Political maneuvers abound to keep it visible on the agenda.[27] It's also gone through some reversals. It all happened in just the short time since the ramping up of the presidential campaign in late 2015. At about that time there began a season of interest in competition policy in the popular media, and a view arose among an improbable range of observers that America had developed a "monopoly problem."[28] Then, in spring 2016, the Obama White House issued a set of new competition objectives,[29] and the Council of Economic Advisors reported uncommonly grave concerns over rising market power.[30] During the presidential campaign—at a time when its actual outcome still seemed extremely unlikely—both Secretary Clinton[31] and some around her[32] expressed similar alarm, and suggested antitrust would play an expanded role in her administration. That was so, mind you, though antitrust had played no meaningful role in presidential election politics in upwards of 70 years.[33]

26. Matthew Yglesias, *5 Different Things People Mean When They Say We Need to Revive Antitrust*, VOX (Sept. 7, 2017), https://www.vox.com/policy-and-politics/2017/9/7/16249698/anti-trust-revival.
27. *See*, *e.g.*, David Dayen, *Democrats Face an Important Anti-Monopoly Test*, NEW REPUBLIC (Sept. 6, 2017), https://newrepublic.com/article/144694/democrats-face-important-anti-monopoly-test (detailing Senator Elizabeth Warren's decision to delay the confirmation of Makan Delrahim to lead the Antitrust Division, and considering its role in Democrats' overall legislative strategy).
28. *See*, *e.g.*, Brian S. Feldman, *The Real Reason Middle America Should Be Angry*, WASH. MONTHLY, March/April/May 2016; Greg Ip, *Why Corporate America Could Use More Competition*, WALL ST. J., July 8, 2015; Lina Khan, *How to Reboot the FTC*, POLITICO (Apr. 13, 2016), http://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090; Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES, Apr. 18, 2016; Phillip Longman, *Bloom and Bust*, WASH. MONTHLY, Nov./Dec. 2015; Matt Stoller, *The Return of Monopoly*, NEW REPUBLIC, July 13, 2017; Derek Thompson, *America's Monopoly Problem*, THE ATLANTIC, Oct. 2016; Joshua Wright & Matt Stoller, *Should the Government Bring Back Trust-Busting?* N.Y. TIMES, Nov. 14, 2016; *Too Much of a Good Thing*, THE ECONOMIST, Mar. 26, 2016; *The Problem with Profits: Big Firms in the United States Have Never Had It So Good. Time for More Competition*, THE ECONOMIST, Mar. 26, 2016.
29. President Barack Obama, Executive Order—Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, 2016 WL 1477723 (Apr. 15, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.
30. COUNCIL OF ECON. ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502 _competition_issue_brief_updated_cea.pdf.
31. Hillary Clinton, *Hillary Clinton: Being Pro-Business Doesn't Mean Hanging Consumers Out to Dry*, QUARTZ (Oct. 20, 2015), https://qz.com/529303/hillary-clinton-being-pro-business-doesnt-mean-hanging-consumers-out-to-dry/.
32. Notably, Senator Warren gave simply an eye-poppingly wonkish, barn-burner of a speech calling for more antitrust, at a time when she was thought to be short-listed as Secretary Clinton's running mate. *See* Elizabeth Warren, Keynote Remarks at New America's Open Markets Program Event, Reigniting Competition in the American Economy (June 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.
33. *See* George Slover, Am. Antitr. Inst., Obama Inauguration Speech Mentions Antitrust: References to the Antitrust Laws in Presidential Inaugural Addresses—Now and Then (Jan. 20, 2013), http://www.antitrustinstitute.org/content/obama-inauguration-speech-mentions-antitrust-references-antitrust-laws-presidential-inaugura.

As an aside, I confess that I never thought those gestures would amount to much, and in practice they did not. For one thing, the 2016 Obama initiative was pretty obviously going to be ineffective for a variety of reasons,[34] not least because it was announced at the very end of the president's eight years, at a time when most presidents issue their slugs of pardons and last-minute housekeeping orders. If the administration wanted to make a substantive impact, there were more likely vehicles. All the tough talk also seemed too much like then-Senator Obama's eye-catching antitrust rhetoric on the campaign trail in 2007,[35] followed by the dramatic show in which his first antitrust chief withdrew the Bush administration's Section Two Report.[36] That in itself seemed more or less just like Bill Clinton's first antitrust chief doing the same thing in 1993 with the Reagan-era Vertical Restraints Guidelines.[37] While opinions can vary, and these things are harder to measure than they may superficially seem,[38] I think it is fair to say that none of those events were actually followed by any very drastic change in federal enforcement. During the entire Obama administration, for example, the Antitrust Division brought a total of two § 2 actions, neither terribly significant and one not even really a § 2 case;[39] and while the Justice Department admittedly brought one important vertical case at the very end of

34. I discuss this point further below, at notes 144-54 and accompanying text. *See generally* Chris Sagers, *Everyone Wants to Get Tough on Antitrust Policy, but Not Really*, N.Y. Times DealBook (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/business/dealbook/everyone-wants-to-get-tough-on-antitrust-policy-but-not-really.html.
35. *See* Barack Obama, Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf; Jeff Mason, *Obama Eyes Media with Promise of Antitrust Push*, Reuters (May 18, 2008), http://www.reuters.com/article/us-usa-politics-obama-antitrust-idUSN1849107920080518.
36. The whole thing was quite a saga. The Bush DOJ and FTC jointly conducted a years-long series of hearings and workshops to consider § 2 issues, and their staffs jointly compiled a lengthy report summarizing existing law and stating a series of specific enforcement commitments, based on a set of normative positions. The agencies' staffs divided on many matters, apparently irremediably, and produced competing drafts of some chapters. The Commission ultimately rejected the report, three Commissioners issuing a scathing opinion that disagreed with almost all of it. Fed. Tr. Comm'n., Press Release, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), http://www.ftc.gov/opa/2008/09/section2.shtm. Chairman Kovacic issued his own, separate statement. That statement borrowed in part from Kovacic, *supra* note 4, no doubt to emphasize the costs to government of affirmative deconcentation. The Justice Department then decided to issue the report on its own, as a statement of its own enforcement intentions. Not long after her confirmation, President Obama's assistant attorney general for antitrust then withdrew the report, in a speech quite critical of it. Christine A. Varney, Vigorous Antitrust Enforcement in this Challenging Era (May 11, 2009), http://www.usdoj.gov/atr/public/speeches/245711.htm. The report itself is U.S. Dept. Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), http://www.usdoj.gov/atr/public/reports/236681.pdf. The FTC staff, evidently in something of a small *cri de coeur*, then posted their own chapters on the agency website. *See* https://www.ftc.gov/news-events/events-calendar/2006/06/section-2-sherman-act-hearings-single-firm-conduct-related.
37. *See* Anne K. Bingaman, Speech Before the American Bar Association Section of Antitrust Law, Antitrust Enforcement, Some Initial Thoughts and Actions (Aug. 10, 1993).
38. *See, e.g.*, William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?* 16 Geo. Mason L. Rev. 903 (2009) (noting that one cannot judge an antitrust agency's performance just by counting up the cases it has brought).
39. United States v. United Continental Holdings, Inc., Case No. Case No: 2:15-cv-07992-WHW-CLW (D.N.J. 2016); United States v. United Regional Healthcare Sys., Case No. 7:11-cv-00030 (S.D. Tex. 2011). *United Continental Holdings* would ordinarily have been brought as a § 7 case—and so I say it was not "really" a § 2 case—but § 7 does not apply to airline asset acquisitions. *See* 15 U.S.C. § 18 (excluding asset acquisitions not within the jurisdiction of the Federal Trade Commission). Interestingly enough, it was needed to preserve the government's prior approval of the merger of U.S. Airways and American Airlines, as the acquisition potentially jeopardized one of the major protections adopted in that settlement. *See infra* notes 135-36 and accompanying text. *United Regional Healthcare* challenged use by a dominant hospital in Wichita Falls, Texas, of exclusive contracts with insurers. The case had strong facts for the government, and it settled without litigation. *See generally* Jad Chamseddine, *Obama No More Aggressive than Bush on Mega-Mergers*, CQ Roll Call Washington Mergers and Acquisitions Briefing, July 5, 2016.

President Clinton's second term,[40] that was about the sum of its new vertical enforcement agenda.[41] No surprises there, really, since most antitrust folks for some decades have based their professional self-image on a range of agreement over substantive matters and continuity of enforcement over different administrations.[42] All that said, though, I suppose that these things at least got people talking about a policy that one could hope the public would understand and support.

Anyway, even after the election in 2016, there was hope that President Trump would prove some sort of surprise populist maverick, as he had made some widely noticed comments to that effect on the campaign trail.[43] Of all things, the Republican presidential platform almost came to include a strongly worded antitrust plank.[44]

But that all seems pretty murky and uncertain now. There is some indication that things may have become dark in antitrust, indeed. Evidence that President Trump and his close advisors already have used antitrust enforcement to leverage unrelated political gains[45] suggests that the closest model for his agenda may be not some populist maverick of yore or even the Reagan or Bush administrations, but

40. United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir.2005). The *Dentsply* complaint was filed in late 1999, and litigated mainly by the Bush Justice Department.
41. The Clinton FTC took two actions on vertical theories of harm. In its review of Barnes & Noble's proposed acquisition of the book wholesaler Ingram, the Commission made second request and apparently indicated serious opposition. The parties abandoned the deal before review was completed. Barbara Quint, *Barnes & Noble Abandons Attempt to Buy Ingram*, Information Today, June 28, 1999. In *In re* Victrex, plc, Docket No. C-4586 (F.T.C. 2016), the Commission settled by consent decree monopolization claims that a maker of a specific polymer for medical implants, which consistently had 90% or more of its market, had maintained its share through exclusive contracting and retaliatory conduct like that in *Dentsply*.
42. *Compare* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 61 Antitrust L.J. 377 (2003) (views of Republican FTC Commissioner), *with* Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 69 Antitrust L.J. 105 (2002) (views of Democratic FTC Commissioner).
43. Specifically, in various offhand comments, candidate Trump implied that his administration would consider actions against the completed Comcast/NBC-Universal merger and the proposed merger of AT&T and Time Warner, and said that Amazon (as to whose CEO, Jeff Bezos, Mr. Trump apparently holds personal animosity) has "a huge antitrust problem." *See generally* David J. Lynch, *Trump's Populist Antitrust Promises Fall Short of Policy*, Fin. Times, July 11, 2017.
44. Carter, *supra* note 8.
45. Specifically, just before his inauguration, President Trump met with the leadership of AT&T and Bayer, while both firms had acquisition deals pending federal antitrust review. *See* Chris Sagers, *Buyer Beware: Donald Trump's High-Profile Apparent Merger Meetings Are a Major Cause for Alarm*, Slate (Jan. 13, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/donald_trump_s_high_profile_apparent_merger_meetings_are_a_major_cause_for.html. Sources, including apparently Bayer itself, confirmed that the deals were discussed at these meetings, and Bayer apparently offered to establish a new, $8 billion domestic jobs program in exchange for merger approval. *See* Kevin Cirilli et al., *AT&T Executives to Meet with Trump to Talk Time Warner Deal*, Bloomberg Politics (Jan. 12, 2017), https://www.bloomberg.com/news/articles/2017-01-12/at-t-executives-said-to-meet-with-trump-to-talk-time-warner-deal; Ludwig Burger & Patricia Weiss, *Bayer Says Had Productive Meeting with Trump over Monsanto Deal*, Reuters (Jan. 12, 2017), http://www.reuters.com/article/us-monsanto-m-a-bayer-trump-idUSKBN14W17O; Jacob Bunge & Christopher Alessi, *Bayer Joins Jobs Parade*, Wall St. J., Jan. 18, 2017. More recently, the *New York Times* and *Politico* cited unnamed sources claiming that White House advisers, including Steve Bannon, had urged antitrust challenge to AT&T's acquisition of Time Warner to pressure better coverage from CNN, which is a Time Warner asset. *See* Michael M. Grynbaum, *The Network Against the Leader of the Free World*, N.Y. Times, July 5, 2017; Steven Overly & Margaret Harding Mcgill, *CNN Parent's $85B Deal at Little Risk from Trump*, Politico (July 6, 2017), http://www.politico.com/story/2017/07/06/cnn-deal-little-risk-from-trump-240282? utm_source=huffingtonpost.com&utm_medium=referral&utm_campaign=pubexchange_article; *see also* Eric Levitz, *White House Warns CNN That Critical Coverage Could Cost Time Warner Its Merger*, N.Y. Mag., July 6, 2017. The ranking Democrat on the Senate antitrust committee has formally objected to that alleged conduct, and requested evidence; *see* Michael Calderone, *Senator Asks Attorney General for Any Evidence Trump Meddled In CNN Deal*, HuffingtonPost (July 7, 2017), http://www.huffingtonpost.com/entry/trump-time-warner-cnn-deal_us_595fc02ae4b02e9bdb0c4e20, and independent groups are conducting records requests; *see* American Oversight, Press Release, Investigation of Trump Administration Actions and the AT&T-Time Warner Merger (July 7, 2017), https://www.americanoversight.org/news/investigation-trump-administration-actions-att-time-warner-merger.

Richard Nixon.[46] In any event, that President Trump would direct meaningful White House resources to day-to-day antitrust administration seems awfully unlikely now, both because his other domestic actions have been so drastically at odds with his campaign-trail populism, and because on a practical level the White House has shown so little interest in mundane governance. At more than a year and counting, the White House has taken longer to confirm its antitrust leadership than any administration in at least forty years,[47] and serious gaps long remained not only in top leadership but lower political appointments as well.[48] That is in keeping with the administration's apparent overall laxity, in government generally.[49] There have admittedly been some striking indications that the Trump antitrust agencies may surprise us, above all the Justice Department's unexpected suit to challenge the merger of AT&T and Time Warner, Inc. Still, though, the greatest likelihood for now seems just that antitrust will be in the hands of traditional experts, who have more than enough substantive competence, but who are very conservative and may lack in personnel and resources. We seem to be in for a sleepy time in federal enforcement.[50]

Still, probably for most, some hope remains. Disappointing or no, a conservative turn for what seems likely to be one presidential term might realistically be not so different than the enforcement we have seen in recent Democratic administrations. In fact, the activity in antitrust right now getting the most notice is among that small group of mostly very young activists and think-tank personnel I've mentioned, and their aspirations are very optimistic indeed.[51] Their tone is urgent and impatient, and occasionally rather personal. Some of us older codgers have not been exactly amused—Professor Hovenkamp thinks some of this work is "worse than useless"[52]—and it does not help that a lot of it really just laboriously reexplains ideas that are very well known to every serious person in antitrust. Still, their success as a matter of public relations is really remarkable,[53] they appear possibly to have a *very* big Rolodex,[54] and recently their inroads with Democrats in Congress have seemed important and

46. To recount the well-known story, President Nixon's Oval Office tape recordings disclosed an episode in which he directed his attorney general to drop antitrust challenge to an acquisition by the conglomerate firm ITT. He made very clear that his order was in exchange for ITT's $400,000 contribution to fund the 1972 Republican National Convention. *See* Richard Reeves, President Nixon: Alone in the White House 323–24 (2002).

47. *See* Eric Kroh, *Wait to Confirm Trump's Antitrust Chief Longest in 40 Years*, Law360 (July 14, 2017), https://www.law360.com/articles/943678/wait-to-confirm-trump-s-antitrust-chief-longest-in-40-years.

48. As of this writing, while the office of Assistant Attorney General for Antitrust has been filled, President Trump's nominee for FTC Chair awaits confirmation. Several of the five positions for Deputy Assistant Attorney General were open for several months, and one remains unfilled. Indications are that those vacancies significantly impeded the agency's work. *See id.* Finally, the FTC not only lacks its chair, but for the moment it operates with three unfilled vacancies. That historically improbable condition has persisted since last summer. One of its two commissioners, the Democrat Terrell McSweeney, has announced her resignation. President Trump's nominees for chair and two other commissioner seats await confirmation. Cecelia Kang, *Trump Picks Joseph Simons*, *Corporate Antitrust Lawyer*, *to Lead F.T.C.*, N.Y. Times, Oct. 19, 2017.

49. As of this writing, for example, only about one quarter of the 602 key policy-making appointments have been filled, and upwards of half of them lack even nominees. *See* Norm Ornstein, *American Kakistocracy*, The Atlantic, Oct. 9, 2017.

50. As for Mr. Delrahim, some critics have focused on his lobbying work, but for what it may be worth he is a long-time antitrust practitioner who served on the Antitrust Modernization Commission and as deputy assistant attorney general. For FTC chair, President Trump has nominated Joseph Simons, another longtime practitioner who previously directed the FTC's Bureau of Competition. *See* Kang, *supra* note 48. Of the two, Mr. Simons may be relatively aggressive, given the range and ambition of the enforcement actions brought while he directed the agency's Bureau of Competition.

51. *See generally* Dayen, *supra* note 8.

52. *See*, *e.g.*, Hovenkamp, *supra* note 10, at 35–38.

53. For example, it was *after* the seemingly devastating election that they enjoyed their biggest popular successes, including not only their influence in the Better Deal, but a widely watched, fairly star-studded event at that new home of 21st-century irony: an academic center at the University of Chicago business school devoted to analyzing and attacking the monopoly problem, named in honor of George Stigler. Dayen, *supra* note 51.

54. While again the details are very murky, an organization called CREDO managed to secure more than 100,000 signatures for a petition opposing confirmation of President Trump's nominee to lead the Antitrust Division. *See* Liz Crampton, *Makan*

promising.[55] They no doubt also deserve some credit for generating popular concern for online platform dominance and what seems like the ripening possibility of antitrust action against one or more of the major platform companies.[56] So far as I understand them, I share their hopes on at least some level of abstraction, though I agree with many others that those impulses remain underdeveloped and in need of more than just ideological enthusiasm.[57] In any case, plenty of others have started beating their drum, sometimes from different perspectives and bringing different competencies to bear, including the offspring of another of this symposium's authors.[58] If nothing else, a person of my persuasion has to be at least a little excited about a nascent movement that, one imagines, echoes the early years in which Bert Foer, Bob Lande, John Cuneo, and others founded the American Antitrust Institute. If they push us all to think harder about whether and how to move antitrust to the left, I think that has to be a good thing.

But still. There is the problem that a surprisingly similar movement, more or less led by Ralph Nader and fueled by the same frustration with centrist Democrats and their antitrust compromises, also achieved extraordinary success as a matter of public relations, during the 1970s, but culminated in breathtaking failure.[59] More importantly, the new factional vehemence dividing American progressives is a genuine worry in itself. As Thurman Arnold apparently learned the hard way—he made the statement above some years *after* having served as the nation's most celebrated, tireless, and

Delrahim's Bad Timing, Bloomberg BNA (Sept. 11, 2017), https://www.bna.com/makan-delrahims-bad-b57982087634/. CREDO itself purports to be merely a platform for grassroots organizing work, but the rhetoric by which it announced the petition seems very much in this group's dialect. *See Stand with Sen. Warren: Block Trump's Pro-Monopoly Pick*, Credo Action (2017), https://act.credoaction.com/sign/warren_makan_delrahim/.

55. Most important has been their apparent influence in drafting the Better Deal, though no clear evidence exists who may have been involved. Separately, the group has been specifically identified as an influence by freshman California Representative Ro Khanna, Alexis C. Madrigal, *A Silicon Valley Congressman Takes on Amazon*, The Atlantic (June 19, 2017), https://www.theatlantic.com/technology/archive/2017/06/ro-khanna-amazon-whole-foods/530805/. By appearances they also seem to have had influence with House and Senate leadership, as well as Senator Elizabeth Warren and Zephyr Teachout, a law professor and campaign law expert who during her run for the U.S. House of Representatives in 2016 had the formal support of Senator Bernie Sanders. *See* Terence Cullen, *Zephyr Teachout, a Bernie Sanders Favorite, Loses Upstate Congressional Bid*, Observer (Nov. 8, 2016), http://observer.com/2016/11/zephry-teachout-loses-bid-for-ny-19th-congressional-district/.

56. Their *noire*-est *bête noire* of the moment, Amazon, does in fact seem to pose real competitive risks, and it seems increasingly likely that some sort of antitrust action against it is forthcoming. *See* Chris Sagers, *Crack Down on Amazon*, Slate (June 19, 2017), http://www.slate.com/articles/business/moneybox/2017/06/yes_there_is_an_antitrust_case_against_amazon.html. Similar theories of liability seem to be popping up in lots of highly respectable places lately, including in the EU's recent record fine against Google's search algorithm practices; *see* European Commission, Press Release: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), and in the recent push by a large association of news organs for an exemption that would allow them to bargain collectively with online platforms over ad revenues; *see* David Chavern, *How Antitrust Undermines Press Freedom*, Wall St. J., July 10, 2017, at A17.

57. In my humble opinion, the problem is definitely not the risk of false positives, or chilling procompetitive conduct, or similar arguments from conservative antitrust that I believe have been significantly overstated and lack empirical support. The serious problem is that if you answer antitrust questions by just asking who seems like the bad guy and who seems like the good guy, you are going to get some cases seriously wrong. That can have bad consequences for the people that antitrust is supposed to protect. A prime case in point is the Apple eBooks affair of 2012–2013, *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015). The new Brandeisians were scathingly critical of the government for bringing the case, as they considered the real villain to be Amazon. They also thought the publishers' conspiracy was the best solution to Amazon's power, for the publishers, authors, and the reading public. But they are dead wrong. The publishers, each of them subsidiaries of the half-dozen multinational conglomerates that control the bulk of media in the entire world, and between them control most trade publishing in English, are emphatically not the authors' friends nor the public's. The conspiracy had no plausible consequence except to cause hundreds of millions of dollars in consumer injury, only to protect the pecuniary interest of really a quite small group of people. For more detailed criticism of this new group's work, see Hovenkamp, *supra* note 10, at 35–38; Barak Orbach, *Antitrust Populism*, 15 N.Y.U. J. L. & Bus. (forthcoming 2018).

58. *See* Franklin Foer, *Amazon Must Be Stopped*, New Republic, Oct. 9, 2014.

59. *See* Kovacic, *supra* note 4, at 1107–9.

influential antitrust chief—antitrust exists within a political context and depends on it. If more active competition policy is needed, support for it will have to come from the left, since at least for now the American right mostly doubts that government should stop any conduct except very large horizontal mergers and naked price cartels. But divisions on the left, which visibly blossomed anew as early as Barack Obama's election in 2008,[60] and seemed bad enough during the 2016 presidential primary, have apparently grown only worse. The left is devolving into what seems like an atomization with so many viewpoints that it's hard to know what anybody thinks anymore. The maligned "establishment" and the more or less centrist liberals that surround it are now opposed not only by a doctrinaire, traditional Left, and by disaffected independents and younger people who lack any strong commitments, but by growing activist blocs that are pushing more stridently away in different directions. Among other things, some factions seem preoccupied with the same doctrinal infighting that has kept the radical Left ever from having meaningful influence in America. Racial divisions also seem likely to complicate economic consensus, not because there should be any conflict in goals, but because so many different attitudes and issues compete for attention.[61] But above all, advocacy on the left has become very strident and divisive, as in the super-cynical venom of *Chapo Trap House*,[62] the Dirtbag Left,[63] and whatever the "alt-Left" might be.[64] These groups have meaningful followings, and since they address other Democrats like this:

> Yes, let's come together. But get this through your fucking head: you must bend the knee to us. Not the other way around. You have been proven as failures, and your entire worldview has been discredited[65]

. . . the others who could be their allies tend to consider them "ignorant and yet arrogant little shits who don't understand anything about the topic at hand."[66]

I could be overreacting. Maybe in a nation so routinely said to lack real radical traditions on either left or right, or meaningful dissent from its basic liberal-democratic commitments,[67] any really lasting fragmentation just isn't going to happen.

60. *See*, *e.g.*, Michael Eric Dyson, *The Ghost of Cornel West*, NEW REPUBLIC, Apr. 19, 2015.
61. For what it may be worth, a coalition affiliated with the Black Lives Matter movement issued a formal economic agenda around the time of the 2016 election, and in many respects, it just stated routine, moderate-left objectives, like progressive taxation and bank regulatory reform. *See* MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, AND JUSTICE (2016), https://policy.m4bl.org/reparations/. In that it was like platforms of older civil rights movements, like one put forward by Martin Luther King and one by the Black Panther Party. *See* Janell Ross, *What a Black Lives Matter Economic Agenda Looks Like*, WASH. POST: THE FIX (Aug. 29, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/08/29/what-a-black-lives-matter-economic-agenda-looks-like/? utm_term=.731c94eac829. And yet, broad coalitions for social welfare advocacy have often tended toward conflict over racial matters, in part when white activists have seen race-specific goals as parochial or secondary to general economic ones. *See generally* DONA COOPER HAMILTON & CHARLES HAMILTON, THE DUAL AGENDA (1997); Ross, *supra* (quoting Black Lives Matter activist that "Trump's conflation of 'black' and 'poor' is very ironically similar to how Sen. Bernie Sanders also talked about race and black Americans").
62. *See* CHAPO TRAP HOUSE, https://soundcloud.com/chapo-trap-house; *see also* https://thetrap.fm.
63. *See* Jia Tolentino, *What Will Become of the Dirtbag Left?* THE NEW YORKER, Nov. 18, 2016.
64. *See* James Wolcott, *Why the Alt-Left Is a Problem*, *Too*, VANITY FAIR (Mar. 3, 2017), http://www.vanityfair.com/news/2017/03/why-the-alt-left-is-a-problem.
65. John Semley, *The Rise of the Internet's "Dirtbag Left,"* MACLEAN'S (July 5, 2017), http://www.macleans.ca/society/the-rise-of-the-internets-dirtbag-left/ (quoting the *Chapo Trap House*).
66. This quote is from James Livingston of Rutgers University, a well-regarded economic historian and outspoken progressive. James Livingston, *Chapo Trap House Take 2*, POLITICS AND LETTERS (July 17, 2017), https://politicsandletters.wordpress.com/2017/07/17/chapo-trap-house-take-2/.
67. For example, famously, *see* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955). "Consensus" history itself has been hotly disputed, and at least in its strong form it probably no longer holds sway with many American historians. Moreover, the American radical left no doubt owes some of its failure to formal suppression by government, and perhaps other factors

But there is also a different issue . . .

B. Why Is No One Talking About the Court?

Whatever may be the case as to our quotidian electoral politics, there remains a more significant consequence of 2016, and it has the potential to kill antitrust in fairly literal terms for a generation or more.

Amid so much other confusion and conflict, virtually no one seems really to be thinking about how profoundly President Trump may influence the Supreme Court and, through its decisions, our law and society. The longer-term consequences for antitrust of anything else the Trump administration might do, or that a Sanders or Clinton administration might have done, are dwarfed by it.

The appointment of Justice Gorsuch in itself seems likely irrelevant to the Court's balance, in antitrust or elsewhere, as by appearances he just replaced a similar justice. But Justice Kennedy is rumored to intend retirement soon,[68] Justice Breyer is 78 and has served for twenty-five years, and Justice Ginsburg, who is 84, has suffered grave illnesses. Justice Thomas is relatively young, but he has served for many years and is rumored to dislike Supreme Court service. Events obviously remain unpredictable, but if President Trump is able to replace each of those justices, his influence on the Court could rival that of almost any president in history, including Franklin Roosevelt, Dwight Eisenhower, and—importantly for this essay, as it turns out—Richard Nixon. Only rarely in American history has any president appointed as many as five justices, and only rarely has a president had the opportunity to change the Court's balance so significantly.[69] Crucially, the decimation of contemporary antitrust began not with the rise of "Chicago," or its "consumer" preoccupation, or any other ideological hobby horse of the moment. It began the last time that one president was able to change the Court's balance so significantly—when Richard Nixon appointed Warren Burger, Lewis Powell, and

as well, in the absence of which it might have fared better. *See*, *e.g.*, Irwin Unger, *The "New Left" and American History: Some Recent Trends in United States Historiography*, 72 AM. HIST. REV. 1237 (1967); James Weinstein, *Socialism's Hidden Heritage: Scholarship Reinforces Political Mythology*, *in* FOR A NEW AMERICA: ESSAYS IN HISTORY AND POLITICS FROM STUDIES ON THE LEFT, 1959-1967, at 221 (James Weinstein & David W. Eakins eds., 1970). But no one seriously doubts that Americans have faced a narrower range of cultural and political experience than many other nations. There has never been a radical tradition here with the consequence of those in Europe. For sympathetic but realistic portrayals, *see* CHRISTOPHER LASCH, THE AGONY OF THE AMERICAN LEFT (1968); STAUGHTON LYND, INTELLECTUAL ORIGINS OF AMERICAN RADICALISM (New ed., 2009).

68. *See* Ariane de Vogue, *Anthony Kennedy Retirement Watch at a Fever Pitch*, CNN POLITICS (2017), http://www.cnn.com/2017/06/24/politics/anthony-kennedy-retirement-rumors/index.html.

69. George Washington holds the record, as he filled each of the Court's six initial seats, and over time made a total of ten appointments. Franklin Roosevelt, who served four terms, appointed eight Justices, and as everyone knows, he worked probably the most significant change on the Court in American history. Andrew Jackson also made a substantial impact. With six appointments, including the long-serving Chief Justice Taney and three others who each served for around thirty years, he changed what had been a Whig Court strongly supportive of federal power into a populist one suspicious of central government and urban elites. Presidents Lincoln, Taft, and Eisenhower each appointed five justices. Lincoln's impact was most significant. His Chief Justice Chase, among the nation's leading abolitionists, was a stark break from his predecessor Taney—the author of *Dred Scott v. Sanford*. The Chase Court would also reverse some of the law's opposition to federal power. With Justice Field, Lincoln would also institute a very conservative new era of constitutional protection for private property that would hold sway until the 1930s. Dwight Eisenhower too probably worked significant change, especially with the appointments of Chief Justice Warren and Justice Brennan, establishing what was probably the most left-leaning Supreme Court in American history. Even if President Trump gets five appointments, his impact may not be quite so grave as that of Jackson, Lincoln, Roosevelt, Eisenhower, or even Nixon. In those cases, the president changed a court that had been polarized much further in the opposite direction—Roosevelt changed a very conservative court to a liberal one, for example, and Nixon made a very liberal one very conservative. Trump, by contrast, seems likely just to make a center-right Court more conservative. But most important for our purposes, given their drastic impact on antitrust, are the four appointments made by President Nixon, and President Trump's potential to make similar impacts. *See infra* note 70.

William Rehnquist. With those appointments, one president was able to turn the most proenforcement antitrust Court in American history into what shortly would become the most antienforcement.[70]

Had any Democrat won in 2016, we might now be looking at a truly epochal reversal of a dark period in antitrust, but instead we likely will see a final move to the radically conservative right. Justice Kennedy, admittedly, was no great antitrust hawk. He authored such starkly antiplaintiff decisions as *Brooke Group*,[71] *Leegin*,[72] *Kansas v. Utilicorp*,[73] and the non-antitrust case that probably did as much harm to antitrust as any other, *Ashcroft v. Iqbal*.[74] But he believed at least in principle in the fundamental federal commitment to competition as a public policy[75] and in strict enforcement against gross abuses.[76] Given the likelihood that his replacement will more closely resemble Justice Thomas, Justice Alito, and Chief Justice Roberts, that person probably will not share those values. If President Trump can replace Justice Kennedy, and especially if he replaces even one liberal, a solid bloc of very conservative votes will be available for every antitrust matter. It will turn the comprehensively anti-enforcement totalism of the dissenters in cases like *North Carolina Board of Dental Examiners*[77] and

70. Those three could usually make a majority coalition, typically with Justices Stewart, White, or Blackmun, for a starkly more conservative antitrust, as in the most important antitrust cases of that period, United States v. General Dynamics Corp., 415 U.S. 486 (1974); and Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
71. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (adopting a standard for predatory pricing under which no public or private plaintiff has won a case in the twenty-five years since).
72. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 2007 551 U.S. 877 (2007) (reversing the long-standing per se rule against vertical price-fixing).
73. Kansas v. UtiliCorp United, Inc., 497 U.S. 199 (1990) (expanding the filed-rate rule to prohibit private recovery against filed rates under effectively all circumstances).
74. 556 U.S. 662 (2009).
75. Admittedly, his statements to that effect appear in cases going to the *scope* of antitrust and not its merits. In that he follows a long judicial tradition, and that interesting story reflects the deep theme of this article. Most people like antitrust just fine in the abstract, more or less, but not in application. And so, while the federal courts still routinely recite rote plaudits to its political priority and importance, they almost never do that in cases concerning exemptions, immunities, or other questions of applicability. In cases going to its merits, in fact, they often go on at length about its downsides and defects, as notoriously in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004) (considering the case not to be one in which "the benefits of antitrust [would be] worth its sometimes-considerable disadvantages"). Plaintiffs also actually win decisions much more often in scope matters than on the merits. In the thirty-five years since plaintiff won in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992), only one other antitrust plaintiff won before the Court's on the merits, and there by 5-4 decision with a fairly tortured majority opinion presumably written to secure Justice Kennedy's fifth vote. *See* F.T.C. v. Actavis, Inc., 133 S.Ct. 2223 (2013). (The opinion seems strangely drafted, in its insistence that it states only a "rule of reason," and not any sort of per se or "quick look" standard, even though in all respects it seemed like a very strict, nearly per se, quick look rule. *See* Thomas F. Cotter, FTC v. Actavis, Inc.: *When Is The Rule of Reason Not the Rule of Reason?* 15 Minn. J.L. Sci. & Tech. 41, 47–48 (2014); Christopher Sagers, *Just What on Earth Did Actavis Really Say? And Does It Mean Something for Section 1 More Broadly?* AntitrustConnect (July 1, 2013), http://antitrustconnect.com/2013/07/01/just-what-on-earth-did-actavis-really-say-and-does-it-mean-something-for-section-1-more-broadly/.) In any case, as for his commitment to the broad antitrust enterprise in general terms, consider Justice Kennedy's views in *North Carolina Board of Dental Examiners:* Federal antitrust law is a central safeguard for the Nation's free market structures. . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market. . . . The Sherman Act serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. North Carolina State Bd. of Dental Examiners v. F.T.C., 135 S.Ct. 1101 (2015) (citations omitted).
76. Notably, he voted in the five-member majority in *Actavis.* Consider, as well, his stirring indictment of price-fixing in *Ticor*: "The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. . . . A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people." F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 632 (1992) (citation omitted).
77. N.C. State Bd. of Dental Examiners v. F.T.C., 135 S.Ct. 1101, 1117–23 (2015) (Alito, J., dissenting). There Justice Alito, joined by Justices Scalia and Thomas, would have extended the state-action antitrust immunity to the conduct of any body

Actavis[78] into the majority view. One can imagine cases like *Appalachian Coals*,[79] or the intermediate opinion in *American Needle*,[80] or the defendants' position in *Addyston Pipe*[81] finally becoming good law, with the practical effect that nothing is any longer illegal.

While the Supreme Court is sometimes said to be distant from antitrust, because it takes few cases and in many areas its most recent decisions are old, its influence is enormous. Consider the case study that is the topic of Part III below, the judicial remaking of merger law. The lower federal courts rewrote merger law during the 1980s and 1990s, and they did it essentially on their own, but their thinking throughout that period was driven by sentiments implied in one peculiar, seemingly factually idiosyncratic Supreme Court opinion in 1974.[82] Price predation is another example. Following one Supreme Court opinion twenty-five years ago,[83] predation plaintiffs have been essentially foreclosed from the courthouse,[84] and that one case also threw the whole law of "exclusion" under § 2 into a long, lasting confusion.[85] Likewise, the Court's new pleading standard under *Twombly*[86] and *Iqbal*[87] appears to

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identified by a state government as an "agency," with barest trappings of state authority. In effect, the states would be free just to authorize private price-fixing, and the gates of state government pork would be flung free.

78. F.T.C. v. Actavis, Inc., 133 S.Ct. 2223, 2238–46 (2013) (Roberts, C.J., dissenting). There Chief Justice Roberts, joined by Justices Scalia and Thomas, would have broadly upheld "reverse-payment" or "pay-for-delay" deals in the pharmaceutical industry, a practice essentially equivalent to naked horizontal agreement not to compete, the overall harm of which the FTC once estimated at about $3.5 billion per year. *See* Fed. Trade Comm'n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions (2010), https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf. The *Actavis* dissenters offered little explanation for the good of the practice or its legality except to imply that patent holders should be permitted to use their property as they choose, except in rare circumstances.
79. Appalachian Coals v. United States, 288 U.S. 344 (1933) (upholding a joint selling cooperative, even though it was literally just a naked price cartel, because of the economic difficulties during the Depression). *Appalachian Coals* has never been reversed as to its substantive holding, but it plainly no longer states the law.
80. Am. Needle Inc. v. National Football League, 538 F.3d 736 (7th Cir. 2008), *rev'd* 560 U.S. 183 (2010) (holding that any collection of separately organized entities could be immune from Sherman Act § 1 so long as its members "act as a single entity," notwithstanding internal conflicts of interest).
81. In this case, decided in the law's earliest, uncertain years, the parties to a naked price cartel said they should be allowed to defend the arrangement as needed to meet their circumstances and as having raised prices no more than was "reasonable." The courts rejected the claim, and in the course of it then-Judge Taft famously wrote that in permitting such defenses the courts would "set sail on a sea of doubt." United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).
82. The case was United States v. General Dynamics Corp., 415 U.S. 486 (1974). *See infra* notes 163-85 and accompanying text.
83. Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
84. To dispute that commonly made claim, Professor Crane points out that one plaintiff did in fact win a jury verdict after *Brooke Group*, that three others procured settlements, and that overall at least 57 complaints alleged predation. Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 4 & nn. 12, 15–16 (2005). (He actually omits one other significant success, presumably because summary judgment for the defendant was not reversed until just after his article had gone to print. *See* Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005)). I find his proof unpersuasive. Between *Brooke Group* in 1993 and Professor Crane's article in 2005, there were something on the order of 10,000 antitrust filings, so it appears that plaintiffs didn't bother to allege predation in more than about 0.6% of all antitrust cases, and they achieved even limited success in no more than about 0.05% of them. So perhaps *Brooke Group* killed predation claims after all.
85. Admittedly, there had already been a long search for some theoretically coherent, generalizable theory of exclusion under § 2, and it continues. The problem added by *Brooke Group* was the possibility that, to avoid false positives, *all* monopolization plaintiffs must put on not just evidence of exclusion, but of conduct that could *only* be exclusionary. Defendants and some courts ever since have argued for very difficult cost-based showings resembling the *Brooke Group* test for all § 2 cases, including variants like "profit-sacrifice" or "no economic sense." *See generally* Thomas N. Dahdou, *Restoring Balance in the Test for Exclusionary Conduct*, Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 51, 56–58 (2015) (summarizing ongoing debate); Herbert Hovenkamp, *Predatory Pricing Under the Areeda-Turner Test* 3-4 (U. Iowa Leg. Studs. Res. Paper No. 15-06, Mar. 16, 2015), https://papers.ssrn.com/sol3/papers.cfm? abstract_id=2422120 (same).
86. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
87. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

have taken a serious toll on federal litigation generally,[88] and could explain a drop-off in private antitrust filings.[89] That matters, both because private plaintiffs have been responsible for 90% or more of all federal antitrust litigation for some decades,[90] and because only private plaintiffs can ordinarily recover money damages.[91]

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So what, then, do the near and (god forbid) maybe the middle term look like? At a minimum, we seem to be in for a period of pretty restrained enforcement. Criminal prosecution will likely steam along, as it did under recent Republican administrations, because hard-core cartels are no one's constituency and opposing them has political benefits with no downside. Tellingly enough, virtually the only antitrust legislation to advance in decades has been ever-increasing criminal penalties, which with rare bipartisanship Congress has pushed to essentially barbaric extremes.[92] But probably few mergers will face serious challenge and civil nonmerger enforcement will become more rare. One might expect both federal agencies to turn more attention to policy workshops and the drafting of reports and enforcement guidelines—if in fact they turn out not to do all that much litigating—the tenor of which will be to stress more caution and restraint in enforcement. And as for the Court, lord only knows what's coming, but with just one or two more Trump appointments, the next decade may prove crucial in a way that few people seem yet to have grasped.

Things don't have to be entirely grim. I could be wrong of course about the appointments. If President Trump is unable to name any more justices, and he is succeeded by a Democrat, then the Court's future could be very different indeed. That could happen in a few ways. There might simply be no more vacancies, or they might come after the 2018 midterm elections, in which Democrats could conceivably win Senate control and then follow Republicans' example of obstructing all Supreme Court nominees until 2020. Even if President Trump does change the Court's balance, times of dissent can at least drive cultural and intellectual creativity. We could hope this period sees the return of a new critical movement in the tradition of Robert Hale and the other economically-minded Realists, who waged war on the individualistic, property-rights heroism of the Supreme Court of their day.[93] That might be useful, as there is even now an academic movement advocating a literal return to the constitutional law of *Lochner v. New York*,[94] and there may shortly be a Supreme Court majority open to it.

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88. Some econometric evidence has shown that the new standards have dampened private filings in federal court. *See*, *e.g.*, Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L. J. 2270 (2012). One might think that's just fine, since after all the Court thought that suits were being filed that shouldn't be. The problem is that despite extensive and careful study, researchers have no confidence that the cases being weeded out are the frivolous ones. *See* Jonah B. Gelbach, *Material Facts in the Debate Over* Twombly *and* Iqbal, 68 STAN. L. REV. 369 (2016). More generally, the reception from both the sitting judiciary and the academy has been simply savage, for the new standard's great confusion and uncertainty. *See* Chris Sagers, *A Tale of Two Panels: The Size of the Chancellor's Foot in* Text Messaging *and* Potash, CPI ANTITR. CHRON. (Nov. 2011), https://www.competitionpolicyinternational.com/assets/Uploads/SagersNOV-2.pdf; *see generally* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests*, *Destabilizing Systems*, 95 IOWA L. REV. 821, 823, 834 (2010) (the new standard has "destabilized the entire system of civil litigation," creating a "revolutionary" new "civil procedure hitherto foreign to our fundamental procedural principles").
89. New filings dropped precipitously in about 2008, to truly historic lows, in the immediate wake of *Twombly*. They've slowly crept back up to averages that prevailed in the early 2000s, and so far are holding. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS, http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts.
90. Based on review of the same sources as in note 89, *supra*.
91. *See infra* notes 124-25 and accompanying text.
92. For an excellent study and critique of the trend, see Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443 (2006).
93. *See generally* FRIED, *supra* note 17.
94. 198 U.S. 45 (1905). *See*, *e.g.*, DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); *cf.* Alan J. Meese, Standard Oil *as* Lochner*'s Trojan Horse*, 85 S. CAL. L. REV. 783, 814

But here I'll confess again my weakness for the old, reactionary Pound, rather than the young, brilliant, rising Progressive Pound. In one way or another I've been saying for most of my career words to the effect that "antitrust is dead." But I never *really* meant it. It really could now plausibly be about as good as dead, for a fair while to come.

III. The Deeper Political Problem That Will Remain, Even When This Is All a Memory

Among the oldest criticisms in all of antitrust is that it is not so much a serious measure actually to control corporate power, but just a compromise, and effectively a surrender. By its mere existence it gives the impression that government is doing something, and so it tempers popular political agitation, but in turn the government takes care not to be so active as to invite political reprisal from business either. The people are misled into quietude, while business mostly gets what it wants.[95]

On some level that is my message as well, except that I do not believe that state of affairs is so inevitable. My conviction is just that, because of problems in the nature of markets and the having of a competition policy, antitrust will be prone to this kind of compromise over time. To improve its effectiveness, institutions should be well designed to counter it. Specifically, markets are difficult to watch in their ordinary, healthy operation. They cause losses of many kinds, they sometimes jeopardize sincerely held and important values, and law enforcement to keep them vigorous often seems in tension with American individualism. And so that makes it hard for the public to support the kind of vigorous enforcement that would actually serve them well.

One particular kind of rule that is especially hard to enforce happens to be the one that I think is needed the most: prospective, no-fault concentration control. As the rest of this essay will argue, it is most important because once concentration occurs, it is more difficult to undo than it would have been to stop it in the first place, and it is difficult to police effectively with the case-specific, mostly retrospective conduct remedies that make up the rest of antitrust. But it is also the hardest kind of rule to enforce aggressively and consistently, because it is inherently speculative. When plaintiffs bring forward-looking claims, they necessarily allege only the likelihood of injuries that haven't yet occurred, and it is a big challenge for them to invoke the invasive machinery of government, complicating private liberty and inviting defendants to tell their own speculative stories of the values that will be undermined. Retrospective remedies are easier in these respects, though they may be much less effective. When the plaintiff sues after the fact, it can point to some concrete antisocial conduct, and put on objective evidence that it was in fact harmful. And for that reason, case-specific post hoc remedies are not only easier for the public to support, they are more attractive to enforcement officials.

A. A Few Empirical Preliminaries

This Part III rests on a few empirical claims that are controversial, fraught, and a lot harder to prove than they might seem. Most controversially, it implies that U.S. merger enforcement has been insufficient. Those have come to be bitter, fighting words. Even saying whether the raw *number* of federal

(2012) (arguing that in fact *Standard Oil*'s famous adoption of a rule of reason was just an application of *Lochner*'s reasoning, and apparently urging that *Lochner* should still inform antitrust analysis).

95. Infamously, by Thurman Arnold himself, who then had to explain himself only a year later in his own confirmation hearing to be antitrust chief. *See* Thurman W. Arnold, The Folklore of Capitalism 212, 217 (1937) ("The actual result of the antitrust laws was to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels.... Thus, by virtue of the very crusade against them, the great corporations grew bigger and bigger, and more and more respectable.").

merger challenges has changed between administrations has evoked fairly bitter controversy, and even that simplest question is as a matter of fact harder than it seems.[96] It should maybe not be surprising that the much bigger normative questions remain completely unanswered, and mostly not even asked. Nobody really can say what effect antitrust enforcement has had on *any* level, not because nobody has tried to measure it, but because the measurement is difficult and problematic.[97] Indeed, as Hofstadter once said, it may be a strength of antitrust precisely that its real effects can't be known.[98] Accordingly, though many in antitrust like to believe they are debating matters of science with scientific tools, our problems are to some degree irremediably political, at least for now, because they pose effectively empirical questions that we cannot answer.[99]

Nevertheless, some emerging econometric evidence does in fact support a claim that merger enforcement has been too lenient, probably for some decades and probably by a significant margin. There is evidence now both that mergers do more harm than many people thought, and that they don't do very much good. The evidence of harm consists primarily of John Kwoka's much-discussed studies,[100] which have reached several striking results. He has found that horizontal mergers can cause serious price and output effects at much lower concentration levels than had been commonly thought. He also found that divestitures and other remedies short of suit-to-block are not very effective. And he finally showed something that seems like it ought to be easier to measure than it really is, which is that federal enforcers have challenged only increasingly larger and larger deals, effectively moving the threshold for enforcement much higher than that stated in the *Horizontal Merger Guidelines*. His work has admittedly drawn one sharp rebuke on a number of miscellaneous methodological points,[101] but it comes from one of the agencies being criticized; and as we shall see below, it is in itself only too revealing. Kwoka has provided a detailed reply.[102] In any case, the European Commission was so impressed with Kwoka's approach that it has begun a study of European mergers using the same protocol.[103] And most importantly, the evidence has been increasingly corroborated by others, mainly

96. The problem is not counting up the raw number of actual enforcement actions. That is easy. It is saying whether changing numbers reflect changing enforcement vigor, because they have to be put in the proper context of changes in the flow of mergers being proposed and the types of remedies being sought. That is much more controversial. *Compare* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 235 (Robert Pitofsky ed., 2008), *with* Kovacic, *supra* note 38; *and* Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement Over Time and Between Agencies*, 2008 Antitrust 37 (2008).

97. John E. Kwoka, Jr., *The Attack on Antitrust Policy and Consumer Welfare: A Response to Crandall and Winston*, Northeastern Univ. Dep't of Econ. Working Paper 03-008, at 2-3, June 2003, http://www.economics.neu.edu/papers/documents/03-008.pdf

98. Richard Hofstadter, What Happened to the Antitrust Movement? in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1964).

99. A wonderful statement of this view is Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust*, 74 N.C. L. Rev. 219 (1995).

100. John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (2014); John Kwoka & Chengyan Gu, *Predicting Merger Outcomes: The Accuracy of Stock Market Event Studies, Market Structure Characteristics, and Agency Decisions*, 58 J.L. & Econ. 519 (2015); John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 Antitrust L.J. 619, 650 (2012); John E. Kwoka, Jr., The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns? (May 21, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782152.

101. Michael Vita & F. David Osinski, *John Kwoka's* Mergers, Merger Control, and Remedies (Dec. 22, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888485. *See also* James Langenfeld, *The Empirical Basis for Antitrust: Cartels*, *Mergers*, *and Remedies*, 24 Int'l J. Econ. Bus. 233 (2017) (raising some similar criticisms, but describing Kwoka's work as "state of the art").

102. John E. Kwoka, Jr., Mergers, Merger Control, and Remedies: A Response to the FTC Critique (Apr. 6, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947814.

103. Eur. Comm'n, A Review of Merger Decisions in the EU: What Can We Learn from Ex Post Evaluations? (2015).

in a series of single-market difference-in-difference studies.[104] Of course, it is early to draw any determined conclusions, and many no doubt will consider it significant that at least superficially this work resembles the empirical work of the 1960s that underlay the structure-conduct-performance paradigm. One uncertainty, for example, remains whether there are factors within particular markets making concentration unusually prone to market power, such that metastudies of large collections of averages may be misleading, though I don't personally think that seems terribly likely, and Kwoka has done work to rebut it.

The evidence that mergers don't do much good is a large econometric literature that has hunted for evidence of efficiencies or other benefits. Aside from the now largely discredited stock-market event studies of the 1980s and 1990s, researchers looking for merger benefits have mostly found that, at least among publicly traded firms, mergers on average actually cause shareholder *losses,* for both acquiring and target firms, suggesting that there really just aren't meaningful benefits to be had.[105]

My second underlying empirical claim is that antitrust enforcement depends on popular support. That is a claim for which neither I nor Thurman Arnold have any systematic evidence, and it may seem at odds with a widely held historical truism of antitrust politics—that antitrust came to be forgotten by the public once it was working tolerably well.[106] But it seems pretty likely that enforcement decisions are political at least to some degree, and that popular support really does matter. At a high level of abstraction, the president and the attorney general are susceptible to political influence, and are known occasionally to exert influence directly on antitrust enforcement.[107] And while enforcement officials themselves seem less directly concerned with popular opinion, even at the political leadership level, they plainly care about opinions within Congress and the risk of reprisals through budget cuts or substantive legislative change.[108] Popular support is more important yet in that enforcement is expensive, and any really meaningful increase in it would require substantial new allocations that Congress would resist. Merger enforcement of the kind I have in mind would at least for the time being be *very* expensive. The cost might subside over time, because after some initial period of very aggressive enforcement, companies would not bother to propose as many big deals. But the initial push would require an increase in federal personnel with few parallels in history. One such increase occurred

104. *See*, *e.g.*, Orley Ashenfelter et al., *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & Econ. S67 (2014); Orley Ashenfelter & Daniel Hosken *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J.L. & Econ. 417 (2010); Matthew Weinberg, *The Price Effects of Horizontal Mergers*, 4 J. Comp. L. & Econ. 433 (2008); Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* (NBER Working Paper No. 22750, 2016).

105. *See* Lawrence A. Sullivan, Warren S. Grimes, and Chris Sagers, Antitrust: An Integrated Handbook (3d ed. 2016).

106. Famously in Hofstadter, *supra* note 98.

107. While it is customary to claim that publicity efforts and congressional hearings do not influence antitrust enforcement, they probably do to some degree. If nothing else, if they truly had no impact it would be hard to see why firms spend so much money on them. *See*, *e.g.*, Justin Elliott, *The American Way*, ProPublica (Oct. 11, 2016), https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust; Brent Kendall at al., *Behind Google's Antitrust Escape*, Wall St. J., Jan. 5, 2013. In fact, at least once a defendant appears to have bribed a president to get a case dropped, in the case of ITT's contributions to the Republican National Convention of 1972. *See supra* note 46. There likewise remains the nagging suspicion that political pressure on the Obama White House may have influenced the decision to drop DOJ's airline merger challenge. *See* Elliott, *supra*.

108. Even now, FTC careerists recall the Federal Trade Commission Improvements Act of 1980, Pub. L. 96–252, 94 Stat. 374 (1980), a law in which "Improvements" should probably have been printed in quotation marks. Congress made no real bones that the law was a punitive reprisal for the agency's aggressiveness under Chairman Michael Pertschuk. It limited the Commission's investigatory authority and prohibited certain actions involving insurance, standard setting, children's television, and other matters that had been of special interest to the Pertschuk Commission. *See* S. Rep. 96-500, 96th Cong., 1st Sess. (1979). Ironically enough, the Commission's aggressiveness during the 1970s was driven at least in part by criticism for its *inaction* during the 1960s. *See*, *e.g.*, Edward F. Cox et al., The Nader Report on the Federal Trade Commission (1970); Am. Bar Ass'n, Report of the American Bar Association Commission to Study the Federal Trade Commission (1969).

during Thurman Arnold's tenure in the 1930s, but it was led by a popular, very personally engaged president and funded by a Congress controlled by his party.[109]

B. The Centrality of Merger Control

Now it is time to defend the claim previewed several times so far: that effective competition policy calls for prospective, no-fault concentration control. A matter that remains underexplored is that our merger control law, Clayton Act § 7, is special in some ways and is unlike other rules in our antitrust, and it is critical that some such rule be available and used aggressively. Without adequate use of a rule like § 7, in my view, the rest of a competition policy will disappoint. The basic argument is that the only alternative policy tools we have are post hoc, and they consist only of (1) the case-specific, tort-style law enforcement tools of a law like the Sherman Act; or (2) regulatory oversight, like the rate-and-entry public utility regulation we used to impose on infrastructure industries.[110]

Most obviously, if a competition regime only prohibits collaborations of separate entities, competitors can accomplish all the same evil ends just by merging. An interesting fact is that there weren't always mergers, in any significant number, and their rise roughly parallels the adoption of the Sherman Act.[111] There has been suggestion that the law's passage caused or hastened the Great Merger Wave of 1895–1905.[112] It is also often said that the conglomerate merger wave of the 1960s and 1970s was caused not by anything good about conglomeration—despite the hype in their favor among

109. *See* Spencer Weber Waller, Thurman Arnold: A Biography (2005). The Antitrust Division's budget was quadrupled between 1938 and 1940, and by the end of Arnold's tenure in 1943 its staff had quintupled. *See* Hofstadter, *supra* note 98, at 230.

110. Strictly speaking, the courts did not originally understand § 7 as a no-fault rule, and the Supreme Court read a "reasonableness" requirement into the government's showing in Int'l Shoe Co. v. F.T.C., 280 U.S. 291 (1930). Many thought that the Celler-Kefauver amendments of 1950 incorporated a no-fault concentration rule, and the Supreme Court effectively adopted one in *Philadelphia National Bank*, but as late as the mid-1970s there was academic doubt whether there really could or should be such a law. *See* Dolores Korman Sloviter, *The October 1973 Term Merger Cases: Whither Clayton § 7?* 48 Temp. L. Q. 861, 862–71 (1975) (canvassing the history of § 7 and academic commentary, and noting the law's continuing tension with the traditional rule that size and power in themselves were not illegal).

111. *See* Sullivan, Grimes, & Sagers, *supra* note 105, at 471–72.

112. The claim is controversial, and I tend to doubt it. For what it is worth, the case has been made in formal, theoretical terms; *see* George Bittlingmayer, *Did Antitrust Policy Cause the Greater Merger Wave?* 28 J. L. & Econ. 77 (1985), and it has been suggested elsewhere; *see*, *e.g.*, Kovacic, *supra* note 4, at 1113. Bittlingmayer's argument has lacked traction, probably because its real goal was to support a much more controversial generalization of "empty core" theory. In any case, the more general claim seems to imply that firms resorted to merger to avoid legal restrictions on price agreements. That may have been the case, since United States v. E.C. Knight Co., 156 U.S. 1 (1895) might have seemed to imply that "mergers," at least among manufacturers, might be generally outside the "interstate commerce" to which the Sherman Act could apply. The argument seems somewhat dubious, because by 1895, about the time that the Merger Movement started, it was widely thought that the federal antitrust law was entirely dead, *see* Kovacic, *supra*, at 1112–13 (discussing), and the Movement was underway before the courts later clarified that the law was not only not dead, but that it would strictly limit price cartels; *see* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898). Moreover, there are several other possible explanations of the Merger Movement, advanced in careful histories on an extensive record, like that was an efficiency enhancing hunt for scale economies and vertical rationalization; *see* Alfred D. Chandler Jr., The Visible Hand: The Managerial Revolution in American Business (1993), that it was at least in part a scramble to reduce excess capacity following the depression of 1893; *see* Hovenkamp, *supra* note 17, that it was just the understandable reaction of an entire society scrambling to find order in what seemed like worsening chaos; *see* Louis Galambos, *The Emerging Organizational Synthesis in Modern American History*, 44 Bus. Hist. Rev. 279, 282 (1970), that it was really just a speculative, oversold, Wall Street investment scheme; *see* Gabriel Kolko, The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916 (1963), or that, after all is said and done, it really was just the hunt for supracompetitive monopoly profits that most people always thought it was; *see* Naomi R. Lamoreaux, The Great Merger Movement in American Business, 1895-1904 (1988).

management gurus, the conglomerates proved among the biggest mistakes in American business history[113]—but by the government's very tough stance at that time against both horizontal and vertical mergers.[114] More generally, it is thought that if only merger control is strong, parties will resort to nonmerger conspiracy, and if only conspiracy law is strong, parties will just merge.[115] Both controls are needed simultaneously.

But there are a number of other problems with insufficient merger control, and I believe they are quite a lot more important. In our system, they follow from certain basic facts. First, Clayton Act § 7 is the closest thing we've ever had to a general, no-fault monopolization law. That is, we have no other law to control size or concentration for their own sake, with no concern for proof that bad conduct has occurred. The few other no-fault structure rules we've had were narrow and idiosyncratic,[116] and we've only rarely toyed with adopting anything more general.[117] It may be that courts at times have been more persuaded that concentration itself was a problem, and so administered monopolization law with less preoccupation for elaborate conduct evidence,[118] but they have never applied any law other than § 7 without requiring some evidence of past exclusionary conduct. Interestingly enough, most other countries are in the same situation—with the exception of the British regulator's remarkable

113. *See* David J. Ravenscraft & F. M. Scherer, Mergers, Sell-Offs, and Economic Efficiency (1987).

114. *See*, *e.g.*, Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 Geo. L. J. 1511, 1527 (1984).

115. The general point has often been made that without merger enforcement, firms will use merger to evade other antitrust rules, *see*, *e.g.*, Sullivan, Grimes, & Sagers, *supra* note 105, at 468 & n. 4, and it was a chief reason that antitrust enforcers urged the Celler-Kefauver amendments of 1950; *see*, *e.g.*, Fed. Trade Comm'n, The Merger Movement: A Summary Report 8–14 (1948).

116. We have had one affirmative deconcentration law in our history, the Public Utility Holding Company Act of 1935, 49 Stat. 803 (1935), which allowed the Securities and Exchange Commission to restructure the utilities industry, a reflection of the widespread belief that speculation in the very large utility holding companies had contributed to the Great Depression. Likewise, though it has been uncommon, our law has occasionally limited firm size or lines of business, in order to serve certain specific policy objectives. The goals may have differed from the narrowly defined allocational goals aimed at by contemporary economics, but by using industry structure to achieve policy outcomes, they were "competition" policies in some sense. This was at one time the case, for example, in banking and communications. In banking, U.S. law traditionally set very tight limits both on firm size and the lines of business in which banks could engage. As late as the 1960s, U.S. banking was almost entirely "unit" banking, in which a given firm could operate only one physical location, and banks could only engage in the narrow range of activities that constituted "banking." That has all changed quite radically since about the 1980s, such that now firms can be of essentially any size and engage in any activities whatever, and still engage in banking. At least nominally, however, we even now impose some formal size and line-of-business limits. *See generally* 1 Jerry W. Markham, A Financial History of the United States 141–80, 207–22 (2002); Bernard Shull & Lawrence J. White, *The Right Corporate Structure for Expanded Bank Activities*, 115 Banking L. J. 446, 449, n. 10 (1998). Likewise, communications law for much of its history limited the number of broadcast licenses any one firm could hold, and also limited cross-ownership of broadcast licenses and newspapers. Those rules too were the subject of very aggressive deregulatory efforts, which began in the second Bush administration. *See* Fed. Trade Comm'n, *Final Rule*, *Broadcast Ownership Rules*, *Cross-Ownership of Broadcast Stations and Newspapers*, *Multiple Ownership of Radio Broadcast Stations in Local Markets and Definitions of Radio Markets*, 68 Fed. Reg. 46,286, 46,299 (Aug. 5, 2003). The goal was to preserve viewpoint diversity, especially in the news. In that, the policy echoed judicial views also found in First Amendment and antitrust caselaw. *See* Assoc. Press v. United States, 326 U.S. 1, 20 (1945). And finally, we did the same for some time with the nascent air carriage industry. The McKellar-Black Air Mail Act of 1934, 48 Stat. 933 (1934), required that firms receiving federal air mail contracts could not be vertically integrated into either manufacturing or other lines of business.

117. Specifically, during the 1970s, the Senate Judiciary Committee under the Chairmanship of Senator Philip Hart considered a set of affirmative deconcentration laws. While they received substantial consideration there, no such bill made it out of committee. *See* Kovacic, *supra* note 4, at 1126–27. A fairly surprising fact to modern eyes is that measures of this now-seemingly drastic nature had in fact been recommended by various different academics and advisory groups for some time. *See*, *e.g.*, Carl Kaysen & Donald F. Turner, Antitrust Policy: An Economic and Legal Analysis 111–19 (1959); Report of the White House Task Force on Antitrust Policy, 115 Cong. Rec. 11, 13890 (1969).

118. *See*, *e.g.*, Hovenkamp, *supra* note 17, at 212–17.

Market Investigation procedure, which permits investigation and government-imposed remedies without proof of legal violation,[119] the only prospective concentration control in most countries is a premerger review regime.

Second, § 7 is our only prospective antitrust rule. All our other antitrust law requires evidence of conduct already committed, whereas § 7 (in principle) takes evidence of existing market structure to predict subsequent abuses that might occur. It is our only tool for stopping anticompetitive concentration before it starts, after which it may be too late for retrospective, regulatory or tort-like enforcement to do any good. This fact largely explains why the Sherman law proved a failure as a tool for merger control.[120]

The reason it matters to stop concentration prospectively and without evidence of fault is that, first all, in our system it is our only remedy for certain serious anticompetitive behavior. Unilateral exercise of whatever pricing power a firm can get its hands on is not in itself illegal, unless the power was gotten through some exclusionary conduct.[121] Likewise, anticompetitive interdependence among oligopolists is not in itself illegal, unless it can be proven that the participants actually reached some explicit agreement.[122] It may be that these problems could be improved upon with better rules under §§ 1 and 2. For example, as conspiracy has gotten more difficult to prove, and the so-called "*Copperweld* gap"[123] has grown wider, the problem of oligopoly interdependence has probably gotten worse. That could be improved without change in merger law just by making conspiracy easier to show. But some such conduct seems pretty likely to escape retrospective legal challenge, because for a range of reasons our law has always distinguished between independent, unilateral conduct and collaboration.[124] It could help matters substantially if we also increased use of our tool for preventing oligopoly conditions in the first place—our merger law.

Second, once markets become concentrated and competition is dull, there is little that policy can do to make it otherwise. Aside from the fact that some harmful conduct following consolidation just isn't illegal, retrospective conduct challenges to miscellaneous bad acts are not very effective once concentration is serious, even when those challenges succeed in court. One of the biggest and most obvious problems, though one rarely remarked, is that the federal antitrust agencies almost never have access to money damages relief. Except in the rare cases they prosecute criminally or where they can secure the unorthodox remedy of disgorgement, the agencies can only seek injunction. Meanwhile, private plaintiffs mostly challenge only the narrow range of conduct subject to per se liability. So for most competitors that engage in anticompetitive conduct, short of naked price-fixing, very likely the

119. *See* Competition & Markets Auth., Guidelines for Market Investigations: Their Role, Procedures, Assessment and Remedies (2013). Since its authorization by Parliament in 2002, the UK Competition & Markets Authority has used the Market Investigation procedure to investigate a number of industries and impose remedies, occasionally including divestiture. As to the latter, a key example was to require the British Airports Authority to give up control of both airports serving London, in 2009. *See* Oxera Consulting, LLP, Evaluation of the Competition Commission's BAA Airports Market Investigation (2015). Opinions of the effectiveness of the tool are, as one might guess, mixed, though it seems quite early to judge. In any case, *see*, *e.g.*, Chrysovalantis Amountzias et al., *A Waste of Energy? A Critical Assessment of the Investigation of the UK Energy Market by the Competition and Markets Authority*, 21 Comp. & Change 45 (2016).

120. *See* Sullivan, Grimes, & Sagers, *supra* note 105, at 471–72. It may be somewhat inaccurate to describe all other antitrust as "retrospective," since at least sometimes non-merger antitrust actions could have forward-looking or prophylactic rationales. For example, our per se rules and attempted monopolization condemn conduct without evidence of past or present harm. My point is merely that, for the most part, nonmerger antitrust requires proof of some specific conduct already committed, and that is true even of per se § 1 challenge and attempted monopolization claims.

121. *See id.*

122. *See id.*

123. *See generally* Chris Sagers, *Why* Copperweld *Was Actually Kind of Dumb: Sound*, *Fury and the Once and Still Missing Antitrust Theory of the Firm*, 18 Vill. Sports & Ent. L.J. 377 (2011).

124. *Id.* at 381–86.

worst loss they can face is a time-limited injunctive remedy, plus the costs of litigation and bad publicity. Those burdens may be greatly outweighed by the supra-competitive profits they get to keep from their conduct.

A separate problem follows from the fact that all our antitrust rules other than § 7 require proof of some specific, culpable conduct. Fault-based remedies are necessarily piecemeal, in that even when one specific instance of bad conduct is successfully stopped, firms with power can usually just figure out some other way to make the same amount of supra-competitive excess they made before. So, while those remedies are better than nothing, they are not as good as using our ready-to-hand merger rule in the first place.

One final thought is that many have recommended from time to time some new law for actual, affirmative deconcentration of companies that have in one way or another become monopolies. In abstract principle that seems fine to me, since there is little reason to believe that very large size or very large market share are very often required for efficiency. But, to repeat a theme once again, the institutional costs are very high, and perhaps quite a bit more so than a pre-consummation merger review regime like HSR. Those believing otherwise should read Kovacic's careful historical study.[125]

* * *

Examples of these problems in recent history have begun to pile up in numbers and gravity that border on the absurd. Power builds in some sector, but the agencies and the courts either can't or won't interfere, for reasons of their own. When that power ripens to produce genuine harm, government has resort only to rearguard, defensive actions to try to tame it, like retrospective, fault-based conduct remedies under Sherman Act §§ 1 and 2, or like non-antitrust regulatory approaches. They seem unequal to the task.

Passenger air is a nice example. In the often-told tale, the industry emerged in 1978 from pervasive regulation, and at first it was quite competitive, with significant benefits for consumers. A period of rapid consolidation followed, essentially unchecked by the agency then responsible for airline merger review, the Department of Transportation. The ensuing few decades saw a few substantial bouts of new entry, but each was followed by a relatively short period of bitter price competition, each time ending with all or most of the new entrants being acquired by a major airline or failing altogether. Those few decades also saw rapid consolidation among the several "legacy" airlines that survived from the regulated era, which were much larger than any of the entrants and offered nationwide and international "network" service that the entrants could not match. Only a few of the legacy mergers were meaningfully challenged under merger review authority, which was transferred to the Justice Department in the 1980s. At length, by 2013, the United States had seen its few dozen airlines dwindle to just five major firms, challenged only by a fringe of much smaller firms widely thought not meaningfully to compete.[126] In that year, American Airlines and U.S. Airways agreed to the largest airline merger in history, creating the world's largest airline. This finally was too much for the Obama Justice Department, which brought a remarkable suit to challenge it. The suit won praise and intense attention, but only some months later, following the merging parties' massive public relations effort, the government settled the case in exchange for what seemed like a very limited set of slot divestitures, given the

125. Kovacic, *supra* note 4.

126. The term "Southwest effect" was coined in Randall D. Bennett & James M. Craun, Dept. of Transp., Off. of Aviation Analysis, The Airline Deregulation Evolution Continues: The Southwest Effect (1993), to denote the positive effects when lower-cost small entrants entered a given route to challenge incumbent carriers. Subsequent experience suggested, however, that only Southwest Airlines was able to exert that influence on any consistent basis, without then being acquired by an incumbent, exiting the route, or going insolvent. *See* Chris Sagers, *"Rarely Tried, and . . . Rarely Successful": Theoretically Impossible Price Predation Among the Airlines*, 74 J. Air L. & Comm. 919 (2009). As to the industry's history, see generally *id.* at 936–41.

gravity of the harms alleged in the complaint.[127] As a result, there are now only four major airlines, and it is widely thought that even Southwest Airlines, the only nonlegacy carrier ever shown to exert consistent, meaningful price discipline, no longer does so.[128] No one knows for sure how much consumer damage that merger might have caused, but there is reason to think it may be well into the billions of dollars per year.[129]

This seems relevant because of the government actions that followed. As many predicted, evidence of anticompetitive conduct began to surface, and media attention focused on apparent capacity coordination at an industry convention in Florida in 2015.[130] Apparently as a result, the Justice Department opened a nonpublic investigation of price fixing among the four remaining major airlines,[131] but it ended a few years later when the government found insufficient evidence to warrant legal action.[132] As often happens, when news broke of the DOJ investigation, a large group of private plaintiff attorneys filed follow-on civil money damages actions. Separately, the Obama Justice Department was compelled to bring one of its two Sherman Act § 2 actions when, in June 2015, United Airlines attempted to buy several departure slots from Delta at the Newark airport. The acquisition had to be stopped because it would have undone the second most significant piece of the divestitures package the agency said would resolve competitive harms of the U.S. Airways/American Airlines merger, only about a year and a half after the settlement was reached.[133]

And finally, Congress is now in the act. Congress is considering a bill that would require federal regulation of seat space. But deciding how to design airplane seats would ordinarily be a concern we leave to markets. The quality of products sold, just like their price, is set, in competitive markets, to maximize consumer preference.[134]

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127. Specifically, the settlement required a large set of divestitures at Reagan National Airport, where the merged firm would have had extraordinary dominance, plus a smaller set of divestitures at Newark airport, and then very limited divestitures at five other airports. The sum total was some competitive relief on about one hundred city-pair routes, whereas the complaint had alleged that the merger would seriously impact competition on about *one thousand* routes.
128. Michael D. Wittman & William S. Swelbar, *Evolving Trends of U.S. Domestic Airfares: The Impacts of Competition, Consolidation, and Low-Cost Carriers* (MIT Small Community Air Service White Paper No. 3 Report No. ICAT-2013-07, Aug. 2013), http://dspace.mit.edu/bitstream/handle/1721.1/79878/ICAT-2013-07.pdf? sequence=1 (presenting evidence that "Southwest effect" has waned, such that even Southwest no longer exerts meaningful price discipline)
129. The main evidence so far is a preliminary difference-in-difference econometric analysis, contained in a research report prepared by Fiona Scott Morton and collaborators on behalf of Charles River Associates for a CRA client representing the travel agent industry. With appropriate caveats—including that the report was initially made available online by that client, but is no longer available—it estimated that on the 600 routes most heavily impacted by the merger, average fares increased during the fourth quarter of 2014 by about 4% more than those on unaffected routes. *See* Fiona Scott Morton et al., Charles River Associates, Benefits of Preserving Consumers' Ability to Compare Airline Fares 45–49 (May 19, 2015). Multiplying through by the actual number of fares sold on those 600 routes and the average fares reported by the Department of Transportation, the annual consumer injury associated only with those 600 routes is on the order of about $1 billion. Only one other study appears to have measured this particular merger, and it read different results, but it suffers from a focus on an extremely limited data set, and the design of the study really can only test for unilateral effects and not coordinated effects. Dennis Carlton et al., Are Legacy Airline Mergers Pro- or Anti-Competitive? Evidence from Recent U.S. Airline Mergers (Oct. 18, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2851954.
130. *See*, *e.g.*, James B. Stewart, *"Discipline" for Airlines*, *Pain for Fliers*, N.Y. Times (June 11, 2015), https://www.nytimes.com/2015/06/12/business/airline-discipline-could-be-costly-for-passengers.html.
131. Jack Nicas et al., *Airlines Face Antitrust Probe*, Wall St. J., July 2, 2015, at A1.
132. Brent Kendall & Susan Carey, *Carriers Dodge Antitrust Action*, Wall St. J., Jan. 12, 2017, at B3.
133. *See infra* notes 135-36 and accompanying text.
134. Fredrick Kunkle, *American Airlines Will Be Shrinking Your Leg Room. Take That Congress*, Wash. Post (May 3, 2017), https://www.washingtonpost.com/news/tripping/wp/2017/05/03/american-airlines-will-be-shrinking-your-leg-room-take-that-congress/?utm_term=.6379e35bfb04. Separately, the Federal Aviation Administration had already been in judicial review litigation over its refusal to regulate seat space, and just recently suffered a rare D.C. Circuit order to review that

Again, the reasons these rearguard actions will all disappoint are several. The Justice Department's price-fixing investigation is poignant proof that harms that firms can accomplish with market power are frequently not independently illegal, or might be illegal but are too hard to challenge for lack of evidence. Apparently no one doubts that there was some sort of interdependence in the industry, as even the publicly reported communications at the Florida convention were brazen. But § 1 conspiracy is now hard enough to prove that it wasn't enough. That is a bitter pill, because anticompetitive but otherwise legal oligopoly interdependence is precisely the conduct at which merger enforcement is most often said to aim.

The § 2 challenge to the Newark airport acquisition was likewise all too predictable. Specifically, DOJ sued to stop an acquisition by United of slots at Newark airport. United and Delta attempted an intricate little dance by which they would shore up the respective legacy airlines' market positions in New York City. They proposed to swap slots, such that United would take Delta's slots at Newark in exchange for United's slots at JFK. The effect would be to substantially increase what was already a United monopoly at Newark, and to shore up the large position that Delta had at JFK, which it considers a "dual hub" with its position at LaGuardia. Surely enough, United actually got that big share at Newark from another merger the DOJ had approved—its acquisition of Continental in 2010. In that earlier deal, DOJ required divestiture of thirty-six Newark slots to Southwest. United's attempted acquisition at Newark in 2015, which draw DOJ § 2 challenge, was no less than its third attempt to re-acquire those same slots. In fact, United already failed to use about 10% of the slots it owned at Newark,[135] and so the acquisition of more was very unlikely to serve any but an anticompetitive purpose. In any case, meanwhile, despite the divestitures required by the U.S. Airways/American Airlines settlement, concentration is also high at LaGuardia. Delta has a large share there, and American is close in size. In effect, though it seemed like just an isolated, one-airport deal between United and Delta, the 2015 swap proposal was a plan to carve up New York, largely between United and Delta.

Overall competition in New York City would have suffered dramatically, and New York was one of the only two markets in the nation in which the American Airlines/US Airways settlement secured meaningful relief.[136] And after all, why would firms handed the remarkable gift of a four-firm oligopoly not take whatever steps are at hand to unravel any remaining vestiges of its competitiveness? It's what we should expect.

One will almost certainly also be disappointed, incidentally, if the government attempts to police that other kind of conduct thought by most observers to be the airlines' most potent tool against competitive entry—price predation. The federal government's last predatory pricing case, nearly twenty years ago, happened to have been in the airline industry. As DOJ learned in that case, predation is now almost impossible to prove, even in a sector in which more or less everyone thinks it might occur.[137]

And finally, the same will be true of the one vestige of antitrust challenge still pending against airline consolidation, the price-fixing cases filed by private plaintiffs in 2015. Those cases numbered in the several hundreds of separate filings, which may have been something of a record. They were consolidated before Judge Kollar-Kotelly of the D.C. District, and though DOJ dropped its investigation, they are now in consolidated discovery, having survived dismissal.[138] In a way, the most frustrating consequence of the whole affair was that the Justice Department price-fixing investigation

decision. *See* Bart Jansen, *Economy Seats Have Shrunk and a Court Wants the FAA to Prove That They're Still Safe*, USA Today, July 31, 2017.

135. Newark is one of only a few airports in the United States at which takeoff and landing slots are restricted by the FAA, to reduce congestion. So, by "grounding" some of its slots, United could substantially limit competition there.

136. *See* United States v. United Continental Holdings, Inc., Civ. No. 2:15-cv-07992-WHW-CLW (D.N.J. 2015) (complaint).

137. United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003). *See generally supra* notes 83-84 and accompanying text.

138. For a time, I was nominally counsel to one of the many cases filed, but nothing stated here constitutes confidential or otherwise protected information of any kind.

immediately—and very predictably—triggered this flurry of private, race-to-the-courthouse lawsuits. There is no question but that the agency gave no weight to how its own influence might affect private enforcement, but the consequence is likely as follows. On the one hand, it is in the nature of these affairs that the complaints are drafted very quickly, the most important pressure being not substantive strategy or depth of investigation—given lack of time—but strategic positioning for the inevitable struggle to be appointed class counsel. The shame is not really for the plaintiff counsel involved, since the structure of their incentives is imposed to some degree externally. Meanwhile, though, given the now-demanding pleading constraints of *Twombly-Iqbal* and lack of access to discovery prior to initial motion practice, these actions depend heavily on the results of federal investigation, which become public only in the event an agency actually brings an action. On the other hand, while no one outside the agency knows what its motives were or what the evidence showed, by all indications the non-public DOJ investigation had an air of the theatrical. Settlement of the U.S. Airways/American Airlines was controversial and earned DOJ much criticism, and so there was some sense that both the nonpublic pricing investigation and the § 2 action in Newark were meant to demonstrate that DOJ was in fact diligent as to the airlines. But by closing the pricing investigation without action, DOJ deprived the private plaintiffs the benefit of its powerful investigative tools and the special statutory benefits for private enforcement under Clayton Act § 5. That then has this key consequence: The private plaintiffs, though they have for now survived dismissal, will probably face significant pressure to settle for what may be much less than the value of the injury consumers have suffered, and they will be pressured to give a broad release of liabilities.[139] One thing that seems fairly clear, and very frustrating, is that when the Justice Department chose to investigate it gave no thought to the consequences for private enforcement.

Finally, regulatory alternatives will also disappoint, and in a way that is only too ironic. Not only do regulatory approaches have a poor track record in these cases, but predicting that unchecked monopoly will leave them as the only alternative—a situation that, generally speaking, no one really favors—is among the most time-honored arguments for active antitrust.[140]

Consider Congress's effort of the moment to intervene in the airlines. With that intensely tedious predictability by which Congress now often names statutes that lack substance, the proposed Seat Egress in Air Travel Act of 2017[141] spells an acronym.[142] It directs the Federal Aviation Administration to adopt minimum seat space rules. While the bill has developed reasonable prospects of passage, and reflects apparently genuine safety concerns as well as comfort,[143] one must simply

139. One problem, if a broad release is given, is that it will substantially complicate any other challenges to airline conduct. That is frustrating because, while admittedly they are vanishingly rare, private § 7 challenges occur, and this airline merger would have been a perfect target for one.

140. *See*, *e.g.*, Fed. Trade Comm'n, The Merger Movement: A Summary Report 68 (1948) ("No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either giant corporations will ultimately take over the country, or the government will be impelled to step in and impose some form of direct regulation."); Charles J. Bullock, *Trust Literature: A Survey and a Criticism*,15 Q. J. Econ. 168, 214 (1901) ("Remedy there will be none, save public ownership or public regulation; and past experience raises uncomfortable doubts whether, under the second method, the government or the trusts would be the regulating power."). In a similar vein, Senator John Sherman himself famously warned his colleagues that without antitrust legislation to stem popular outrage, they "must be ready for the socialist, the communist, and the nihilist." 21 Cong. Rec. 2460 (1890).

141. H.R. 1467, 115th Cong., 1st Sess. (2017).

142. *See generally* Chris Sagers, *A Statute by Any Other Name Might Smell Less Like S.P.A.M.*, *or*, *the Congress of the United States Grows Increasingly D.U.M.B.*, 103 Geo. L. J. 1307 (2015).

143. *See* Ethan Wolff-Mann, *"SEAT Act": Congress Set to Finally Push Back Against Shrinking Airline Seats*, Yahoo Finance (July 19, 2017), https://finance.yahoo.com/news/seat-act-congress-finally-set-push-back-shrinking-airline-seats-194843416.html.

marvel at this extraordinary wagging of the dog. Shrinking seat space seems like just one of a huge array of problems in quality-adjusted price that we ordinarily think is a problem for markets to police. It is not an alternative competition policy for the entire Congress or its regulatory agencies directly to manage product quality. For one thing, unless Congress also means to regulate all other aspects of quality, as well as abuses in ancillary fees, pricing, scheduling, rebooking, and whatever other ways the now heavily concentrated airlines will just reconfiscate the same consumer surplus they got through shrinking seat space, then this seat-space initiative will just be a Band-Aid. And even if Congress and its agencies really could provide that kind of panoptic consumer protection, there are dozens or hundreds of industries in which concentration problems are just as serious as the airlines. Is Congress really going to do all the things in each of these sectors that healthy markets are supposed to do?

If too-little-too-late regulatory last resorts are a sign that up-front competition policy was neglected back when it might have done some good, then we've gotten that sign in a lot of different places in the past few decades. In a whole variety of scenarios, situations have evolved in which the best we seem to be able to hope for is regulatory oversight or authorization of bilateral monopoly. A chief example is the so-called "net neutrality" initiative, where old-school economic regulation was sought to be imposed, but only because the Internet service provider (ISP) sector had consolidated so rapidly as to destroy what could perhaps have been workable competition. The same seems true of the repeated efforts of doctors' groups to secure legal permission to bargain collectively with big insurers, and the new request of the newspapers to bargain collectively with Facebook and Google over their share of online ad revenues.

One last example before finally getting to the real meat of the topic at hand. The Obama administration's executive order of 2016, announcing a new slate of procompetition initiatives,[144] was in many respects the prime, most telling reflection of the problem of would-be retroactive oversight of already concentrated markets. The order and the accompanying Council of Economic Advisors report[145] recognized that concentration might be systematically increasing in the U.S. economy, and that it seemed to be accompanied by increasing market power, with a set of potentially serious consequences. But it came at the very end of eight years in office, during which the administration had had the extensive resources, enforcement tools, and legal authority of our century-old antitrust regime with which to stop that power. Instead, the White House proposed to address it with new tools that would have been toothless and disappointing even if President Obama were succeeded by a Democrat. The order called on non-antitrust agencies to examine their agendas and enforcement powers. They were directed to determine ways that they could remove regulatory impediments to competition and use new regulatory actions to spur it. The problem is that federal regulatory agencies, most of which are sector-specific and seem prone to take their regulees' perspectives, have been notoriously hostile to use of any government powers for competitive ends. Common examples are the Securities and Exchange Commission's long-running refusal to end the brokerage house price-fixing system, despite its statutory mandate to protect competition,[146] that agency's battle to secure general antitrust immunity for its regulees,[147] the Agriculture Department's great laxity as competition

144. *See supra* note 29.
145. *See supra* note 30.
146. *See* Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance (3d ed. 2003).
147. The long-running saga began in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), in which the Court first held that conduct regulated by the Securities and Exchange Commission might nonetheless violate antitrust. The Commission then participated in a number of lawsuits over the years in effort to secure antitrust immunity for its regulees, an effort that largely succeeded in *Credit Suisse Secs. (USA), LLC v. Billing*, 551 U.S. 264 (2007). Often, the Commission was directly pitted against the Justice Department in this effort. In *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), a private cause of action, the Commission and DOJ filed conflicting amicus briefs. In *United States v. National Association of*

enforcer in various sectors under its purview,[148] the Surface Transportation Board's acquiescence in rail consolidation,[149] the broad disregard of competition values by federal energy and maritime regulators,[150] and the Transportation Department's brief career as airline merger regulator.[151]

And in any case, one must seriously doubt whether the tools the non-antitrust agencies have could be much use even if they used them. Except for the handful of agencies that still have some merger-review role and the few that can control entry and line-of-business matters, few non-antitrust agencies have regulatory authority that could in any direct way affect industry structure. Often what they have are actually tools to control fraud or deliberate consumer injury, not to require competition. That may be why regulated entities so often claim that, because of their regulator's own enforcement powers, they should be immune from other antitrust challenge.[152]

In any case, there is a lesson in one of the few actions explicitly announced under President Obama's order of 2016: a request to the Federal Communications Commission to require cable companies to permit third parties to make set-top boxes to receive their service. Naturally it did not survive the change in administrations,[153] but even if it had, it just could not have done very much good. Even firms one would have thought would benefit the most from it more or less shrugged their shoulders,[154] and as for consumers, it really seems just like Congress's proposal directly to regulate airline seat space. Is there any doubt that cable companies would be able just to make up that same confiscation of surplus in some other way?

* * *

And so finally, that invites the most telling example of all. Once markets get really concentrated, even merger law itself just doesn't work anymore.

Securities Dealers, 422 U.S. 694 (1975), a DOJ enforcement action, the SEC filed an amicus opposing antitrust liability. And in *Credit Suisse*, the agencies each responded to the Second Circuit's request to submit their views, and they opposed one another. Before the Supreme Court, the Solicitor General, appearing as amicus at the Court's request, filed on behalf of both agencies and urged a compromise position to reconcile their doctrinal differences below. Credit Suisse Secs. (USA), LLC v. Billing, No. 05-1157 (U.S. Jan. 22, 2007) (Brief of U.S. Solicitor General).

148. *See* Ralph Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 Colum. L. Rev. 1623 (1980).

149. *See* Chris Sagers, *Competition Come Full Circle? Pending Legislation to Repeal the U.S. Railroad Exemptions*, 9 GCP: Antitrust Chron. 1, 6-8 (2009).

150. *See generally* Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 345 (1983) (history of agency capture in federal energy regulation); Chris Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 Vand. J. Transnat'l L. 779 (2006) (history of federal maritime agencies' laxity in oversight and failure to use statutory enforcement authority).

151. Following deregulation of the airlines in 1978, the Act deregulating them phased out their federal regulator, the Civil Aeronautics Board, and transferred a few of its functions to other agencies. It gave the CAB's merger review power to the Department of Transportation, and some years later transferred it permanently to the Justice Department. While review was still at DOT—a period of about ten years that were the industry's critical first years after deregulation—the agency approved each of the many mergers proposed to it, several of which were strongly opposed by DOJ.

152. *Cf.* Credit Suisse Securities (USA), LLC v. Billing, 551 U.S. 264 (2007).

153. Though the proposal has not yet been formally disapproved, procedural action by new FCC Chairman Ajit Pai rendered it a dead letter almost immediately after President Trump took office. *See* Peter Kafka, *The FCC Won't Force Cable Companies to Unlock Their Set-Top Boxes After All*, Recode (Jan. 31, 2017), https://www.recode.net/2017/1/31/14453444/fcc-tv-open-set-top-box-dead-ajit-pai.

154. For example, in an earnings call while the proposal was pending, Netflix CEO Reed Hastings told investors and analysts that the set-top box rule would be "not meaningful . . . if it goes through" because "for us, the open set top is the Roku or the Apple TV or the SmartTV. . . . [W]e don't really follow very closely like the intricacies of the cable set top industry in the US, as opposed to these great global platforms that are IP centric like a Samsung SmartTV." Thompson Reuters StreetEvents: Edited Transcript of Netflix, Inc., Q1 2016 Earnings Call, at 9–10 (Apr. 18, 2016), http://files.shareholder.com/downloads/NFLX/0x0x888591/598D09BB-3F29-451C-8C78-A22ECD827E7E/NFLX-Transcript-2016-04-18T21_00.pdf (statement of Reed Hastings, replying to Peter Kafka of Recode.com).

The evidence is in part anecdotal, consisting of certain fairly calamitous failures of big recent merger remedies. In 2012, the Federal Trade Commission approved a massive horizontal merger of the rental car firms Hertz and Dollar Thrifty, a deal that was essentially a national 4-to-3, the four players controlling about 98% of airport car rentals in the United States. It conditioned approval of the deal on divestitures to a third party, but that third-party's own chief executive, to the chagrin of its private-equity owners, said it wouldn't work. The deal and the divestiture both went through anyway, but the third-party buyer filed for bankruptcy months later.[155] As events developed, Hertz has actually suffered dramatically since the deal, though its remarkable decline seems mainly the consequence of the kind of implementation problems that seem to explain the results of big deals generally.[156]

Undeterred, in any case, the Commission in 2015 agreed to a seemingly quite similar arrangement in approving a very large grocery merger. This time it conditioned approval on a divestiture of stores to a small Oregon chain that increased that chain's size by roughly 900%. That chain soon filed for bankruptcy, and the original acquiring firm, Albertson's, wound up buying back more than 20% of the stores it had divested, for pennies on the dollar.[157] That's a pretty clever and predictable little ploy, and Albertson's seems to have pulled it off about as well as anybody in history: execute a hugely concentrating horizontal merger, and make divestitures, and then buy them back as soon and cheaply as possible. There also is reason to think it was not just Albertson's good luck. The bankrupt divestiture buyer filed suit and alleged that Albertson's had deliberately sabotaged the divested assets by depleting inventories and personnel before transfer.[158]

One rather less talked-about example is the apparently calamitous failure of a remedy imposed on a consummated hospital merger in suburban Chicago. The deal was consummated in 2000, well before government action, because it fell below the filing threshold for HSR review. Its competitive impacts were grave, however, the parties' own expert finding that its real-world price effects had been on the order of 10%. It drew successful administrative challenge before an FTC administrative law judge (ALJ). The full Commission affirmed, but rejected the ALJ's order of divestiture, finding it too radical coming so long after consummation. The Commission instead imposed a conduct remedy requiring the two merged hospitals to negotiate their contracts separately and in competition with one another. It takes not too much cynicism to doubt that such a remedy could work, and in fact the continued price increases were serious enough that the Seventh Circuit took the extraordinary, almost unheard-of step of permitting a private class challenge under § 7 to proceed for retrospective money damages.[159]

A telling and important little back story precedes these examples, and it will be important to my major point below. They are just the kind of failures predicted by an important, well-regarded study that the Commission itself published in 1999. Much more on that below.[160]

Anyway, one might still give the agencies the benefit of the doubt, as these are only a few cases, and the plural of "anecdote" is not "data." But as mentioned, econometric evidence is emerging that the merger programs under administrations of both parties have been too lax for a long time. For the moment, the most important part of that literature is evidence that divestiture remedies have not worked well.

155. *See* David McLaughlin et al., *Hertz' Spinoff of Advantage Rent-A-Car Was Doomed from the Start, Says Insider*, Bloomberg (Nov 30, 2013), https://skift.com/2013/11/30/hertz-spinoff-of-advantage-rent-a-car-was-doomed-from-the-start-says-insider/.

156. *See* Tara Lachapelle, *That Troubled Hertz Car Rental Deal*, Bloomberg Gadfly (May 10, 2017), https://www.bloomberg.com/gadfly/articles/2017-05-10/hertz-s-deal-for-dollar-thrifty-is-a-lemon-so-far

157. *See* Robert Anglen, *Albertsons Buys Back Stores Feds Forced It to Sell*, Ariz. Republic (Nov. 25, 2015), http://www.azcentral.com/story/money/2015/11/25/albertsons-buys-back-stores-feds-forced-sell/76383234/.

158. *See* Ángel González, *Albertsons Settles Haggen's $1 Billion Lawsuit for $5.75 Million*, Seattle Times, Jan. 22, 2016.

159. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802 (7th Cir. 2012).

160. *See infra* notes 192-96 and accompanying text.

As for why remedies short of suit to block seem not to work that well, there are some pretty obvious candidate explanations. Every time a divestiture is set up to preserve competition, it is to some degree an attempt to create a new competitor that by definition has not existed before, and it will face competitive conditions that are new. It is a start-up, sometimes literally a brand-new freestanding entity. It also often invites the problems of integrating different corporate cultures as in other mergers. And so, despite the agencies' frequently stated preference for divestitures, as opposed to "regulatory" remedies,[161] divestitures are in fact preeminently regulatory in approach, especially as to large mergers in markets that are already concentrated. Attempting to create a meaningful competitor, and prospectively creating a market's structure by government fiat, is a regulatory exercise.

* * *

My point so far is that where government fails to stop concentration before it starts, predictable problems emerge for which the public will demand government redress, but for which the government will have inadequate tools. Admittedly I can support this claim only with anecdotal evidence from the past few decades of enforcement experience, in certain very visible sectors.

I understand Professor Kovacic to have made a similar point before, though I doubt he would draw the same conclusions from it that I do. In a paper early in his career he laid out a careful, detailed history of cyclical efforts throughout the history of antitrust in which anticoncentration antagonisms build, enjoy some success, and then ultimately suffer political backlash.[162] Crucial to my purposes is his suggestion that when periods of vigorous enforcement end, even if they enjoy meaningful courtroom successes, they are followed by times of fallow enforcement, and the concentration that then grows is especially difficult for subsequent periods of activity to correct or police.

C. The Political Need for Visible but Ineffective Merger Control

So why can't our merger law and, as a corollary, our antitrust, do better? Like Thurman Arnold, I think the problem most fundamentally is a lack of popular commitment. It manifests in one respect in the delicate compromise in which enforcement officials have consistently found themselves, between political reaction from industry and political reaction from consumers. It manifests in another respect in the difficulty of persuading the federal judiciary to take anticompetitive risks seriously.

* * *

As for the state of doctrinal merger law itself, it has become, from my humble perspective, very poor. In another often-told story, Congress struggled for the first half-century of antitrust law to come up with a statutory regime that would convince the courts to police mergers actively. That seemed finally to occur with the Celler-Kefauver amendments of 1950, accompanied by a legislative history stressing Congress's somewhat urgent intent, and with the rise of a Supreme Court under Chief Justice Warren willing to give the law strict and prophylactic life. In 1963, *United States v. Philadelphia National Bank*[163] set up a familiar burden-shifting framework, under which bare proof of sufficient increase in concentration is enough to hold a horizontal merger presumptively illegal.[164] For a time the courts

161. *See* U.S. Dep't of Justice, Antitr. Div., Antitrust Division Policy Guide to Merger Remedies 3, 7, n. 12 (2011). *Compare* U.S. Dep't of Justice, Antitr. Div., Antitrust Division Policy Guide to Merger Remedies pt. III.A (2004) (prior version, stating stronger opposition to conduct remedies, as involving "costly government entanglement in the market").
162. Kovacic, *supra* note 4.
163. 374 U.S. 321 (1963).
164. Specifically, the Court wrote that where a merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in concentration," then a court may find it illegal "with[out] elaborate proof of market structure, market behavior, or probable anticompetitive effects," unless defendant "clearly show[s] that the merger is not likely to have . . . anticompetitive effects." 374 U.S. at 363.

applied that framework very strictly. However, while it remains nominally the structure of merger law, at least with respect to horizontal mergers,[165] it has been weakened to the point that where it once presumed even small concentration increases to be illegal, it is now nearly impossible to stop any but the largest horizontal mergers in highly concentrated markets.

As mentioned, that change finds its origin in *United States v. General Dynamics*,[166] a 1974 Supreme Court opinion by the notable merger-policy critic, Potter Stewart.[167] To the contemporary eye, the deal in that case seems not a very strong target for merger enforcement, and not one that likely did much competitive damage. But in that it was just one more example attesting to Justice Marshall's view that easy cases, too, can make bad law.[168] It was an acquisition of a declining old coal mine by a conglomerate that was also involved in some coal mining. It would nontrivially increase concentration in the market for "coal," writ broadly, and it was large enough for the Court to acknowledge that in an ordinary market the deal would be illegal.[169] But the target firm had actually already committed all its coal under long-term contracts, and it had no prospects for finding new reserves. The government's *Philadelphia National Bank* showing—relating only to *prior* sales—therefore "[did] not, as a matter of logic, give a proper picture of [the] company's ability to compete in the future."[170] None of the sales between the two firms were or could have been competitive with one another.

The central lesson of *General Dynamics*, at least on one reasonable reading and the one I presume that Justice Stewart intended, is that mergers should be blocked only where the firms *would otherwise have competed*. That may seem commonsensical enough, and it might make perfect sense on the narrow facts before the *General Dynamics* Court. And yet that one brief moment in judicial time turned out to be more than enough to end American merger law as a meaningful institution. It invited judicial speculation about what competition would look like in the future, the inevitable result being predictions that any number of different factors would neutralize even large concentration increases. The problem, in other words, was uncertainty, and it is a very familiar one in antitrust. The issue for policy is deciding which of the two parties must bear the costs of it.

General Dynamics was given what would be its real modern consequence in two lower-court opinions, *United States v. Baker Hughes Inc.*[171] and *United States v. Waste Management, Inc.*[172] They both nominally acknowledged the rule of *Philadelphia National Bank*, but held that under *General Dynamics*, courts should ask whether the facts cast doubt on inferences from market share data. The facts in neither case were idiosyncratic, as they had been in *General Dynamics*, and neither involved the *General Dynamics* scenario in which the parties as a matter of logical necessity could not compete. But both courts nevertheless indulged in pretty much unfettered factual guesses about what competition in the future would look like. On those hunches, consisting mainly of views about entry, they said that even large concentration increases would not injure competition. *Baker Hughes*, in affirming approval of a merger on extraordinarily high concentration numbers,[173] added one very important legal observation. Writing for the court, then-Judge Clarence Thomas noted that the burden of proving

165. The structure has been built in to all versions of the enforcement agencies' *Merger Guidelines*, for example, and it is routinely re-stated as the law by contemporary merger decisions. *See generally* SULLIVAN, GRIMES, & SAGERS, *supra* note 105.

166. 415 U.S. 486 (1974).

167. As evinced by his famous, obsessively quoted and requoted quote. U. S. v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency . . . is that in litigation under § 7, the Government always wins").

168. Heckler v. Chaney, 470 U.S. 821, 840 (1985) (Marshall, J., concurring).

169. 415 U.S. at 497–98.

170. *Id.* at 501.

171. 908 F.2d 981 (D.C. Cir. 1990).

172. 743 F.2d 976 (2d Cir. 1984).

173. Prior to the merger the parties together held 76% of the essentially undisputed relevant market, and the merger increased HHI from 2,878 to 4,303. 908 F.2d at 983 n.3.

whether or not entry would be effective would be "onerous," and so in his view it should not be the defendant's burden to carry.[174] But for that reason he implicitly put the same burden on the government—of proving the entry would *not* be effective, a burden presumably no less onerous. While later courts tempered the rule itself, and do typically impose some obligation on defendants actually to put on evidence of timely, likely, and effective entry,[175] a very important ideological claim was staked. For the sake of essentially libertarian, noninterventionist values, the "onus" of the uncertainty in merger law would be on the government, not private industry. Meanwhile, *Waste Management* went so far as to reverse the lower court's findings of fact on ease of entry, and hold that a merger to 50% of a market for garbage collection could not reduce competition because entry would be so easy—even while acknowledging record evidence that most entrants stayed small, dissolved, or were acquired by one of the merging parties.[176]

Admittedly, in and of itself it is not by any logical necessity worse to put the burden of proving the future on plaintiffs, as under *Waste Management* and *Baker Hughes*, than it was to put it on defendants, as courts had done prior to *General Dynamics*. But making that change was a really substantial policy choice, it was not a change that was very clearly required by *General Dynamics* itself, and it was contrary to most observers' understanding of the law's legislative history. Choosing not to enforce the law because there isn't yet overwhelming evidence is itself a policy choice, and a big one. And there is no real explanation for the change except the libertarian individualism that is essentially never acknowledged in words, but nevertheless runs through conservative antitrust.[177] It made the law no more coherent or even obviously more consistent with economic theory (though perhaps more so with a *certain* economic theory). Instead, "the sole consistency" now is just "that in litigation under § 7, the Government always [loses]."[178] However, as I've suggested, we no longer make that judgment on a cleanly a priori slate. The empirical record increasingly corroborates the impulses that underlay the law's legislative intent and *Philadelphia National Bank*, that growth by acquisition does not do anyone much good, except possibly executives and their bankers, and it does in fact do social harm. The burden, I would humbly submit, ought to be flipped back.

Anyway, since then, merger law has become extremely difficult to enforce. We now routinely see cases, for example, like the remarkable *FTC v. Staples*.[179] There we chalked it up as a big win that the government got the merger stopped, and the defense was apparently so confident of a win that it rested at trial without putting on any evidence.[180] But that deal would have generated absolutely astounding

174. 743 F.2d at 983.

175. *See*, *e.g.*, F.T.C. v. Staples, Inc., 190 F. Supp. 3d 100, 133 (D.D.C. 2016) (*quoting* United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 73 (D.D.C. 2011)) ("Defendants carry the burden of showing that the entry or expansion of competitors will be 'timely, likely and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern'").

176. 743 F.2d at 983. The court seemed at times to imply that it meant to reverse only the district court's view that ease of entry could not, as a matter of law, defeat the *Philadelphia National Bank* presumption. However, the court also explicitly rejected the finding below that "there is no showing of any circumstances, related to ease of entry or the trend of business, which promises in and of itself to materially erode the competitive strength" of the merged entity. *Id.*

177. By our now-strong orthodoxy, antitrust is merely an application of price theory microeconomics. In itself that theory says little about "rights," except as instruments within an otherwise collectivist notion of aggregate welfare, and so whether an individual feels "free" is to the theory quite irrelevant. And yet our courts and our antitrust debate do discuss "rights" a fair bit, as conspicuously in modern characterizations of the *Colgate* rule; *see*, *e.g.*, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004), or in the right to charge any price so long as market power was not gotten by way of exclusion; *see* Pac. Bell Tel.e Co. v. Linkline Comm's, Inc., 555 U.S. 438, 454–55 (2009); *Trinko*, 540 U.S. at 407.

178. *Cf.* U. S. v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

179. F.T.C. v. Staples, Inc., 190 F. Supp. 3d 100 (D.D.C. 2016).

180. Chris Sagers, *Ill-Fated Strategy in Staples-Office Depot Deal*, N.Y. Times DealBook (May 18, 2016), https://www.nytimes.com/2016/05/19/business/dealbook/ill-fated-strategy-in-staples-office-depot-deal.html?_r=0.

concentration numbers,[181] of a kind that not so long ago would have been effectively per se illegal, so obviously so that few parties would have proposed it. But none of that was really the remarkable part. The court, while rejecting defendant's argument that Amazon would provide sufficient discipline by way of its nascent business-to-business division, nevertheless thought that "if Amazon Business was more developed . . . , the outcome of this case very well may have been different."[182] In other words, had there only been a better developed potential competitor, had there been an only somewhat less speculative possibility of future entry, the court would have approved an acquisition by the largest seller of the second largest, doubling its size and resulting in an entity fifteen times larger than its nearest challenger.

Many will object, of course, that the government does still bring cases, and wins some of them, and some claim that the Obama administration significantly increased enforcement.[183] But in fact, even the raw enforcement numbers show only a tepid increase over the Bush administration,[184] and what hasn't yet been done with rigor is to measure whether enforcement actions kept pace with changes in the numbers, size, and competitive danger of mergers being proposed. If enforcement numbers tick up a bit even though parties are proposing lots more very big horizontal deals, that might actually represent a *drop* in enforcement. And impressionistically at least, there does seem to have been an increase in big, dangerous deals.[185]

* * *

It might be very telling if, as it often seems, merger enforcement has been weakened because the antitrust agencies substantially prefer after-the-fact conduct remedies. If so, it presumably reflects the difficulty of convincing a skeptical judiciary of what might happen under a prospectively oriented cause of action. Given the very strong but mostly unwritten judicial presumption against government interference, it is the enforcer's much safer bet to let mergers go through, and then wait for hard evidence that they have in fact resulted in harm. The retrospective conduct remedy to challenge that harm is then a simpler case.

But that then invites a different question, and it is key. While we don't seem actually to enforce our merger law all that much, we spend a *lot* of resources on it. No one knows for sure how much our merger review regime costs us as a society, but it is on any measure pretty substantial. Every acquisition of sufficient size must be reported, regardless of likelihood that it will have competitive significance. But then only a vanishingly small number are even seriously scrutinized, much less challenged. Virtually none are ever stopped, and only a slightly larger number are made subject to divestitures or other remedies.

To be clear, this is no critique whatsoever of the HSR framework. Preconsummation government merger review is indispensable. The adoption of the HSR scheme was the culmination of a many-decades-long effort by the agencies and their supporters, who recognized as early as the early 20th century that without preconsummation review, even a highly effective merger rule would be pyrrhic in practice.[186] Without something like HSR, merger control would be truly, genuinely hopeless.

181. 190 F. Supp. 3d at 131 (finding HHI increase of nearly 3,000, with postmerger HHI of 6,265).

182. *Id*. at 136.

183. *See*, *e.g.*, Steven Mufson & Renae Merle, *As Obama's Term Winds Down*, *Crackdowns on Mergers Speed Up*, Wash. Post, May 2, 2016.

184. *Cf.* David Goldman, *Obama's Not as Tough on Mergers as You Think*, CNN Money (Apr. 8, 2016), http://money.cnn.com/2016/04/08/news/obama-mergers-antitrust/index.html (noting that even in raw enforcement numbers, the Obama administration did not significantly increase enforcement over the Bush administration, and challenged fewer mergers than the Clinton administration).

185. Bourree Lam, *2015: A Merger Bonanza*, The Atlantic, Jan. 9, 2016.

186. A widely read study of the late 1960s found that while the federal agencies frequently won merger challenges in court, the law was largely ineffective in the real world because those lawsuits came almost always after mergers had been

Moreover, losing it would be probably an irreparable political peril, since it seems unthinkable that having once lost it we would ever bring it back. Instead, the question is whether we are getting anything for the value we currently expend on the system, and if we are not, then why we keep it up.

The answer, I submit, is that it is important to our government to preserve the appearance of antitrust enforcement. This has been captured nowhere else better than in some behavior of the FTC, which by appearances has felt beleaguered in recent years. A certain defensiveness has been very characteristic of all federal agencies for probably as long as there have been such things, and it has long been routine for agencies to publish reports of their own work claiming great successes. But even with that grain of salt, public comments and actions of the agency's political leadership over the past five years or so seemed to evoke a gradually more urgent desire to quash external criticism.[187]

And then there came the agency's bitter reaction to Kwoka's empirical results.[188] In general the agency response loses some credibility just by the extraordinary methodological standards it seems to require before results can be taken seriously, and its flavor of a miscellaneous hodgepodge of nitpicking. As Kwoka later pointed out, many of that study's points just restate his own caveats as criticisms,[189] and some of them criticize him for failure to use procedures that its own named authors don't use.[190] It seems telling too that the report was apparently a big, all-hands agency effort. As Kwoka notes in his reply:

> I call this the "FTC critique" despite its disclaimer that it does not represent official agency position and despite the fact that it does not represent the views of many at the FTC. I do so since it is the product of an unusual amount of agency time and effort (a total of sixteen people are listed as authors or contributors to it, including the directors of both the Bureau of Competition and the Bureau of Economics) and because it echoes public criticisms of my work by the then-Chairwoman of the FTC and the current Acting Chair.[191]

This new defensiveness, and a willingness seemingly to lash out regardless what the evidence shows, was captured above all in a different study: the agency's long-awaited, much-discussed study of its own merger remedies.[192] What really is most telling is to compare this study of 2017 to a well-regarded study of 1999[193] that nominally asked the same questions, and to which the 2017 study earnestly and repeatedly compares itself. The 1999 study was initiated internally by the staffers in charge of remedies under the HSR process, a law that was comparatively new. It stated their concerns that remedies were not well understood, and sometimes might not be effective. And indeed it found in some particulars that remedies were not working well, and made several recommendations that were

consummated. Courts then and now typically deny any meaningful remedy for postconsummation mergers, even when they are found illegal. Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?* 12 J. L. & Econ. 43 (1969).

187. Edith Ramirez, Chair, F.T.C., Keynote Remarks of FTC Chairwoman Edith Ramirez, Georgetown University Law School (Sept. 2016); Maureen Ohlhausen, Acting Chair, F.T.C., The FTC's Path Ahead, Antitrust Law Leaders Forum (Feb. 2017); Maureen Ohlhausen, Commissioner, F.T.C., Does the U.S. Economy Lack Competition, And If So What To Do About It? Remarks at Hogan Lovells, Hong Kong (June 1, 2016).
188. Vita & Osinski, *supra* note 101.
189. Kwoka, *supra* note 102, at 5.
190. *Id.* at 15, n. 33 (noting that the study faults him for failure to use a weighting technique that the study's named authors haven't used in their own merger retrospectives).
191. *Id.* at 3, n. 6.
192. Burs. of Comp. and Econ., Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012 (2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. *See generally* Chris Sagers, *The Limits of Divestiture as an Antitrust Remedy*, N.Y. Times DealBook (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/business/dealbook/the-limits-of-divestiture-as-an-antitrust-remedy.html
193. Staff of the Bur. of Competition, Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999), https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

duly adopted and became standard practices. Crucially, however, the 1999 study was very clear about its own limitations. It explicitly noted that it could not directly measure whether Commission remedies preserved "competition." All it could do was ask whether divestiture orders had been carried out, and whether the divested assets stayed in the relevant market.

The 2017 study is a different animal altogether. It explicitly claims, frequently, to measure "competition" itself, and that Commission remedies in the main have preserved it. The report says it found a previous Commission remedy successful "only if it cleared a high bar—maintaining or restoring competition in the relevant market." "Competition" in antitrust, as a matter of the most basic hornbook law, means actual rivalry on price and quality. The only way to measure it convincingly is econometric study. In their own harsh critique of Mr. Kwoka's book, Commission economists said econometric measurement was "essential if one is to correctly measure the competitive effect of a merger."[194] But the 2017 Remedies study, while strangely evasive even about its own methodology, plainly came nowhere near study of econometric rigor. It appears that in most cases, Commission staff members interviewed market participants and calculated market shares, and then reported only their own unelaborated subjective judgments whether a given remedy "succeeded" or not. Bold claims are made in abstract terms, but "success" appears to mean nothing more than that a given divestiture was actually carried out and that the divested assets stayed in the market. Indeed, with that understanding of the report's methodology, one of its most striking results is that about a sixth of the merger remedies the commission ordered from 2006 to 2012 didn't even have any effect at all, apparently because the divested assets left the market.

Critically, the 2017 study was *not* initiated by internal staff conscientious about their own mission. It was explicitly recommended by political leadership, apparently to defend the agency against external critique.[195] In the end, the agency charged with prosecuting deceptive advertising announced this report with a press release claiming: "Study Affirms Effectiveness of FTC Merger Remedy Process."[196]

* * *

Ultimately, I think the best explanation so far for this kind of behavior lies in a formal model developed by Professor Jonathan Baker. In a trio of articles,[197] he laid out what is effectively a quantitative elaboration of Hofstadter's famous claim that antitrust disappeared from popular debate when it started working well. That is, once the system is in place and its benefits are reasonably distributed, it disappears from the political agenda and evades further risk of policy change.

Baker's model formalizes that insight by drawing on the positive political theory of interest group competition. Positive political theory takes interest group politics as a collective action problem. Groups take action to secure policy change when they judge the benefits to outweigh the costs of mobilization. Mobilization is difficult, however, particularly for the very diffuse groups affected by broadly applicable policies like antitrust. Baker ultimately argues that competition policies are arrived at through a process of bargaining between consumers[198] and producers. They each decide whether or not to mobilize to seek further legal change by judging whether the benefits will be worth the costs of collective mobilization. He does not assume any literal negotiation among groups. Rather, the system

194. Vita & Osinski, *supra* note 101.
195. Edith Ramirez, Chair, F.T.C., Retrospectives at the FTC: Promoting an Antitrust Agenda, American Bar Association Symposium on Retrospective Analysis of Agency Determinations in Merger Transactions, at 12, George Washington University Law School Washington, DC (June 28, 2013).
196. Fed. Trade Comm'n, Press Release: FTC Releases Staff Study Examining Commission Merger Remedies Between 2006 and 2012: Study Affirms Effectiveness of FTC Merger Remedy Process (Feb. 3, 2017), https://www.ftc.gov/news-events/press-releases/2017/02/ftc-releases-staff-study-examining-commission-merger-remedies
197. Baker (2013, 2010, 2006), *supra* note 5.
198. Defined to include consumers, farmers, workers, and small businesses. Baker (2006), *supra* note 5, at 486.

reaches equilibrium when a set of legal rules is in place such that the gains to the two sides outweigh the net gain to either from mobilizing to seek some other regime. Neither will renege on the bargain by seeking disproportionate benefits, because the parties are engaged in long-term play, and both do better with a stable regime of mutual benefits than with regulatory cycling. He argues that the American experience can be characterized as having first reached a lasting equilibrium of this kind during the 1940s, when Thurman Arnold's enforcement program established a set of moderately proenforcement antitrust rules. Consumers and producers then split the efficiency gains, a key assumption being that antitrust enforcement does in fact generate net social gain. The rise of conservative antitrust during the 1970s and 1980s was not a reneging on the bargain, but a period of reform with mutual benefits, which in any event did not disadvantage consumers enough to generate political retaliation.

Importantly, the model implies that competition policy not only achieves a stable political equilibrium, but one that is net positive in efficiency terms. One senses that it might appeal to Professor Baker on a more or less ideological level. It proves perhaps that antitrust has been a likeable-enough half-a-loaf political settlement, and does in fact do good on balance, as he has elsewhere persuasively argued.[199]

The model is on many levels brilliant. It is most impressive in overcoming initial doubts that the underlying phenomena are concrete enough to model, or for that matter that they even exist. It also makes a surprisingly plausible case that long-term policy stasis or equilibrium could arise from repeated interaction of interest groups, and their assessments of their own interests. And it makes a plausible argument that such a stasis can explain the U.S. experience since World War II.

I think in this model there is a plausible explanation for the general lack of vigor in enforcement and the great defensiveness about it by agencies of both parties. On the one hand, it is key not to enforce the policy overaggressively, lest it effectively renege on the political compromise and cause mobilization within industry. On the other hand, it is important to keep consumers placated, for the same reason. In the case of enforcement officials in particular, the status quo is important for the sake of preserving agency jobs and budgetary stability.

* * *

The model breaks down for me in a few ways, and one of them is actually quite important here. As one general matter, like a lot of loose theoretical accounts of historical change, it is stated at a level of abstraction that probably precludes falsification. It can be made to explain plausibly too many different outcomes in order for it to be tested. Professor Baker seems fully aware of that problem, and in comparing his formal model to actual U.S. history he carefully qualifies the argument and acknowledges its limits.

But much more significant is the model's assumption either of some real sophistication among "consumers," or some mechanism that can take the place of it so that their political efforts will be mobilized when it will do them good. The model explains stasis as the confidence of both opposing interests that stable gains could not be attained that outweigh the cost of mobilizing for change in the legal status quo. Consumers generally don't judge such gains to be available, the argument goes, because efficiency gains of even modest antitrust enforcement are sufficiently shared.

I think it is much more likely that consumers are systematically unable to gauge the benefits of competition. As for consumers themselves as individuals, no more than a small minority of lay Americans could even define "competition" in the sense Professor Baker intends, or articulate how it benefits them. It is of course true that some popular sentiment is at all times anticorporate or opposed

199. *See* Jonathan B. Baker, *The Case for Antitrust Enforcement*, 2003 J. Econ. Persp. 27 (2003); *see also* Jonathan B. Baker, Wash. Ctr. for Equitable Growth, Market Power in the U.S. Economy Today (2017), http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today/ (laying out current empirical evidence of market power harms in U.S. industry, and arguing that antitrust enforcement could improve on them).

to large corporate size, but that seems too far removed from actual antitrust rules, and too much open to any number of other policies not consistent with antitrust, to explain the model on Baker's terms. Frequently—including both now and, as Kovacic demonstrates, at other points during Baker's period of stasis—substantial parts of consumer opinion have favored trade, labor, and small-business protectionism that seem more difficult to square with the microeconomic foundations of the postwar antitrust model. Recent requests for statutory exemption for doctors' groups, newspapers, and other groups have enjoyed substantial popular sympathy. Major enforcement actions, like *Untied States v. Microsoft, United States v. Apple*, and the FTC's investigation of Google, on the other hand, are met with at least as much confusion, skepticism, and antigovernment frustration among consumers as they are with welcome. In particular, consumers express substantial opposition when antitrust is brought against apparently struggling firms, as when the government has opposed mergers of firms in bankruptcy. And indeed, even antitrust professionals with the aid of econometric literatures cannot say with confidence when or whether particular rules or enforcement actions do consumers any good.

That is hardly to say there has not been some stasis or that consumer judgments play no role in it. It simply seems that consumers' inability to organize is explained less by systematically rational estimates of real-world policy consequences than systematic ignorance or mistake. I think that consumer ignorance is substantially worsened by a point I've made a few times throughout the article, and here emphasize. Markets in their ordinary operation are difficult to watch, because they are machines for generating pain. Impressionistically, it will often seem to the consumers who are the engines of Professor Baker's political stasis that the competition that would most benefit them is actually undesirable. Moreover, it seems very likely that producer interests now make these judgments much, much better than consumers do. They may also be able to exacerbate consumer ignorance in various ways. For example, consumers may have difficulty judging competitive circumstances that are deliberately masked. To pick just one example, many travel websites display results from various different entities that are in fact all owned by the firm Tripadvisor. Likewise, businesses can surely divide the interests of consumer factions that might otherwise have formed coalition for better antitrust rules. Amazon, for example, might be a very severe competitive threat for the monosopony power it wields over small suppliers, small third-party firms that sell items over it platform, and its own small retail rivals, all of which might be "consumers" on Baker's definition. But end-user retail consumers who buy Amazon products very cheaply and with extraordinary customer service are unlikely compatriots. If these various things better characterize the world than Professor Baker suggests, then a long-term stasis could persist in which no good is done for consumers at all, and substantial forces in society have interests in preserving such a state of affairs.

For these reasons, the crucial key to me seems to be to generate policy that does in fact generate significant social gains, *and locks them in*. That is, I think that the present fairly strong presumption against government interference, exemplified among other things by the merger law discussion above, should be flipped back, to reestablish a fairly strong presumption against consolidation and anticompetitive conduct. But as Professor Baker's model nevertheless very plausibly suggests, that situation will be unstable if it recaptures gains that producers have enjoyed under previously less-active antitrust.

To be clear, legal rules that would *literally* lock in such gains seem both very implausible and undesirable. But an institutional arrangement that could improve things significantly might just be a system of information that better accounts for the actual effects of competition policy. That is, even just our present enforcement institutions—the courts and the federal enforcement agencies—might effectively lock in competition gains if they just have better access to information concerning competitive effects.

And that brings me to the last point.

D. A Glimmer, and the Really Pretty Substantial Odds of Screwing It Up

This has been a pretty relentlessly downbeat essay, and indeed no matter what else I say, I cannot personally lay very strong odds that changes will occur in the near future favoring better antitrust results. But in the spirit of the young Pound, there is a living proposal at the moment that could possibly lead to legislative changes, and it could conceivably be designed in a way that would make it one of the best things to happen in antitrust in decades. It appears in the Democrats' "Better Deal,"[200] and in part in its implementation in a recent bill introduced by Senator Klobuchar.[201] It also happens to be an object lesson in this essay's theme, that in antitrust, institutions matter. It poses institutional issues in two ways. First, it seems like an important way of reaching the most important antitrust institution of all, the courts; and second, it would itself be an institution that could be designed well or poorly.

1. It's Potentially Really Promising. The Better Deal is a range of economic policy proposals, only some of which relate to antitrust. It explains all of them in openly populist language as tools for job creation and middle-class welfare.[202] Overall, it has had a pretty dim popular reception. Its name seems lukewarm, drawing unflattering comparison to the New Deal, the New Freedom, and the Great Society,[203] and its content has had tepid receipt even among congressional Democrats.[204] But for what any of that may be worth, its antitrust proposals contain one idea that is simply, historically great: postconsummation merger review performed by a government authority. It seems great not because it is new. It is obvious, and lots of people have been urging it for years.[205] It seems great because it has found a meaningful place on the congressional agenda, and it seems like something that could conceivably become law if things go well for Democrats in 2020 (or if they go very well in 2018).[206]

Among antitrust institutions, the courts are far and away the most important, and it is ultimately the courts whose understanding of the relevant facts that matter. While the federal courts and above all the

200. A Better Deal (July 24, 2017), http://www.democraticleader.gov/abetterdeal/.
201. Merger Enforcement Improvement Act, S. 1811, 115th Cong., 1st Sess. (2017).
202. The antitrust planks all appear in A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power (July 24, 2017), http://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf.
203. One critic thought the slogan was so bad it must have been devised by an undercover Russian hacker, and as another put it, you'd "never sell burgers by saying they were slightly better than the other guy's." Christian Schneider, *The "Real" Story of How the Democrats Came Up With Their "Better Deal" Slogan*, USA Today (July 31, 2017), https://www.usatoday.com/story/opinion/2017/07/31/democrats-better-deal-slogan-parody-christian-schneider-column/523940001/; Graham Vyse, *Progressive Candidates to Democratic Leaders: You Can Do Better Than "A Better Deal,"* New Republic (July 28, 2017), https://newrepublic.com/article/144098/progressive-candidates-democratic-leaders-can-better-a-better-deal. *See also* Editorial Board, *Are Democrats Offering "A Better Deal"? Not So Fast*, Wash. Post (July 24, 2017), https://www.washingtonpost.com/opinions/a-better-deal-its-still-a-little-hard-to-tell/2017/07/24/c2f529c6-70a3-11e7-9eac-d56bd5568db8_story.html?utm_term=.2c1d554a4d0e; Eugene Robinson, *Forget "A Better Deal." Here's What Would Actually Work for Democrats*, Wash. Post (July 24, 2017), https://www.washingtonpost.com/opinions/forget-a-better-deal-heres-what-would-actually-work-for-democrats/2017/07/24/3865e556-70a9-11e7-9eac-d56bd5 568db8_story.html? utm_term=.19ad832ef5a3.
204. *See*, *e.g.*, Elana Schor & Heather Caygle, *Dems' New Pitch to Voters: A "Better Deal,"* Politico (July 5, 2017), http://www.politico.com/story/2017/07/05/democrats-trump-congress-better-deal-240150; Aaron Pero, *KRON4's Exclusive Interview with Nancy Pelosi*, KRON4 (Aug. 23, 2017), http://kron4.com/2017/08/23/kron4s-exclusive-interview-with-nancy-pelosi/.
205. *See*, *e.g.*, Kwoka, supra note 100; Kovacic, *supra* note 4, at 1147–48; Ramirez, *supra* note 195.
206. I've been charitable in hinting that this good idea may have come from the new Brandeisians, but I don't think it did. To be honest, no one outside an apparently small and undisclosed group knows who had anything to do with the Better Deal. However, this specific idea appears to have come from the economists Mark Jarsulic, John Kwoka, and others working with them from the Center for American Progress. *See* John Kwoka & Marc Jarsulic, *Evidence-Based Policy in Antitrust: The Need for Ongoing Merger Retrospectives*, ProMarket (Apr. 20, 2017), https://promarket.org/evidence-based-policy-antitrust-need-ongoing-merger-retrospectives/.

Supreme Court have been pulled to the right by Republican presidents, they are extraordinary lawyers as a group who by and large are devoted to rule-of-law values and the primacy of congressional intent. At present it is my impression that they don't really *believe* that mergers do harm, and they believe that mergers promise substantial offsetting benefits. The whole reason it has been so hard to disabuse them of the strictly a priori theoretical arguments by which they've come to hold those views[207] is precisely that there's been so little empirical proof that they are wrong. A well-designed review authority, I think it is fair to predict, would produce a steady stream of hard-to-ignore corroboration that consolidation really does cause harm at much lower concentrations than we have heretofore thought, of the kind that Congress plainly intended to stop, and that remedies short of outright prohibition do not work. Convincing the courts of this means potentially remaking all of antitrust.

2. Here's How Easily It Could Be Screwed Up. Because other institutions matter too, however, we should consider just how easily this good idea could be made useless. Even the Klobuchar bill, while a good first step, falls well short of the ideal.

There is no public explanation who composed the Better Deal proposals or had input into them. Their antitrust content seems like a soup with many chefs, as it contains a variety of different ideas and at least a few real contradictions.[208] It seems to bear the fingerprints of the neo-Brandeisians among others, because some of the language captures so particularly their specific preoccupations.[209] A lot of it worries me because it seems like the work of conflicting interests at best and to lack sufficient substantive competence at worst, and above all because it shows so little consideration for designing institutions that would actually work in practice.

As for postconsummation merger review, the "Better Deal" itself says nothing about who would perform the review or how. The Klobuchar bill does, and, again, it is a good start but not enough.

A review authority will not generate meaningful results unless it has the right structure, adequate resources, and does the right sort of study. Its independence is first of all crucial. It must be located outside the antitrust agencies themselves, and must be insulated from control or reprisal from the antitrust agencies' political leadership. Additionally, the sort of review it performs must be difference-in-difference econometric review, or some similarly exacting means of measuring actual price and output effects. It must be able to perform the study not only on the same confidential record on which the agencies perform HSR review, but a substantial additional amount of information that at least sometimes will not be easily publicly available. What is needed is some nontrivial period's worth of price and output data, not only from the merged firm but from some sample of firms in similar markets that did not experience a similar consolidation.[210] In some markets, sufficient data may be publicly available, but often that will not be the case. So, a really effective merger review authority should have

207. *See especially* Harold Demsetz, *Two Systems of Belief about Monopoly*, *in* Industrial Concentration: The New Learning (Harvey J. Goldschmid et al. eds., 1974); Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18 (1968); and Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. Pol. Econ. 110 (1965).

208. Notably, the plan proposes not only to protect "small businesses [and] suppliers," but also to promote "new, innovative competitors." Typically, existing small competitors and suppliers will be jeopardized by competitively successful innovation. Likewise, the plan is meant to "revisit our antitrust laws to ensure . . . the economic freedom of all Americans—consumers, workers, and small businesses," but it will also prevent "higher prices and less choice for the things the American people buy every day." Protection of workers and small businesses may be very desirable, but unless they are publicly subsidized, protecting them typically means higher consumer prices.

209. In particular, it proposes to end merger law's preoccupation with "narrow, short-term effects of a merger on price and output," a reflection of the hostility among many in this group to the focus on short-term consumer welfare effects. There also is concern for the online platforms, as evident in new "merger standards [that will] explicitly consider the ways in which control of consumer data can be used to stifle competition or jeopardize consumer privacy."

210. This is how difference-in-difference studies work, and it is the source of their persuasive power. They compare the change in price or output in a market in which there was a merger to the change in price or output in some set of markets that are as

statutory authority to collect information subject to compulsory discovery tools. Finally, the resource requirements need not be extravagant, since a fairly small staff of economists and perhaps one or a few lawyers to administer statutory investigative powers could perform some appropriate sample of regression studies each year.

Designing a review authority in this way would invite significant controversy. The antitrust agencies would oppose it vigorously. They would demand that a statutory review mandate do no more than require the agencies themselves to perform the review, using their own personnel and research design, with results subject to approval of their political leadership. If such a thing were agreed to in Congress, by way of compromise, then the postconsummation review idea would have failed utterly. The antitrust agencies, like all other federal agencies, have been producing those kinds of reports for decades, and they are mostly self-congratulatory, evasive, and superficial in those cases where meaningful criticism is most needed—when the agency's own failures are at issue.[211] Business interests would also vigorously oppose a well-designed merger review authority. In particular, they will oppose the authority having access to postconsummation information, or even such preconsummation information they now must provide the agencies under HSR, all of which is protected by strong statutory confidentiality rules.

In short, a postconsummation review authority might be a watershed if it is politically independent, properly funded, statutorily mandated to perform the right kind of review, and statutorily provided with the right kind of information. Shortcomings on any of those terms could pretty easily lead to just the same sort of reporting most agencies do most of the time, which is easier, cheaper, and much less controversial.

So how does the Klobuchar bill stack up? On the one hand, it is a substantial relief in being a much more professional effort than one might expect after reading all the contradictory and sometimes self-defeating ideas thrown into the Better Deal promotional materials. But on the other hand, evident political compromises and reticence to commit real resources will cause it to be only a first step at best. It would require the Government Accountability Office (GAO) to study six years' worth of federal merger remedies, including their impact on "maintaining competition"; their impact "on wages, employment, innovation, and new business formation"; and "the viability of divested assets." It would also require merging parties that have secured consent decree approval to submit annual informational reports for five years after the agreement, concerning competition-relevant data.[212]

The review could be quite effective, but shows its own limitations. GAO is politically independent of the agencies, and has traditionally been unafraid to criticize other government entities. It is substantively competent and has its own staff and resources. (Some may question whether it presently has in-house capacity to perform these particular inquiries, but that seems like a manageable personnel issue.) But as designed, the review would face two large difficulties. First will be lack of data. Provision is not made for GAO access even to the data provided to the antitrust agencies during HSR, and while it presumably would have access to the postconsummation data to be provided by merging parties, that information will be self-generated and the mandate to provide it would be administered (presumably) by the Federal Trade Commission's Premerger Notification Office. It will have no data as to firms other than merging parties that is not publicly available. (Sometimes it is, typically for purchase, but often it is not.) Second, the Klobuchar bill would limit GAO review only to remedies imposed in consent decrees. Accordingly, it would study only a very small range of the very largest mergers—those in which an agency has issued a second request in the HSR process and would have

similar as possible, but that did not experience merger. If the market that experienced merger sees more significant changes, then that is an indication that the merger increased market power.

211. *See supra* notes 192-96 and accompanying text.

212. S. 1811, at §§ 3, 5.

challenged the deal without concessions. Those are important deals, and knowing whether remedies to them work is an important question. But in terms of numbers of deals and cumulative effects, what might be much more significant is that large range of deals that may well cause harm but are not even presently on the federal radar. The Klobuchar bill would leave them completely unexamined.

If the Klobuchar bill remains the only implementation of the Better Deal's merger review idea, then some study can be done, but what is most needed—broad review of mergers in a range of industries, with econometrically rigorous isolation of price and output effects—will most emphatically not be.

IV. Conclusion

This long article wove together a lot of different material. Its inspiration is the present season of interest in antitrust and the hopes for it that I share with the many young advocates and journalists writing about it so much. Its message is that the ideas and short-term policy corrections with which they are preoccupied are unlikely to bring those hopes to life. Instead, there is a deeper, longer-term problem in having a competition policy, and failure to address it has caused its cyclical disappointment during its lifetime. Specifically, our tool for controlling concentration before it starts needs more effective use. It is so difficult to use, however, because to a public to which competitive markets can be very counterintuitive and confusing to watch, it is most difficult to justify prospective government interference. For reasons that I believe are captured in Jonathan Baker's model of antitrust as political compromise—even if one doubts as I do that the compromise is driven by his assumption of consumers' accurate judgment of their own best interests—making those interventions more effective, without more, will invite swift reversion to the postwar antitrust political stasis under which, for the most part, they are not effective. In fact, unlike Professor Baker, I think consumers as a group are systematically unable to assess their own interests with respect to competition policy, with or without the aid of the professional policy entrepreneurs who attempt to educate and organize them. Producers enjoy a large, systematic advantage in that respect, and—so long as institutions are not in place to prevent it—are much better able to ensure reversion to law that does limited good but gives consumers sufficient evidence of government activity to keep them from organizing for change. That is why, I submit, institutions are required to put a brake on that political reversion, and why I think robust information could be an excellent solution.

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