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ESSAY

ANTITRUST'S UNCONVENTIONAL POLITICS

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INTRODUCTION

Antitrust law stands at its most fluid and negotiable moment in a generation. The bipartisan consensus that antitrust should solely focus on economic efficiency and consumer welfare has quite suddenly come under attack from prominent voices calling for a dramatically enhanced role for antitrust law in mediating a variety of social, economic, and political friction points, including employment, wealth inequality, data privacy and security, and democratic values. To the bewilderment of many observers, the ascendant pressures for antitrust reforms are flowing from both wings of the political spectrum, throwing into confusion a conventional understanding that pro-antitrust sentiment tacked left and antitrust laissez faire tacked right.

On the left, the assault on the consumer-welfare-oriented status quo has migrated from reformist organizations like the Open Markets Institute¹ and anti-corporate progressives like senator Elizabeth Warren and the House Democratic Leadership, which has staked the 2018 mid-

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¹ Open Markets, <https://perma.cc/G35H-LAFH> (last visited Aug 23, 2018). Open Markets was affiliated with the left-leaning New America Foundation, until forced out over Open Markets's criticisms of Google, a New America patron. Kenneth P. Vogel, Google Critic Ousted from Think Tank Funded by the Tech Giant, N.Y. Times (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/politics/eric-schmidt-google-new-america.html>.

term elections on an economic platform including antitrust reform as a centerpiece.² In the Democratic Party's center, the formation of a House Antitrust Caucus³ and reform bills introduced in both the House⁴ and the Senate⁵ underscore increasing political traction to jettison the consumer-welfare status quo. The Democrats' "Better Deal" plan asserts that consumers are but one of the classes that antitrust should protect, with workers, suppliers, and small business taking an equal place in the protected class.⁶ Significantly, the document launches harsh criticisms of the past thirty years of antitrust enforcement as excessively lax—a period over which Democrats ran antitrust enforcement just over half of the time.⁷ The Democratic leadership has made clear that it does not intend to exclude the Clinton and Obama administrations from its criticism, and that it intends to advocate a major trans-partisan rethinking of antitrust policy.⁸

On the right, President Trump has attacked concentrated economic power in technology and big media,⁹ and his Justice Department launched a surprising, aggressive challenge to the AT&T–Time Warner vertical merger (the district court rejected the Administration's challenge to the merger on substantive antitrust grounds and the case is now on

² U.S. House of Representatives Democratic Leadership, *A Better Deal: Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, <https://perma.cc/25GM-QFJX>.

³ Tess Townsend, Keith Ellison and the New 'Antitrust Caucus' Want to Know Exactly How Bad Mergers Have Been for the American Public, *N.Y. Mag.* (Dec. 4, 2017), <https://perma.cc/JE3W-THHS>.

⁴ 21st Century Competition Commission Act of 2017, H.R. 4686, 115th Cong. (2017), <https://perma.cc/JE3W-THHS>; Merger Retrospective Act of 2017, H.R. 4538, 115th Cong. (2017), <https://perma.cc/6CW7-QNCC>.

⁵ Merger Enforcement Improvement Act, S. 1811, 115th Cong. (2017), <https://perma.cc/H9XS-GSUH>.

⁶ U.S. House of Representatives Democratic Leadership, *supra* note 2.

⁷ *Id.*

⁸ Chuck Schumer, *A Better Deal for American Workers*, *N.Y. Times* (July 24, 2017), <https://www.nytimes.com/2017/07/24/opinion/chuck-schumer-employment-democrats.html> (“Democrats have too often hesitated from taking on those misguided policies directly and unflinchingly — so much so that many Americans don't know what we stand for.”).

⁹ Trump Says Amazon has 'a huge antitrust problem,' *CNBC* (May 13, 2016), <https://perma.cc/2SYD-W6HF>; Trump's comments create a lose-lose position for Justice, *Wash. Post* (Nov. 13, 2017), https://www.washingtonpost.com/opinions/trumps-comments-create-a-lose-lose-position-for-justice/2017/11/13/6fd7b28e-c596-11e7-aae0-cb18a8c29c65_story.html?utm_term=.3fa9eb549b54.

appeal).¹⁰ Trump's trustbusting might be dismissed as a feature of his idiosyncratic populism or, less charitably, abusive vendettas against corporate political foes like CNN and Amazon, but the reformist sentiment on the right is far from limited to the President. Similar sentiments have been expressed by diverse conservative figures such as activist Steve Bannon, who wants to turn Google and Facebook into public utilities,¹¹ conservative economist Kenneth Rogoff,¹² and Trump's decided political foe Bill Kristol, who criticizes Robert Bork's consumer-welfare standard and proposed a significant reinvigoration of the antitrust laws to limit the growing power of tech's Big Five (Amazon, Apple, Facebook, Google, and Microsoft).¹³ The American Conservative recently turned with surprising ferocity on that conservative icon Bork, asserting that "[w]hereas prior generations of lawmakers protected the American citizenry as businessmen, entrepreneurs, and growers, Bork led a revolution that sacrificed the small producer at the altar of efficiency and cheap goods."¹⁴

Standing against the anti-incumbent challengers from both political wings is a broad, bi-partisan establishment center seeking to defend the consumer-welfare framework. Until recently, this establishment center seemed far from unified. Since the rise of the Chicago School in the 1970s, antitrust law has been contested on terms that seemed generally to track left-right political ideology, with those on the left favoring more aggressive intervention and those on the right more *laissez faire*.¹⁵ But the rising tide of calls for a radically different version of antitrust has led to a circling of establishment wagons around the consumer-welfare standard. Left-leaning organizations that once led the charge for more aggressive enforcement now find themselves defending the consumer-welfare idea in principle, even while calling for more aggressive

¹⁰ *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), appeal docketed, No. 18-5214 (D.C. Cir. July 13, 2018).

¹¹ Robinson Meyer, *What Steve Bannon Wants to Do to Google*, *The Atlantic* (Aug. 1, 2017), <https://perma.cc/ZL8L-7URB>.

¹² John Kehoe, *Kenneth Rogoff Concerned by the Dark Side of the Technology Revolution*, *Fin. Rev.* (Mar. 9, 2018), <https://perma.cc/94G5-HY8W>.

¹³ *The New Center, Ideas to Re-Center America 10–17*, <https://perma.cc/L9H6-6QY2>.

¹⁴ Daniel Kishi, *Robert Bork's America*, *The Am. Conservative* (Mar. 1, 2018), <https://perma.cc/KD9E-YLGT>.

¹⁵ See generally *How The Chicago School Overshot the Mark: the Effect of Conservative Economic Analysis on U.S. Antitrust* (Robert Pitofsky ed., 2008) (presenting arguments, generally from "the left," against reigning Chicago School orthodoxy).

enforcement within that paradigm.¹⁶ Meanwhile, conventionally conservative or pro-business leaning organizations continue to defend the consumer-welfare standard against assaults from their own right flank.¹⁷

This Essay shows that, although unconventional in presentist terms, the emerging political dislocations over antitrust policy reflect longstanding ideological ambiguities about and within the antimonopoly tradition. In particular, the current political fracturing over antitrust is best understood by examining three ideological friction points that have emerged periodically within American history: (1) the ideological ambiguity surrounding the association between large scale in business and large scale in government; (2) the shifting meaning of “monopoly” from the exclusive grant of government privilege to purely private power, and a related question about the sources of monopoly power; and (3) pragmatic concerns about the ability of the capitalist order to survive without regulatory interventions to smooth its roughest edges. Taken in the context of these longstanding friction points, the strange-bedfellow coalitions uneasily rising around contemporary antitrust reform aren't that strange at all.

I. THE IDEOLOGICAL AMBIGUITY OF LARGE SCALE IN GOVERNMENT AND BUSINESS

A. Brandeis and Bork as Ideological Touchpoints

Although American antitrust policy has been influenced by a wide variety of ideological schools,¹⁸ two influences stand out as historically

¹⁶ See Danny Vinik, *Inside the New Battle Against Google*, Politico (Sept. 17, 2017), <https://perma.cc/G9JV-77WL> (reporting on resistance to Open Markets' assault on the consumer-welfare standard by traditionally left-leaning, pro-enforcement groups like American Antitrust Institute and New America Foundation).

¹⁷ See, e.g., Federalist Soc'y Regulatory Transparency Project, *Antitrust & Consumer Protection Working Group*, <https://perma.cc/JSM3-2NYB> (defending the consumer-welfare standard); U.S. Chamber of Commerce, *Competition Policy & Antitrust*, <https://perma.cc/52L2-6ZHV> (“Antitrust remedies should enhance consumer welfare and make sense in an interconnected world.”).

¹⁸ See generally Daniel A. Crane & Herbert Hovenkamp, *The Making of Competition Policy: Legal and Economic Sources* (2013) (summarizing the intellectual influences that have shaped competition policy).

most significant to understanding the contemporary antitrust debate. The first is a Brandeisian school, epitomized in the title of Louis Brandeis' 1914 essay (subsequently made the title of a 1934 collection of his essays) in Harper's Weekly: A Curse of Bigness.¹⁹ Arguing for "regulated competition" over "regulated monopoly," Brandeis asserted that it was necessary to "curb[] physically the strong, to protect those physically weaker" in order to sustain industrial liberty.²⁰ Brandeis evoked a Jeffersonian vision of a social-economic order organized on a small scale, with atomistic competition between a large number of equally advantaged units. In particular, he criticized industrial consolidation on economic, social, and political grounds.²¹ As explained in a dissenting opinion by William O. Douglas in the 1948 case of *United States v. Columbia Steel Co.*, Brandeis worried that "size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices."²²

The Brandeisian vision held sway in U.S. antitrust law from the Progressive Era through the early 1970s, albeit with significant interruptions.²³ Its spirit animates a long chain of important cases from *Chicago Board of Trade*²⁴ in 1918 (authored by Brandeis himself) to *Topco* in 1972,²⁵ and a string of Congressional reforms including the Clayton²⁶ and Federal Trade Commission Acts of 1914,²⁷ the Robinson–Patman Act of 1938,²⁸ and the Celler–Kefauver Antimerger Act of 1950.²⁹

¹⁹ Louis D. Brandeis, A Curse of Bigness, Harper's Wkly., Jan. 10, 1914, at 18.

²⁰ Louis D. Brandeis, Shall We Abandon the Policy of Competition? (1934), reprinted in Crane & Hovenkamp, supra note 18 at 185. On Brandeis' influence in antitrust, see generally Kenneth G. Elzinga & Micah Webber, Louis Brandeis and Contemporary Antitrust Enforcement, 33 Touro L. Rev. 277 (2017).

²¹ See Jeffrey Rosen, The Curse of Bigness, The Atl. (June 3, 2016), <https://perma.cc/6QQG-GQS5> (summarizing Brandeis' vision).

²² *United States v. Columbia Steel Co.*, 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting).

²³ See, e.g., Ellis W. Hawley, The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence 3–16 (1995) (detailing the place of Brandeisian School among prevailing New Deal ideologies).

²⁴ *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918).

²⁵ *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

²⁶ Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2012).

²⁷ Federal Trade Commission Act of 1914, 15 U.S.C. § 41 (2012).

²⁸ Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (2012).

The ascendant Chicago School of the 1960s and 70s threw down the gauntlet to the Brandeisian tendency of U.S. antitrust law. In an early mission statement, Robert Bork and Ward Bowman characterized antitrust history as “vacillat[ing] between the policy of preserving competition and the policy of preserving competitors from their more energetic and efficient rivals,”³⁰ the latter being an interpretation of the Brandeis School. Richard Posner struck a similar note in his 1976 book on antitrust, asserting that “the proper purpose of the antitrust laws is to promote competition, as that term is understood in economics.”³¹ Chicagoans argued that antitrust law should be concerned solely with economic efficiency and consumer welfare³² (more on these values in a moment). “Bigness” was no longer necessarily a curse, but often the product of superior efficiency. Chicago criticized Brandeis’ “sympathy for small, perhaps inefficient, traders who might go under in fully competitive markets.”³³ Preserving a level playing field meant stifling efficiency to enable market participation by the mediocre.³⁴

Beginning in 1977–78, the Chicago School achieved an almost complete triumph in the Supreme Court, at least in the limited sense that the Court came to adopt the economic efficiency/consumer welfare model as the exclusive or near-exclusive goal of antitrust law. (Adoption of Chicago School interpretations of consumer welfare and policy positions on particular competitive practices would occur neither immediately nor completely.)³⁵ In 1979, citing Bork, the Court declared that “Congress designed the Sherman Act as a ‘consumer welfare

²⁹ Act of December 29, 1950 (Celler-Kefauver Antimerger Act), 64 Stat. 1125–26, 15 U.S.C. § 18 (2012).

³⁰ Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 *Colum. L. Rev.* 363, 363–64 (1965).

³¹ Richard A. Posner, *Antitrust Law: An Economic Perspective* ix (1976).

³² Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 9 (1978).

³³ *Id.* at 41.

³⁴ *Id.* at 137 (“Any firm that operates excludes rivals from some share of the market. Superior efficiency forecloses. Indeed, exclusion or foreclosure is the mechanism by which competition confers its benefits upon society. The more efficient exclude the less efficient from the control of resources, and they do so only to the degree that their efficiency is superior.”). Years later, as a paid consultant for Netscape against Microsoft, Bork employed the level-playing-field metaphor affirmatively, asserting, “The object is to create a level playing field benefiting consumers. That is what antitrust is about” Robert H. Bork, *What Antitrust Is All About*, *N.Y. Times*, May 4, 1998, at A19.

³⁵ See Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 *U. Chi. L. Rev.* 1911, 1922 (2009).

prescription.”³⁶ Over time, the maxim that antitrust law should protect “competition rather than competitors” became canonical.³⁷ Brandeis had been displaced by Bork.

If the last three or four decades of U.S. antitrust policy have largely belonged to Bork—at least at an ideological level—the Bork-versus-Brandeis dichotomy is far from settled. The voices at the cutting edge of the rising reformist movement—particularly those aligned with the influential Open Markets Institute—explicitly style themselves as a “New Brandeis” school in order to re-up the historic contest between the Brandeisian and Chicago School orders.³⁸

II. THE LINGERING SHADOWS OF JEFFERSONIANISM AND HAMILTONIANISM

Although it is conventional to understand Brandeis’s anti-bigness ideology as an aspect of Progressivism standing in contrast to Chicago’s big-business conservatism, the story is historically more nuanced. Brandeis’s preoccupation with “bigness” was not limited to large corporate scale. He was also deeply concerned with large governmental scale generally, and a large-scale federal government in particular. As Jeffrey Rosen has observed, “Denouncing big banks as well as big government as symptoms of what he called a ‘curse of bigness,’ Brandeis was determined to diminish concentrated financial and federal power, which he viewed as a menace to liberty and democracy.”³⁹ Brandeis styled himself a Jeffersonian, and his ideology resonated with the Jeffersonian preference for small-scale yeomanry and localized political organization.⁴⁰

³⁶ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Bork, *The Antitrust Paradox*, supra note 32 at 66).

³⁷ E.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (“It is axiomatic that the antitrust laws were passed for ‘the protection of *competition*, not *competitors*.’”) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

³⁸ David Dayen, *This Budding Movement Wants to Smash Monopolies*, *The Nation* (April 4, 2017), <https://perma.cc/7ZMB-XHVM>; Vinik, supra note 16; see also Matt Stoller (@matthewstoller), Twitter (Jul. 9, 2018, 9:29 AM), <https://perma.cc/P22E-U2EY> (showing a leading member of Open Markets self-identifying the organization as “neo-Brandeis”).

³⁹ Rosen, supra note 21; see also Jeffrey Rosen, *Louis D. Brandeis: American Prophet 1* (2016) (discussing Brandeis’ concern with big corporations and centralization of government power under the New Deal).

⁴⁰ Alfred Lief, *Brandeis: The Personal History of an American Ideal* 478 (1936).

In lionizing large corporate scale, the Chicago School aligned itself with the Hamiltonian vision for a robustly mercantile society grounded on powerful financial and economic institutions. By doing so, Chicago always risked alienating the libertarian right, with its affinity for Jefferson's vision for small-scale government and industrial production.⁴¹ Many libertarians have found it hard to attack bloated government without also worrying about bloated business (witness the rise of the Tea Party, which arose in large part as a reaction to corporate bailouts). Influential libertarians like Friedrich Hayek saw a role for antitrust law in curbing monopolistic abuses because they understand unfettered corporate power as a threat to personal liberty.⁴²

The divide between the competing Hamiltonian and Jeffersonian ideals on organizational scale and their implications for efficiency and liberty thread through antitrust's intellectual and ideological history, often disrupting conventional political alignments. Teddy Roosevelt, a deep admirer of Hamilton, was comfortable with large scale in both government and business. Far from a "trustbuster," Roosevelt opposed breaking up Standard Oil, viewing large aggregations of capital as inevitable and necessary—so long as superintended by a strong federal government.⁴³ Roosevelt's affinity for large-scale government and business earned him the epithet of "socialist."⁴⁴ That charge was hyperbolic, but not directionally implausible. In the late nineteenth and early twentieth centuries, American socialists looked with suspicion on the antitrust laws because they viewed the rise of the Gilded Age trusts as salutary stepping stones to government appropriation of the means of production and industry.⁴⁵ Socialist Presidential candidate Eugene Debs, himself the defendant in an antitrust prosecution, argued: "Monopoly is certain and sure. It is merely a question of whether we will be collectively owned monopolies, for the good of the race, or whether they

⁴¹ Rosen, Louis D. Brandeis: American Prophet, *supra* note 39, at 10–14; see also Albert Joy Nock, *Jefferson* (1983).

⁴² Ellen Frankel Paul, Hayek on Monopoly and Antitrust in the Crucible of United States v. Microsoft, 1 N.Y.U. J. Law & Liberty 167, 174–80 (2005).

⁴³ See Letter from President Theodore Roosevelt to Arthur B. Farquhar (Aug. 11, 1911), *in* Theodore Roosevelt: Letters and Speeches 652 (Louis Auchincloss ed., 2004).

⁴⁴ Martin J. Sklar, The Corporate Reconstruction of American Capitalism, 1890–1916, at 344–46 (1988).

⁴⁵ See generally Henry Rand Hatfield, The Chicago Trust Conference, 8 J. Pol. Econ. 1, 4 (1899) (reporting that some socialists favored consolidation as a means to nationalization).

will be privately owned for the power, pleasure and glory of the Morgans, Rockefellers, Guggenheims, and Carnegies.”⁴⁶

Conversely, influential conservatives in antitrust’s formative era favored aggressive antitrust enforcement as an antidote to the simultaneous aggrandizement of government and business. In the crucible election of 1912, William Howard Taft argued against Progressive proposals to create a new Federal Trade Commission, asserting that his administration’s aggressive enforcement record demonstrated how traditional prosecutorial and common-law processes could obviate the need to create new large governmental organizations to combat big business.⁴⁷ Taft’s pro-enforcement saber rattling reached such a crescendo that Wall Street began to wonder whether Roosevelt might be the candidate more sympathetic to their interests.⁴⁸

The New Deal, too, saw the Democratic Party equivocate between contending Jeffersonian and Hamiltonian impulses on the question of governmental and business scale. The first New Deal period—from 1933 to early 1935—was dominated by the National Industrial Recovery Act (“NIRA”), which encouraged a centralization of both governmental and industrial power.⁴⁹ Brandeis led the charge on the Supreme Court to strike down the NIRA in 1935, warning the White House that the Court would not tolerate continued centralization of business or governmental power.⁵⁰ From 1935 until the beginning of World War II, the New Deal administration followed a policy of aggressively Brandeisian antitrust enforcement.⁵¹ Then, facing a need to mobilize big business for the war effort, the administration abruptly shifted course and embraced a model of partnership between big government and big business.⁵²

⁴⁶ Eugene V. Debs, *A Study of Competition*, Appeal to Reason, May 28, 1910, at 2, reprinted in Brett Flehinger, *The 1912 Election and the Power of Progressivism* 163 (2003).

⁴⁷ Daniel Crane, *Progressivism and the 1912 Election*, in Crane & Hovenkamp, *supra* note 18, at 104–05.

⁴⁸ *Id.* at 106.

⁴⁹ Hawley, *supra* note 23, at 43–46.

⁵⁰ Shortly before voting to strike down the NIRA in the *Schechter Poultry* and *Panama Refining* decisions, Brandeis conveyed the following message to the White House: “This is the end of this business of centralization, and I want you to go back and tell the President that we’re not going to let this government centralize everything. It’s come to an end.” Peter H. Irons, *The New Deal Lawyers* 104 (1982).

⁵¹ Hawley, *supra* note 23, at 360.

⁵² Richard M. Steuer & Peter A. Barile, *Antitrust in Wartime*, *Antitrust*, Spring 2002, at 72–73 (reporting the government’s suspension of major antitrust prosecutions during World War II).

After the war, the perception that industrial concentration in Germany and Japan had fueled the rise of fascism contributed to a two-decade period of intensive antitrust enforcement—particularly against mergers—launched by the Celler–Kefauver Antimerger Act of 1950.⁵³ Here again, the ideology of the antimonopoly movement was ambiguous in conventional left–right terms. The antimonopolist Senator Kefauver warned that the consequence of further industrial concentration would be government takeover, and that could lead either to fascism, on the one hand, or socialism or communism, on the other.⁵⁴ Other proponents of the act argued that the antitrust laws were “one of the greatest bulwarks against Communism,” and that the rising tide of industrial concentration was driving the country toward “collectivism.”⁵⁵ It is no coincidence that the most anti-consolidationist statute in American history was passed during the period of the Red Scare.

The ambiguity in the relationship between corporate scale and governmental scale has translated into a historical ambiguity in the politics of antitrust enforcement. Just as the two major contemporary political parties each blend contradictory Hamiltonian and Jeffersonian elements, so too antitrust ideology has not neatly tracked left–right dichotomies. On a statistical basis, civil antitrust enforcement by the government peaked during the conservative Nixon and Ford administrations.⁵⁶ The Chicago School rode the wave of Ronald Reagan’s decoupling of the curse of bigness; bigness was a curse in the government only, not in business. But Chicago’s decoupling of the ideological aversion to large scale in government and business is not inevitable and may be, in historical perspective, anomalous. As historian Richard Hofstadter has written, American feelings about large organizational units in government and business have generally tracked in parallel: “From [America’s] colonial beginnings through most of the nineteenth century . . . Americans came to take it for granted that property would be widely diffused, that economic and political power would be decentralized.”⁵⁷ The gradual public acceptance of the rise of

⁵³ Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1053–54 (1979).

⁵⁴ 96 Cong. Rec. 16,452 (1950) (statement of Sen. Kefauver).

⁵⁵ Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 Geo. Wash. L. Rev. 1, 25 (1982) (quoting House and Senate debates).

⁵⁶ Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* 36–37 (2011).

⁵⁷ Richard Hofstadter, *What Happened to the Antitrust Movement* (1964), *reprinted in* Crane & Hovenkamp, *supra* note 18, at 227.

big business in the twentieth century is attributable in part “to the emergence of countervailing bigness in government and labor.”⁵⁸ Historically, it is no anomaly that small-government conservatives would find common ground with Brandeisian progressives in resenting the growth and power of large-scale industrial firms, which are not so easily distinguished from large-scale governmental agencies.

II. THE SHIFTING MEANING OF “MONOPOLY” AND CONTESTATION OVER ITS SOURCES

A. What Is a “Monopoly?”

The ideological valence of the antimonopoly principle is ambiguous in contemporary left–right terms, owing in large part to a historical shift in the meaning of the word “monopoly,” particularly in its popular and pejorative senses. Is a monopolist a private firm that corners a market through nefarious, shrewd tactics? If so, the law’s antimonopoly response codes “regulatory” and “interventionist” in left–right terms. Or is a “monopoly” a cronyist intervention by the state to prevent free-market competition? In that case, the antimonopoly principle codes as “deregulatory” and “free market.” Both of these senses of “monopoly” have been used historically, and their contemporary manifestations remain tangled.

The first sense of “monopoly”—of purely private market power—has a long-standing historical resonance. Legal regulation of private monopoly and unfair competition reportedly extends back as far as the Code of Hammurabi.⁵⁹ A primordial antitrust case against grain dealers appears in fourth-century B.C. Athens.⁶⁰ One finds an antimonopoly sentiment expressed in ninth-century B.C. Chinese thought, on the ground that monopolies increase prices to consumers.⁶¹ A similar sentiment appears in early Islamic law⁶² and in a fifth-century decree of

⁵⁸ *Id.* at 238.

⁵⁹ Fritz Machlup, *The Political Economy of Monopoly: Business, Labor and Government Policies* 185 (1952).

⁶⁰ Lambros E. Kotsiris, *An Antitrust Case in Ancient Greek Law*, 22 *Int’l Law.* 451, 454–55 (1988).

⁶¹ 2 Chen Huan-Chang, *The Economic Principles of Confucius and His School* 535 (1911).

⁶² Arvie Johan, *Monopoly Prohibition According to Islamic Law: A Law and Economics Approach*, 27 *Mimbar Hukum* 166, 167 (2015), <https://perma.cc/24W9-V2BX> (“Whoever withholds food (in order to raise its price), has certainly erred.” (citation omitted)).

the Byzantine Emperor Zeno and the Justinian Code.⁶³ A generally moralist antimonopoly strand runs through the Christian tradition from the medieval scholastics to the Protestant reformers.⁶⁴ The earliest common-law cases vitiating private monopolies date from the fourteenth century.⁶⁵

On the other hand, constitutional historians recognize a long-standing antimonopoly tradition—defined by such attributes as prohibitions on governmental cronyism and special grants of economic privilege—in Anglo-American jurisprudence.⁶⁶ Debates over corporate chartering and monopoly pervaded the Founding era and continued through the Jacksonian period and into the corporate liberalizations of the late nineteenth century.⁶⁷ Antimonopoly themes played an important role in many of the landmark cases of U.S. constitutional law on such matters as the limits of federal power,⁶⁸ states' impairment of contract obligations,⁶⁹ and the reach of the Reconstruction Amendments.⁷⁰ Indeed, the constitutional-democratic sense of the antimonopoly tradition predates the American political order, with deep roots in the British common law. Sir Edward Coke argued that all monopolies were against the Magna Carta because they stood against liberty and freedom,⁷¹ and the well-known British *Case of Monopolies* asserted parliamentary jurisdiction over the grant of monopolies.⁷²

⁶³ Code Just. 4.19.25, in 13 S. P. Scott, *The Civil Law* 120 (2d ed. 1932) (prohibiting monopolies and cartels upon pain of confiscation and banishment).

⁶⁴ See Kenneth Elzinga & Daniel A. Crane, *Christianity and Antitrust*, in Daniel A. Crane & Samuel Gregg, *Christianity and Economic Regulation* (forthcoming Cambridge University Press) (on file with author).

⁶⁵ William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355, 356–58 (1954).

⁶⁶ See, e.g., Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 985–86 (2013); Michael Conant, *Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 Emory L.J. 785, 789–90, 797–800 (1982); Kenneth Lipartito, *The Antimonopoly Tradition*, 10 U. St. Thomas L.J. 991, 991 (2013).

⁶⁷ Daniel A. Crane, *Antitrust Antifederalism*, 96 Cal. L. Rev. 1, 1–5 (2008).

⁶⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 365, 378 (1819).

⁶⁹ *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 451–52 (1837).

⁷⁰ *Slaughter-House Cases*, 83 U.S. 36, 64–66 (1872).

⁷¹ Edwardo Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* 181 (1817).

⁷² *Darcy v. Allein (The Case of Monopolies)* (1603) 77 Eng. Rep. 1260, 1264–65, 11 Co. Rep. 84b, 86b–87b.

Throughout much of the Anglo-American antimonopoly tradition, “monopoly” primarily denoted a governmental grant of an exclusive privilege—a “letter patent” in the sense of the classic common-law case: *The Case of Monopolies*.⁷³ Until the late nineteenth century, the American antimonopoly tradition was concerned primarily with governmental cronyism and exclusive privilege. As late as 1878, Thomas Cooley devoted the thrust of his essay on limits to state control of private business to the problem of state-granted monopoly, turning only in the last few pages to the subsidiary problem of “monopolies not created by the legislature.”⁷⁴

Over time, however, the primary legal meaning of “monopoly” has shifted from the government-granted to the purely private. This shift became apparent in U.S. antitrust law in 1943, when, in *Parker v. Brown*, the Supreme Court held the Sherman Act inapplicable to anticompetitive structures created by state regulation.⁷⁵ *Parker* grew out of the Supreme Court’s post-1937 constitutional jurisprudence rejecting *Lochner*-era judicial scrutiny of regulatory schemes impairing property or contract rights.⁷⁶ Just as the post-1937 constitutional dispensation avoided second-guessing state regulatory judgments in favor of judicially preferred economic theories, so too the courts rejected efforts to use the Sherman Act to the same effect (to the dismay of conservatives, who favored the judiciary as a bulwark against over regulation).

From one perspective, *Parker* turned the meaning of “monopoly” on its head.⁷⁷ Whereas, the primary meaning of “monopoly” in the Anglo-American tradition had been a governmental grant of exclusive

⁷³ See Edward S. Mason, *Monopoly in Law and Economics*, 47 *Yale L. J.* 34, 44 (1937) (discussing a shift in meaning of the word “monopoly,” from “an exclusion of others from the market by a sovereign dispensation in favor of one seller” to a “broad sense of restriction of competition”).

⁷⁴ Thomas M. Cooley, *Limits to State Control of Private Business*, reprinted in Crane & Hovenkamp, *supra* note 18, at 67.

⁷⁵ 317 U.S. 341, 350–51 (1943).

⁷⁶ Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 *Mich. L. Rev.* 365, 370–73 (2016).

⁷⁷ Richard A. Epstein, *The Narrow Province of the Antitrust Laws, Or, Doing a Few Things Well*, Presentation Before the Institute for Consumer Antitrust Studies, (1997), in 9 *Loy. Consumer L. Rev.* 113, 125 (“What happens [under *Parker*] is that this legal regime marks a complete inversion of the proper approach. State-sponsored cartels in the aftermath of the New Deal legitimization are more permanent and more dangerous than privately-operated ones, but they are given complete immunity from the antitrust act.”).

privilege—an interference with the natural rights of other market participants—that primary sense of “monopoly” was now to be excluded altogether from the Sherman Act’s antimonopoly legal regime. Only purely private monopolies—the second sense of the word discussed above—would be covered by antitrust.

The *Parker* doctrine of state-action immunity from antitrust has not developed to immunize state regulation from Sherman Act preemption as strongly as *Parker*’s language would suggest, and the doctrine’s evolution continues.⁷⁸ In the push-and-pull over the doctrine’s boundaries, advocates of the Chicago School’s consumer-welfare approach have been the principal proponents of narrowing state-action immunity on the view that states systematically distort competitive processes for the benefit of rent-seekers.⁷⁹ This simultaneously pro-antitrust and deregulatory perspective tracks that strand of the antimonopoly tradition that blames the government for various problems.

A. Are Private Monopolies the Product of Governmental Intervention?

This ambiguity over the meaning of “monopoly” and its attendant legal and policy implications cashes out also in legal and economic discourse over the sources of monopoly power. A neoclassical economic view, today associated with Chicago School ideology, holds that markets are contestable and that any monopoly power gained through anticompetitive means is quickly eroded, but with one important exception: governmentally created entry barriers.⁸⁰ If regulation and

⁷⁸ Crane & Hester, *supra* note 76, at 365–76.

⁷⁹ *Id.* at 366–70 (arguing for a more preemptive role for the FTC Act over anticompetitive state regulations that harm competition and consumer welfare); Frank H. Easterbrook, Antitrust and the Economics of Federalism, *in* Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 189–213 (Richard A. Epstein & Michael S. Greve, eds., 2004) (proposing a modification to *Parker* immunity doctrine to curb excesses of state anticompetitive regulation); Frank H. Easterbrook, The Chicago School and Exclusionary Conduct, 31 *Harv. J. L. & Pub. Pol’y* 439, 446–47 (2008) (discussing Robert Bork’s concern about use of government as an agent of exclusion); Richard A. Epstein & Michael S. Greve, Introduction: The Intractable Problem of Antitrust Jurisdiction, *in* Competition Laws in Conflict, *supra* note 79, at 13 (describing the *Parker* doctrine as enabling mutual exploitation of citizens by the states).

⁸⁰ See Bork, *The Antitrust Paradox*, *supra* note 32 at 347–64 (examining predation through governmental process, which Bork described as a serious and growing problem); Milton Friedman, *Capitalism and Freedom* 129–31 (2d ed. 1982) (discussing the problem of government-created labor monopolies); Howard P. Marvel, *Hybrid Trade Restraints: The*

governmental favoritism are the only important sources of durable monopoly power, then one potential policy response is not to worry about privately acquired monopoly—essentially, to turn the *Parker* state-action immunity regime on its head and police only state-granted monopolies. But there is another possibility flowing from the opening premise, which is to hold that any observed instances of genuinely durable monopoly power must be owing to some seen or unseen governmental distortion. In this latter view, when what at first blush seems to be purely private monopoly power persists over time, there must be some underlying governmental distortion accounting for it. Then, even committed libertarians should favor antitrust intervention to terminate the monopoly.

This view is not hypothetical; it explains some of the right's historical affinity for antitrust enforcement despite the right's otherwise laissez-faire predilections. The clearest case in point is the 1982 consent decree breaking up AT&T.⁸¹ How did the largest antimonopoly corporate break-up in history occur at the hands of the Reagan Administration and its decidedly Chicago School Justice Department? The answer lies in Assistant Attorney General Bill Baxter's conviction that AT&T was exploiting its status as a regulated monopolist to stifle competition.⁸² What has come to be known as "Baxter's law" posits that rate-regulated monopolists may extract monopoly profits from vertically integrated markets without running afoul of the "one monopoly profit" theorem.⁸³ Suspecting government regulation as the deep source of AT&T's

Legal Limits of a Government's Helping Hand, 2 Sup. Ct. Econ. Rev. 165, 180 (1983) ("Government may or may not be the source of all monopolies; it is clearly at the heart of a substantial number of monopolies."); Stephen A. Siegel, Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Public Utility Rate Regulation, 70 Va. L. Rev. 187, 202–03 (1984) (examining the neoclassical view that only monopolies created by law are durable).

⁸¹ United States v. AT&T, Inc., 552 F. Supp. 131 (D.D.C. 1982).

⁸² Lawrence A. Sullivan & Ellen Hertz, The AT&T Antitrust Consent Decree: Should Congress Change the Rules?, 5 High Tech. L. J. 233, 238 (1990).

⁸³ William F. Baxter, Conditions Creating Antitrust Concern with Vertical Integration by Regulated Industries—"For Whom the Bell Doctrine Tolls", 52 Antitrust L. J. 243 (1983); see generally Einer Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, 123 Harv. L. Rev. 397, 403 (2009) ("The single monopoly profit theory holds that a firm with a monopoly in one product cannot increase its monopoly profits by using tying to leverage itself into a second monopoly in another product."); Tim Wu, Intellectual Property, Innovation, and Decentralized Decisions, 92 Va. L. Rev. 123, 138–39 (2006) (explaining that the doctrine described by William Baxter is referred to as Baxter's Law).

persistent monopolistic behavior, the conservative Reagan Administration was willing to break it up.

Similar suspicions that Big Tech companies, like Google and Facebook, are the monopolistic beneficiaries of subtle governmental cronyism show up today on the political right.⁸⁴ That Big Tech tends to be associated politically with the Democratic Party only furthers these perceptions.⁸⁵ Those inherently suspicious of governmental interventions in markets may understand Big Tech as the unnatural spawn of governmentally granted privilege and private greed. Conversely, those more sympathetic to governmental intervention may find nothing alarming about the multiple ways in which Big Tech appropriates governmental benefits through such vehicles as intellectual-property law, government subsidies, or the Digital Millennium Copyright Act. But these matters divide the left as well. The Open Markets Institute was forced out of the progressive-leaning New America Foundation over Open Markets' criticisms of Google.⁸⁶ In light of the contestable boundaries of the public-private divide and the shifting meaning of monopoly, it is not surprising to see political alliances fraying over antitrust reform.

III. PRAGMATIC CONCERNS OVER ANTITRUST'S ALTERNATIVES AND CAPITALISM'S SURVIVAL

A final reason that the politics of antitrust sometimes confound conventional left-right divides has to do with the pragmatic sense that some regulatory interventions may be necessary to preserve capitalism politically, and that antitrust may be the least objectionable one. This "antitrust or else" perspective has characterized the politics of antitrust from the beginning.

The conventional view that Congress intended the Sherman Act to seriously undermine the trusts is balderdash. According to Professor

⁸⁴ E.g., Seton Motley, *Democrats Want Big Government Crony Socialism—Why Are Some Republicans Giving It to Them?*, Red State (July 8, 2015, 10:13 AM), <https://perma.cc/PVU7-39WD>.

⁸⁵ See Ryan Grim, *Steve Bannon Wants Facebook and Google Regulated Like Utilities*, The Intercept (July 27, 2017, 12:31 PM), <https://perma.cc/TB99-MEB7>; Farhad Manjoo, *Silicon Valley's Politics: Liberal, With One Big Exception*, N.Y. Times (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/silicon-valley-politics.html>.

⁸⁶ See *supra* note 1.

Merle Fainsod and Lincoln Gordon of Harvard University, “[T]he Republican Party, in control of the 51st Congress, was ‘itself dominated at the time by many of the very industrial magnates most vulnerable to real antitrust legislation.’”⁸⁷ A more realistic view is that the 51st Congress passed the Sherman Act to avert more radical reforms. Speaking on the Senate floor in 1890, Senator John Sherman warned his brethren, many of whom were controlled by the trusts, that Congress “must heed [the public’s] appeal or be ready for the socialist, the communist, and the nihilist.”⁸⁸ Sherman thus conceived of his eponymous antitrust statute as politically necessary to diffuse more radical political movements—as a sort of Band-Aid on capitalism.

The idea that antitrust legislation and enforcement are necessary accommodations to public demand has a long pedigree in both conservative and more progressive circles. Writing in 1914, William Howard Taft described the Sherman Act as “a step taken by Congress to meet what the public had found to be a growing and intolerable evil.”⁸⁹ Notably, Taft did not own the public’s concern himself, nor did he attribute such a concern to Congress. Similarly, Theodore Roosevelt was relatively unconcerned with the trusts personally, but he “saw the trust problem as something that must be dealt with on the political level; public concern about it was too urgent to be ignored.”⁹⁰

Beyond the concern that, absent antitrust, capitalism itself might succumb to reformist pressures, there is a more modest possibility that, absent antitrust, political pressures would lead to overregulation. Antitrust and administrative regulation are conventionally viewed as alternatives to address market failures. From the Reagan Administration to the Financial Crisis of 2008, the overall arc of American law involved simultaneous deregulation and relaxation of antitrust enforcement. If popular dissatisfaction with the economic status quo grows, demand might grow to pull either the regulatory or antitrust lever. Those ideologically committed to a light governmental hand on the market might prefer the antitrust alternative.

⁸⁷ William J. Letwin, *Congress and the Sherman Act: 1887–1890*, 23 *U Chi. L. Rev.* 221, 221 (1955) (quoting Merle Fainsod & Lincoln Gordon, *Government and the American Economy* 450 (1941)).

⁸⁸ 21 *Cong. Rec.* 2454, 2460 (1890).

⁸⁹ William Howard Taft, *The Anti-Trust Act and the Supreme Court* 2 (1914).

⁹⁰ Hofstadter, *supra* note 57, at 231–32.

It is hard to judge at any given moment how much political support for antitrust intervention is motivated by genuine concern over monopoly and competition, and how much of it derives from the fact that, in the face of popular demand for a governmental cure to a perceived evil, it is often easier to delegate the solution to antitrust than to propose a regulatory solution. From the Sherman Act forward, however, it is certain that antitrust has often been deployed as a foil to more interventionist forms of regulation. The ideological and political implications of that move are complex and not neatly housed in left-right categories.

CONCLUSION

Antitrust is back on the menu. Given the ebb-and-flow patterns of antitrust enforcement in American history, that should come as no surprise. Nor should it be surprising that the pressures for enhanced antitrust enforcement are coming from both wings of the political spectrum, as is the defense of the incumbent consumer welfare regime. Despite the appearance of a conventional left-right divide over antitrust enforcement since the 1970s, in broader historical perspective the ideological lines over monopoly and competition are far less determined.