ANTITRUST

Antitrust's Unconventional Politics

The ideological and political motivations for antitrust policy do not neatly fit the standard left/right dichotomy.

BY DANIEL A. CRANE

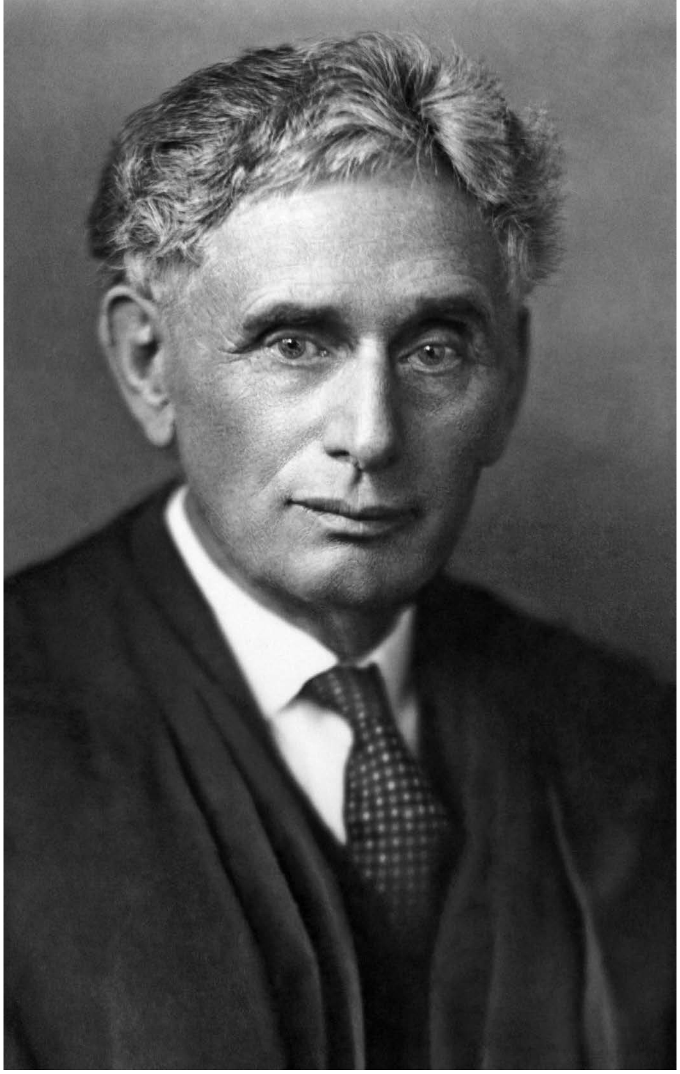
Antitrust law now stands at its most fluid and negotiable moment in a generation. The bipartisan consensus that antitrust should focus solely on economic efficiency and consumer welfare has quite suddenly come under attack from prominent voices calling for a dramatically enhanced role for antitrust law 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 tacks left and antitrust laissez faire tacks right.

On the left, the assault on the consumer-welfare-oriented status quo has migrated from reformist organizations like the Open Markets Institute and anti-corporate progressives like Sen. Elizabeth Warren (D, MA) to the House Democratic Leadership, which has staked the 2018 midterm elections on an economic platform including antitrust reform as a centerpiece. In the Democratic Party's center, the formation of a House Antitrust Caucus and reform bills introduced in both the House and Senate underscore increasing political traction to jettison the consumer welfare status quo. The Democrats' antitrust plank in their "Better Deal" platform asserts that consumers are but one of several classes that antitrust should protect, with workers, suppliers, and small business taking on equal status. Significantly, the document launches harsh criticisms of the past 30 years of antitrust enforcement as excessively lax—a period over which a Democratic president oversaw antitrust enforcement more than half of the time. 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.

On the right, President Trump has attacked concentrated economic power in "Big Media" and his Justice Department has launched a surprising, aggressive challenge to the AT&T–Time Warner vertical merger. Trump's trustbusting might be dismissed as a feature of his idiosyncratic populism or, less charitably, abusive vendettas against corporate political foes such as CNN and Amazon, but the reformist sentiment on the right is far from limited to the president. Similar sentiments have been expressed by such diverse conservative figures as activist Steve Bannon, who wants to turn Google and Facebook into public utilities, conservative economist Kenneth Rogoff, and Trump's decided political foe Bill Kristol, who criticizes conservative icon Robert Bork's consumer welfare standard and proposes a significant reinvigoration of the antitrust laws to limit the growing power of tech's "Big Five" (Amazon, Apple, Facebook, Google, and Microsoft). *The American Conservative* magazine recently turned on Bork with surprising ferocity, asserting that "whereas 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."

Standing against the anti-incumbent challengers from both political wings is a broad, bipartisan 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 view of antitrust 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. But the rising tide of calls for a radically different version of antitrust has led to a circling of establishment wagons around the consumer

DANIEL A. CRANE is the Frederick Paul Furth Sr. Professor of Law at the University of Michigan. This article is based on a longer article forthcoming in the *Virginia Law Review Online*



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

Although unconventional in present terms, the emerging political dislocations over antitrust policy reflect longstanding ideological ambiguities about and within the anti-monopoly 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:

- the ideological ambiguity surrounding the association between large scale in business and government
- the shifting meaning of "monopoly" from exclusive grant of government privilege to purely private power and a related question about the sources of monopoly power
- 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.

BRANDEIS AND BORK AS IDEOLOGICAL TOUCHPOINTS

Although American antitrust policy has been influenced by a wide variety of ideological schools, two influences stand out as historically most significant to understanding the contemporary antitrust debate.

The first is a Brandeisian school, epitomized in the title of Louis Brandeis's 1914 essay in *Harper's Weekly*, "The Curse of Bigness." Arguing for "regulated competition" over "regulated monopoly," he asserted that it was necessary to "curb[] physically the strong, to protect those physically weaker" in order to sustain industrial liberty. He 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. His goals included the economic, social, and political. As explained in a dissenting opinion by William O. Douglas in the 1948 *Columbia Steel* case, 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.

The Brandeisian vision held sway in U.S. antitrust from the Progressive Era through the early 1970s, albeit with significant interruptions. Its spirit animates a long chain of important cases from *Chicago Board of Trade* in 1918 (authored by Brandeis himself) to *TOPCO* in 1972, and a string of congressional reforms including the Clayton and Federal Trade Commission Acts of 1914, the Robinson–Patman Act of 1938, and the Celler–Kefauver Act of 1950.

The ascendant Chicago School of the 1960s and 1970s threw down the gauntlet to the Brandeisian tendency of U.S. antitrust law. In an early mission statement, 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," the latter being an interpretation of the Brandeis School. Chicagoans argued that antitrust law should be concerned solely with economic efficiency and consumer welfare. "Bigness" was no longer necessarily a curse, but often the product of superior efficiency. Chicago criticized Brandeis's "sympathy for small, perhaps inefficient, traders who might go under in fully competitive markets." Preserving a level playing field meant stifling efficiency to enable market participation by the mediocre.

Beginning in 1977–1978, 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.) In 1979, citing Bork, the Court declared that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" Over time, the maxim that antitrust law should protect "competition rather than competitors" became canonical. 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 vs. 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 historical contest between the Brandeisian and Chicago School orders.

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 George Washington University law professor Jeffrey Rosen observed in a June 2016 article in *The Atlantic*, "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." Brandeis styled himself a Jeffersonian and his ideology resonated with the Jeffersonian preference for small-scale yeomanry and localized political organization.

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 of small-scale government and industrial production. 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 understood unfettered corporate power as a threat to personal liberty.

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 they were superintended by a strong federal government. Roosevelt's affinity for large-scale government and business earned him the epithet of "socialist."

That charge was hyperbolic, but not directionally implausible. In the late 19th and early 20th 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. 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 they will be collectively owned monopolies, for the good of the race, or whether they will be privately owned for the power, pleasure and glory of the Morgans, Rockefellers, Guggenheims, and Carnegies.

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. 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.

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, which encouraged a centralization of both governmental and industrial power. 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. From 1935 until the beginning of the war, the New Deal administration followed a policy of aggressively Brandeisian antitrust enforcement. Then, facing a need to mobilize big business for the war effort, the administration abruptly shifted course and embraced a "business commonwealth" model of partnership between big government and big business.

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 Act of 1950. Here again, the ideology of the anti-monopoly movement was ambiguous in conventional left/right terms. The anti-monopolist Sen. Estes Kefauver (D, TN) 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. 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." 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. 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. 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.

THE SHIFTING MEANING OF "MONOPOLY"

The ideological valence of the anti-monopoly 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 or shrewd tactics? If so, the law's anti-monopoly 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 anti-monopoly principle codes as "deregulatory" and "free market." Both of these senses of "monopoly" have been used historically, and their contemporary manifestations remain tangled.

Throughout much of the Anglo-American anti-monopoly tradition, "monopoly" primarily denoted a governmental grant of an exclusive privilege—a "letters patent" in the sense of the classic common law case. Until the late 19th century, the American anti-monopoly tradition was concerned primarily with governmental cronyism and exclusive privilege. 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 U.S. Supreme Court held the Sherman Act inapplicable to anticompetitive structures created by state regulation. *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. Just as the post-1937 constitutional dispensation would avoid second-guessing state regulatory judgments in favor of judicially preferred economic theories, so too the courts would reject 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* stood the meaning of "monopoly" on its head. Whereas the primary meaning of "monopoly" in the Anglo-American tradition had been a governmental grant of exclusive 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 anti-monopoly 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. In the push and pull over the doctrine's boundaries, it has largely been advocates of the Chicago School's consumer welfare approach who have argued for narrowing state-action immunity on the view that states systematically distort competitive processes for the benefit of rent-seekers. This simultaneously pro-antitrust and deregulatory perspective tracks that strand of the anti-monopoly tradition accusing the government as culprit.

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 neo-classical 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.

If regulation and 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 only police 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 the result of some seen or unseen governmental distortion. In this latter view, when what at first blush may seem to be purely private monopoly power persists over time, there must be some underlying governmental distortion accounting for it. Then, this argument goes, 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 1983 consent decree breaking up AT&T. How did the largest anti-monopoly corporate breakup 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. 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. Suspecting government regulation as the deep source of AT&T's 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. That Big Tech tends to be associated politically with the Democratic Party only furthers these perceptions. 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. 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.

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

A final reason that the politics of antitrust sometimes confound the conventional left/right divide 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. The 51st Congress that passed the Sherman Act was dominated by industrial magnates who wanted to avert more radical reforms. Speaking on the Senate floor in 1890, Sen. John Sherman (R, OH) 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." 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." Notably, he did not share the public's concern nor attribute such a concern to Congress. Similarly, Theodore Roosevelt was relatively unconcerned with the trusts personally, but "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."

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.

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. *R*