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THE POLITICAL ECONOMY OF THE DECLINE OF  
ANTITRUST ENFORCEMENT IN THE UNITED STATES

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### **ABSTRACT**

Antitrust enforcement in the United States has declined since the 1960s. Building on several new datasets, we argue that this decline did not reflect a popular demand for weaker enforcement or any other kind of democratic sanction. The decline was engineered by unelected regulators and judges who, with a few exceptions, did not express skepticism about antitrust law in confirmation hearings. We find little evidence that academic ideas played an important role in the decline of antitrust enforcement except where they coincided with the interests of big business, which appears to have exercised influence behind the scenes.

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## Introduction

According to a familiar narrative, the demise of antitrust enforcement in the United States was caused by the spreading of the Chicago School<sup>2</sup> approach to antitrust.<sup>3</sup> In the late 1960s and 1970s, economists and law professors affiliated with or trained at the University of Chicago challenged U.S. antitrust law by arguing that the antitrust doctrine prevailing at the time was incoherent and harmful to competitive markets. These scholars argued that antitrust should be based on economic principles of price theory and industrial organization, with emphasis on maximizing efficiency or consumer welfare. Drawing on those principles, they argued that antitrust law and enforcement should be narrowed. These ideas found receptive ears in different administrations and in the U.S. judiciary, which (with exceptions to be discussed) significantly reduced antitrust enforcement.

We will call this theory the “enlightened technocratic narrative” because it claims that the ideas of experts were the primary drivers that influenced law and public policy. The major evidence for this theory is that Chicago-School ideas (and accompanying citations) made their way into supreme court opinions, lower court opinions, and various guidance documents issued by regulators, and that indeed the law and enforcement priorities moved radically in the direction of Chicago views in the decades following their publication.

However, this narrative raises several questions. First, the stated objective of the Chicago School approach was to improve antitrust enforcement and increase market competition by focusing antitrust policy on the most serious violations (for example, price-fixing), while limiting its impact on other types of commercial behavior that could be understood as pro-competitive (for example, vertical restraints). Yet the evidence indicates that market competition declined and

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<sup>2</sup>We adopt here the commonly-used term “Chicago School” even if it is a bit misleading. Members of the Chicago School held different views on many issues (see Anu Bradford, Adam S. Chilton, and Filippo Lancieri, “The Chicago School’s Limited Influence on International Antitrust,” *The University of Chicago Law Review* 87, no. 2 (2020): 297–330.) and quite a few scholars associated with the “Harvard School” expressed similar skepticism toward antitrust enforcement, see William E. Kovacic, “The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,” *Colum. Bus. L. Rev.*, 2007, 1.; William E. Kovacic, “The Chicago Obsession in the Interpretation of US Antitrust History,” *The University of Chicago Law Review* 87, no. 2 (2020): 459–94. Some scholars think that the Harvard School exercised more influence than the Chicago School; others that the Schools more or less converged and reinforced each other. See Daniel A. Crane, “A Premature Postmortem on the Chicago School of Antitrust,” *Business History Review* 93, no. 4 (2019): 759–76.

<sup>3</sup> See, for example, Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change* (UNC Press Books, 1991)., Lina Khan, “Amazon’s Antitrust Paradox,” *The Yale Law Journal* 126, no. 3 (2017): 710–805., Francis Fukuyama, *Liberalism and Its Discontents* (Profile Books, 2022). Binyamin Appelbaum, *The Economists’ Hour: False Prophets, Free Markets, and the Fracture of Society* (Hachette UK, 2019).

markups increased during the era of Chicago-School ascendancy. Second, the Chicago School approach was almost immediately challenged by economists who rejected its simple price-theoretical approach—many drawing on the burgeoning fields of game theory and information economics.<sup>4</sup> By the 1980s and 1990s, the “post-Chicago” approach had largely overtaken the earlier Chicago view in economics departments and law schools. If the enlightened technocratic story were to be believed, the post-Chicago view would have displaced the Chicago view in law and policy, but it has not, except on the margins. Third, the enlightened technocrat narrative does not explain (or demonstrate) causation between the emergence of the ideas and the implementation of policy. Indeed, it flies in the face of another contribution of the University of Chicago: public choice theory. George Stigler, an exponent of the Chicago School, famously affirmed that “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit”.<sup>5</sup> Yet the technocratic narrative assumes exactly the opposite—that an antitrust law that benefited inefficient producers was replaced by an antitrust law that advanced the public interest.

In this paper, we focus on the political economy of the decline of antitrust enforcement between the 1950s and today. After having established in Part I the existence of this decline, in the rest of the paper we rely on several new datasets to better identify the forces that caused it. We start, in Part II, by establishing that the decline in enforcement was not driven by voters’ preferences.<sup>6</sup> Our conclusion is based on an examination of polling data, presidential speeches, and related sources.

In the U.S. system of democracy, elected officials are not required to follow the polls; they may use their discretion in determining policy and then take their chances during elections. The president also appoints powerful regulators with the consent of the senate, and those regulators too enjoy significant policy discretion. In Part III, we consider these more complex forms of public accountability. We start by looking at instruments employed by elected officials—the passage of new laws and the enactment of Presidential Executive Orders—and then look at regulations,

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<sup>4</sup> Herbert Hovenkamp and Fiona Scott Morton, “Framing the Chicago School of Antitrust Analysis,” *U. Pa. L. Rev.* 168 (2019): 184 Steven C. Salop, “Invigorating Vertical Merger Enforcement,” *The Yale Law Journal*, 2018, 1962–94.

<sup>5</sup> George J. Stigler, “The Theory of Economic Regulation,” *The Bell Journal of Economics and Management Science*, 1971, 3–21. at 3.

<sup>6</sup> Paul Tucker, *Unelected Power* (Princeton University Press, 2018) also raises this point. We test this hypothesis by following the framework used by Martin Gilens and Benjamin I. Page, “Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens,” *Perspectives on Politics* 12, no. 03 (September 2014): 564–81, <https://doi.org/10.1017/S1537592714001595>.

nomination hearings, enforcement decisions, and judicial decisions. We find that elected officials have almost never used their powers in an overt way to restrict antitrust law—either directly (by passing laws or issuing executive orders) or indirectly (by nominating or voting to confirm judges and regulators who during confirmation hearings publicly advocated restriction of antitrust enforcement).

In Part IV, we show that nearly all key decisions that reshaped antitrust policy were made by regulators and judges with relatively little democratic accountability.

If the decline of antitrust law was due to the independent decisions of regulators and judges rather than elected officials, the question arises, who drove that decision-making? According to the “enlightened technocrat story,” the answer is no one: the officials simply enacted the best policy they could, based on the best thinking of the time, shielded from irrational, uninformed, or uninterested voters. Indeed, many defenders of modern, Chicago-inflected antitrust analysis make just this argument by shoving voters’ skepticism of big business into the big tent of “populism”.<sup>7</sup>

In Part V, we argue that this view is too hasty. There is no evidence that the relaxation of antitrust enforcement benefited the economy, while there is ample evidence big business benefited from it. That outcome complicates simple assertions about the merits of superior expertise when it is exercised by people with no accountability to those most affected by policy decisions. And so evidence as well as theory suggest that the answer to the key question of public choice—*cui bono?*—is also the most obvious answer—big business. We bolster this hypothesis by examining a range of historical factors from the 1960s and 1970s that explain why big business would turn its attention to antitrust enforcement and how business obtained advantages in the public arena, allowing it to push forward an anti-antitrust agenda. Chicago School thinking had originated well before this era, but in the 1970s businesses ramped up its promotion. The theories at the time were plausible enough to appeal to policy elites and, because of their simplicity, they enticed regulators and judges or the lawyers who were later appointed regulators and judges. However, the major reason behind why the Chicago School prevailed and its dominance persisted for forty years is that business coopted and promoted Chicago school thinking as a useful tool to advance its interest.

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<sup>7</sup> See, e.g., Crane, “A Premature Postmortem on the Chicago School of Antitrust.”, Herbert Hovenkamp, “Whatever Did Happen to the Antitrust Movement,” *Notre Dame L. Rev.* 94 (2018): 583. Carl Shapiro, “Antitrust in a Time of Populism,” *International Journal of Industrial Organization* 61 (2018): 714–48..

## Part I: The Decline of U.S. Antitrust Enforcement

U.S. civil antitrust enforcement has significantly weakened over the past decades. Vivek Ghosal studied Department of Justice enforcement actions (cases filed in court) between 1958 and 2002,<sup>8</sup> and identifies several structural breaks in enforcement dynamics taking place throughout the 1970s, all in the direction of weaker enforcement. Ghosal defines a structural break as the Quandt Likelihood Ratio statistic that enables the separation, with a 15% trimming threshold, between two parts of the sample with different means. The estimated breaks took place in: (i) 1972 for total civil cases; (ii) 1974 for Clayton Act section 7 merger cases as a proportion of total US mergers; (iii) 1981 for Sherman Act Section 1 cases; and (iv) 1972 for Sherman Act Section 2 cases.

The exception to these findings of dwindling DOJ civil antitrust litigation is Ghosal's findings of a 1979 positive structural break towards increased enforcement in criminal cases. Yet, while relevant, the data on civil and criminal investigations are not really comparable across time: cartelization only became a felony in 1974, with the associated creation of a corporate leniency program in 1978 (though its initial effectiveness is contestable).<sup>9</sup>

Other studies of the DOJ and FTC caseloads come to similar conclusions. Gallo et al. find that although total DOJ antitrust litigation rose from an average of 52 cases a year between 1955-1979 to an average of 77 per year between 1980 and 1997, the cases' focus changed significantly. In the first period the DOJ brought an average of 21 cases per year against Fortune 500 companies; this number drops to 6 per year after the 1980s. Similarly, the number of civil cases drops from an average of 31 a year from 1955 to 1979 to 16 between 1980 and 1997, while criminal litigation rises from an average 21 cases per year to 61 per year.<sup>10</sup> Even more noteworthy, between 1955 and 1979, the DOJ brought at least 221 cases for monopolization, exclusionary practice, and vertical restrictions, while from 1980 until 1997, this number fell to 22.<sup>11</sup> Starting in mid-1970s

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<sup>8</sup> Vivek Ghosal, "Regime Shift in Antitrust Laws, Economics, and Enforcement," *Journal of Competition Law and Economics* 7, no. 4 (2011): 733-74.

<sup>9</sup> Ghosal. at 770. While our focus in this article is on civil antitrust cases that can impact market structure, a shift in policy towards the more aggressive prosecution of price-fixing is relevant. Virtually no one defends cartelization, and so it seems natural that as other forms of antitrust enforcement diminished, enforcement resources would be shifted to criminal investigations.

<sup>10</sup> Joseph C. Gallo et al., "Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study," *Review of Industrial Organization*, 2000, 75-133. at 78-79; 90-91.

<sup>11</sup> Gallo et al. at 100.

and early 1980s the DOJ shifted from enforcing antitrust law against large corporations to focusing on price fixing against smaller defendants. Babina et al., also use the Commerce Clearing House Trade Regulation Reports to construct a series of DOJ antitrust lawsuits beginning in the 1980s. They find that cases steadily dropped from approximately 100 per year in the early 1980s to slightly above 25 in 2018.<sup>12</sup> Short finds a similar break in DOJ challenges against large mergers that starts in 1981.<sup>13</sup>

There are fewer studies of FTC enforcement, possibly because of a lack of reliable data. Still, what is available paints a similar picture. An early analysis of FTC complaints by Richard Posner indicated that the FTC started an average of 15 restraint-of-trade cases per year between 1950 and 1969, a number that rises to an impressive 61 once Robinson-Patman claims are included.<sup>14</sup> Complementary data compiled by Kovacic indicates that FTC enforcement actions (excluding horizontal restraints) drop significantly after the 1980s. The average number of FTC complaints falls from an average of 18 a year between 1961 and 1979 to 9 a year between 1980 and 2003.<sup>15</sup> This drop, however, masks significant heterogeneity. As is well known, FTC enforcement of Robinson-Patman cases disappears after the 1970s, decreasing from an average of 19 complaints a year between 1961 and 1980 (with the majority in the 1960s) to only 0.3 complaints a year between 1981 and 2000. A less stark but similar trend exists for vertical restraints cases, which drop from an average of 3.5 per year between 1961 and 1980 to 0.85 per year between 1981 and 2000.<sup>16</sup> The FTC rarely leads in challenging monopolization—the bulk of that work rests with the DOJ. Still, the average number of complaints filed by the agency falls from a low 0.7 per year between 1961 and 1980 to 0.3 per year between 1981 and 2000.<sup>17</sup> The only increase in enforcement takes place against horizontal restraints among competitors, which rise from 1.9 per year from 1961-1980 to 7.1 from 1981-2000.<sup>18</sup> It is worth noting that these numbers likely

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<sup>12</sup> Tania Babina et al., “Does Antitrust Enforcement Affect Industry Dynamics? Evidence from 40 Years of U.S. Department of Justice Lawsuits,” *Working Paper (Mimeo)*, 2022. at 25.

<sup>13</sup> Nicholas Short, “Antitrust Deregulation and the Politics of the American Knowledge Economy” (Working Paper, 2021), <https://scholar.harvard.edu/files/nickshort/files/main2.pdf>.

<sup>14</sup> Richard A. Posner, “A Statistical Study of Antitrust Enforcement,” *The Journal of Law and Economics* 13, no. 2 (1970): 365–419. at 369-70.

<sup>15</sup> William E. Kovacic, “The Modern Evolution of US Competition Policy Enforcement Norms,” *Antitrust LJ* 71 (2003): 377. at 478.

<sup>16</sup> Kovacic. at 460.

<sup>17</sup> Kovacic. at 449

<sup>18</sup> Kovacic. at 426. Kovacic defines horizontal restraints as “direct, formal coordination of output or other dimensions of rivalry” and “collectively or unilaterally adopted practices to facilitate coordination”.

understate the degree of changes in enforcement between the 1950s and today, as they rely on the raw number of cases and not the number of cases divided by the size of the economy—yet, real gross domestic product jumped from USD 3.3 trillion in 1960 to USD 19.1 trillion in 2021.<sup>19</sup>

More recent data further corroborate this decline in enforcement. The fraction of mergers that regulators challenge has dropped dramatically in recent years and government non-merger civil complaints are also down, even when compared to the already low standards of the 1990s.<sup>20</sup> Antitrust authorities are also facing important resource constraints. The antitrust division of the Department of Justice has approximately 25% less full-time staff today than it did a decade ago,<sup>21</sup> while the staff of the Federal Trade Commission has dropped by around 40% since a peak in the late 1970s.<sup>22</sup> U.S. GDP grew approximately 40% since 2010, but the budget of the FTC and the DOJ Antitrust Division has remained roughly constant,<sup>23</sup> leading to warnings that budget shortfalls may jeopardize enforcement actions.<sup>24</sup> A comparison with activities of European antitrust regulators shows how, in the past decades, antimonopoly enforcement has significantly weakened in the U.S.<sup>25</sup>

In sum, no matter where one looks, the overall downward trend in public civil enforcement of the antitrust laws is unmistakable, in particular when targeting dominant companies that monopolize or attempt to monopolize markets. With some exceptions, government enforcement of the antitrust laws now boils down to enforcement against cartels and mergers that create (near) monopolies.

This decrease in enforcement is not restricted to the public sector. The number of private antitrust claims has dropped significantly from a peak in the 1970s and early 1980s—private case filings in federal courts that reached an average of 1500 a year during that period diminished by

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<sup>19</sup> In chained 2012 dollars - See <https://fred.stlouisfed.org/series/GDPC1>.

<sup>20</sup> See Michael Kades, “The State of US Federal Antitrust Enforcement,” *Washington: Washington Center for Equitable Growth*, 2019, <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true>.

<sup>21</sup> Kades.

<sup>22</sup> Reza Rajabiun, “Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States,” *Journal of Competition Law and Economics* 8, no. 1 (2012): 187–230. at 208.

<sup>23</sup> Kades, “The State of US Federal Antitrust Enforcement.”

<sup>24</sup> Alex Kantrowitz, “‘A Breathtaking Constraint on Capacity’: Internal FTC Memo Announces Major Cuts Ahead of Tech Giant Action,” n.d., <https://bigtechnology.substack.com/p/a-breathtaking-constraint-on-capacity>.

<sup>25</sup> Germán Gutiérrez and Thomas Philippon, “How EU Markets Became More Competitive than US Markets: A Study of Institutional Drift,” 2018.



66%, to a little more than 500 filings a year by 2010.<sup>26</sup> This in part reflects supreme court decisions like the 1977 Illinois Brick ruling that limited the parties that qualify as potential plaintiffs in antitrust lawsuits.<sup>27</sup> These aggregate data also mask the real extent of the decline. First, this analysis also does not consider the significant expansion of the U.S. economy over the period: cases should have risen for enforcement to remain steady. Second, the data hide a similarly important shift within enforcement patterns, as cases against price-fixing arrangements, which represented only 10% of litigation early in the century, rose to almost 50% of all filings later-on.<sup>28</sup> Third, the decline in antitrust enforcement took place at a time when antitrust enforcement should have increased to address the impact of deregulation on the economy. Deregulation was supposed to require more antitrust enforcement as price discipline was displaced from government oversight to market competition.

The data thus confirm the conventional wisdom among scholars and others in the antitrust community that in the middle of the 1970s antitrust enforcement started to decline, both in absolute terms and relative to the size of the economy. This decline is particularly surprising since the deregulation that started in the late 1970s demanded higher, not lower, antitrust enforcement.

## Part II. Popular Demand for Antitrust Enforcement

In an influential article, Gilens and Page argue that political outcomes in the United States do not track the preferences of the median voter, but instead those of economic elites and special interest groups.<sup>29</sup> We follow their approach but focus on antitrust enforcement rather than general political outcomes, and give more consideration to the institutional machinery that translates preferences into outcomes.

This Part starts the analysis by examining the relationship between public opinion and antitrust enforcement. We start by analyzing two proxies for this popular opinion: nationally representative polls (Part II.A.) and the electoral promises of political parties during presidential campaigns (Part II.B).

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<sup>26</sup> Rajabiun, “Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States.”

<sup>27</sup> See Spencer Smith, “The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment,” *Journal of Competition Law & Economics*, 2021.

<sup>28</sup> Rajabiun, “Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States.” at 215-16.

<sup>29</sup> Gilens and Page, “Testing Theories of American Politics.”

## Part II.A. Opinion Polls

A natural first step to gauge popular interest is to look at public opinion polls and other representative national surveys. We conducted an extensive search of all the popular surveys available for the period 1950- 2020,<sup>30</sup> but found no single survey that consistently asked a representative sample of Americans how they felt about antitrust law and enforcement over time. We found, however, several surveys about Americans’ attitudes towards big business, which were asked consistently over time, and several ad hoc surveys on antitrust in general or specific antitrust issues, which were asked at various points in time.

We start with a Gallup poll on the confidence towards big business, which was asked consistently between 1973 and 2020.<sup>31</sup> Gallup asked the question: “Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one -- a great deal, quite a lot, some, very little, none?”

Figure 1 shows the percentage of Americans who said that they trust U.S. big business a “great deal” or “quite a lot”. As can be seen clearly, the percentage of people trusting big business has dropped steadily over time. On the other hand, the percentage of Americans who answered “very little” or “none” has climbed from 24% in 1973 to almost 40% in 2021. To the extent the demand for antitrust enforcement comes from a mistrust towards big business, this demand has increased, not decreased, since 1973.

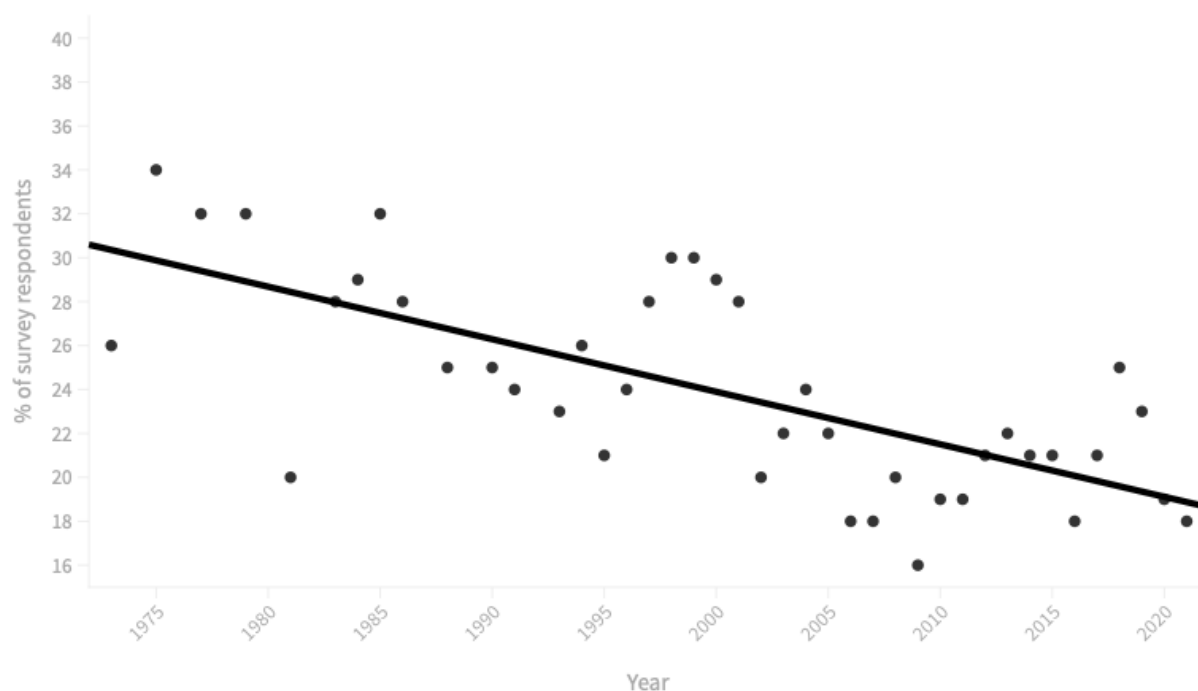
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<sup>30</sup> To do this, we relied primarily on the iPoll database collected by the Roper Center for Public Opinion Research at Cornell University—which collects and provides a searchable database of public opinion data for the U.S. We then complemented these searches with other independent quests, including by contacting some pollsters.

<sup>31</sup> Gallup conducted the survey every other year between 1973-90, and then annually from 1990.

**Figure 1: Public Confidence in Big Business (1973 to 2021)**

Level of confidence ● High to moderate

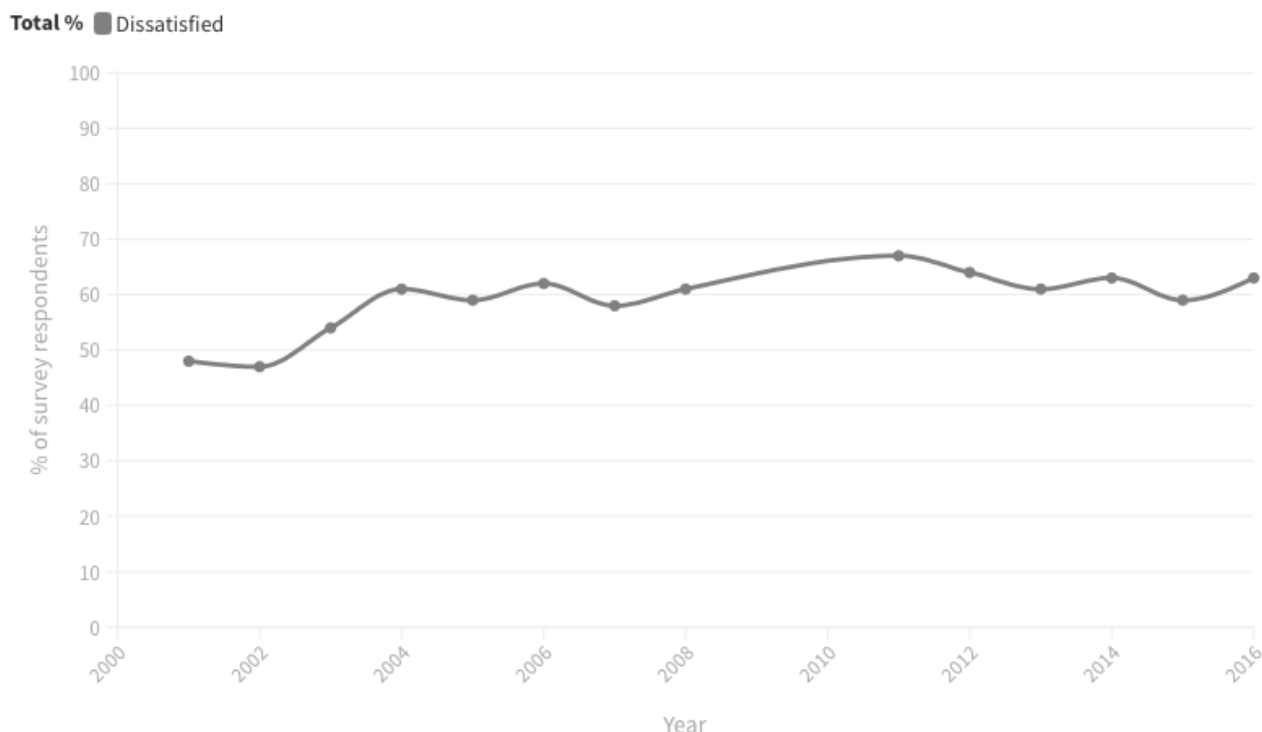


Source: [Gallup - Confidence in Institutions Index](#)

Since the year 2000, Gallup has also asked whether Americans are satisfied with “the size and influence of major corporations.”<sup>32</sup> Figure 2 plots the percentage of people who are dissatisfied (somewhat or very), which jumps from 50% in 2001 to almost two-third by 2016. On the other hand, the percentage that is satisfied (very or somewhat) drops from around 50% to a bit more than 30% by 2016.

<sup>32</sup> The question is: “Next, we’d like to know how you feel about the state of the nation in each of the following areas. For each one, please say whether you are -- very satisfied, somewhat satisfied, somewhat dissatisfied or very dissatisfied. If you don’t have enough information about a particular subject to rate it, just say so. How about -- the size and influence of major corporations?.”

**Figure 2: Percentage of Americans Dissatisfied with Size and Influence of Major Corporations (2001 to 2016)**



Source: Gallup Social Series: Mood of the Nation

While antitrust policy has continued a steady shift towards weaker enforcement, the period the sharpest changes occurred between the end of the 1960s and the late-1980s. Can polls provide any evidence of changes in attitudes towards antitrust during this period? In 1968 and 1969, General Electric asked U.S. Citizens how important were antitrust activities and legislation to the maintenance of their way of life.<sup>33</sup> In 1968, 66% of the respondents answered “important or some importance”, versus 15% who said not important. The numbers grow to 71% of important versus 14% of not important in 1969.

During the 1970s, the major concern was inflation, so the only questions that asked about antitrust connected it to the fight against inflation. In 1974 a Roper poll asked: “President Ford in an address to Congress in early October (1974) made ten proposals for dealing with inflation. Here is a list of those proposals. Would you go down that list and for each one tell me whether you are in favor of or opposed to it, or are you uncertain about it?... Increase penalties for antitrust

<sup>33</sup> The question was: “As for their effect on your own way of life in the next few years, say within 10 years, how would you rate the importance of each of the following topics...very important, of some importance, or not particularly important?... Anti-trust activities and legislation.”

violations.” Sixty percent of the respondents were in favor of increasing antitrust penalties, while only 6% were against doing so.

In 1980, Cambridge Reports a pollster asked the question: “Here is a list of possible goals of government regulation of business. For each one, please tell me how important a goal it is to you—is it not important at all, somewhat important, important, very important or very, very important?) ... Promote competition.” Sixty-four percent responded important, very important, or very, very important. Only 12% said not important at all.

A 1982 General Electric question is even more specific: “I would like to get your opinion on several areas of important government activities. As I read each one, please tell me if you would like the government to do more, do less, or do about the same as they have been on ... controlling the activities of large companies.” Seventy-five percent of respondents wanted the government to do more or the same, versus only 24% that wanted the government to do less. Later, in 2000, a Harris Interactive poll asked: “As corporations merge and grow larger, should the government respond with tougher enforcement of antitrust measures, or not?” and 58% answered affirmatively.

In sum, these surveys provide no evidence that the general support for antitrust enforcement declined in the United States between 1965 and 1985. On the contrary, throughout this period, the majority of Americans were solidly in favor of strong antitrust enforcement.

To be comprehensive, in Figure 3 we report all the answers to all question in the ROPER dataset that contain the word antitrust.<sup>34</sup> These include some questions in the 1980s where respondents are asked whether American antitrust should be relaxed to give American firms the same possibility of coordination with their competitors enjoyed by foreign firms. Not surprisingly, there is less support for antitrust in these cases.<sup>35</sup> Between 1998 and 2000 there are also many questions about the specifics of the Microsoft antitrust case, including preferred remedies. Figure 3, which plots the average answers to all these questions, shows that even if we were to treat all

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<sup>34</sup> With permutations, such as anti-trust and anti trust.

<sup>35</sup> One question asked by Cambridge Reports was: “22. In many countries, big companies are allowed to work out with each other how much they will produce, what price they will charge, and how they will meet consumer demand. In the United States, our antitrust laws prohibit companies in the same industry from getting together to discuss these kinds of things. Do you think it does more good than harm or more harm than good to make it illegal for big companies in the same industry to get together for these purposes?”. Still, 38% of respondents saying that outlawing close cooperation between business did more good than harm, versus 37% who said more harm than good.

**Figure 3: Proportion of Public in Favor of Expanding Antitrust Enforcement (1949 to 2021)**



<sup>36</sup> See also Jacob Brown, Sophie Hill, and Nicholas Short, “Is Antitrust’s Consumer Welfare Standard Anti-Democratic?,” *Working Paper*, 2022, [https://scholar.harvard.edu/files/nickshort/files/article\\_-\\_is\\_antitrusts\\_consumer\\_welfare\\_standard\\_antidemocratic.pdf](https://scholar.harvard.edu/files/nickshort/files/article_-_is_antitrusts_consumer_welfare_standard_antidemocratic.pdf). at 8, surveying polls on mergers and concluding that “there is reason to believe public is generally skeptical about the consumer benefits that purportedly flow from mergers and acquisitions”.

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Americans agreed that “For the good of the country, many of our largest companies ought to be broken up into smaller companies.” By 1981, 53% did.

In sum, public opinion polling indicates that support for antitrust enforcement from the 1950s to the present has either remained stable or strengthened, while support for big business has declined.

## Part II.B Electoral Platforms

In this Part, we complement our previous assessment of poll data by examining whether a decline in public support for antitrust law can nonetheless be discerned in voting behavior. Our working assumption is that if the public supported less antitrust enforcement, then politicians running for election would have echoed this view.

To answer this question, we collected and analyzed public statements by candidates and elected officials from 1932 to 2021, including (i) all presidential inaugural addresses; (ii) all State of the Union speeches; and (iii) all presidential campaign platforms of both Democratic and Republican presidential nominees.

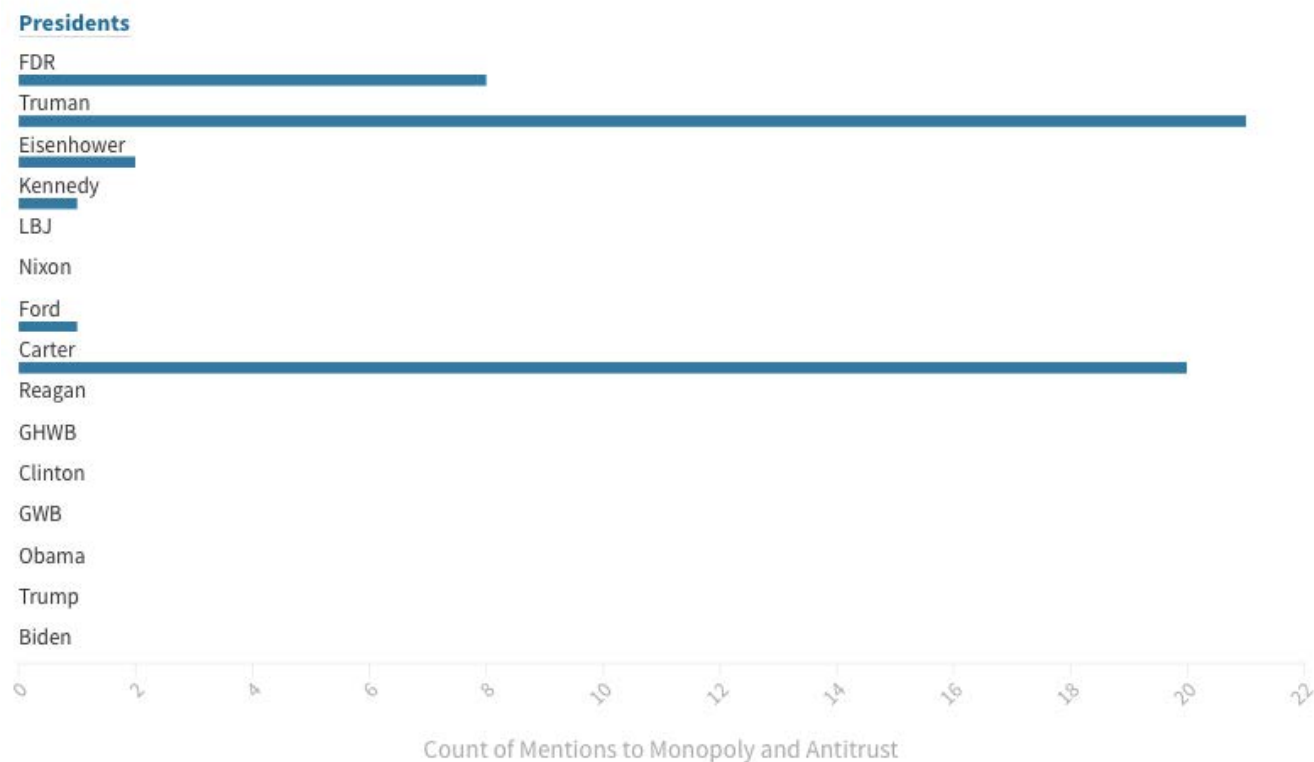
### Part II.B.1 Presidential Speeches

Figure 4 displays the frequency of the words “antitrust” and “monopoly” in presidential inaugural addresses and State of the Union speeches from 1932 to 2021.<sup>38</sup>

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<sup>38</sup> Antitrust includes both “antitrust” and “anti-trust”. Monopoly includes variants such as “monopoly”, “monopolies” and “monopolistic”. Some mentions to monopoly were removed when they did not relate to economic policies, such as “monopoly over violence”, etc. In addition, we also collected and analyzed the term “competition” and variants, but decided not to include it because it yields largely similar but noisier results, as many mentions to competition are unrelated to antitrust (international competition with the USSR, fair competition in international trade, etc.). Each time the term is mentioned we count as one.

**Figure 4: References to Monopoly and Antitrust in Inaugural and State of the Union Speeches - Per President (1932-2021)**



Source: [American Presidency Project at the University of California Santa Barbara](https://www.presidency.ucsb.edu/)

Antitrust and the fight against monopolies were politically salient topics until the Carter presidency in the late 1970s (the exception being Presidents Lyndon Johnson and Nixon). References to antitrust and monopoly disappear from public speeches from the 1980s onwards, when most of the weakening of antitrust enforcement takes place.

Before the 1980s, all references to antitrust law were positive, and included promises of increased enforcement, and enthusiasm for antitrust came from both parties. For example, in his 1944 State of the Union Address, FDR promoted “[t]he right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad.”<sup>39</sup> In his 1948 State of the Union Address, President Truman affirmed that “[c]ompetition is seriously limited today in many industries by the concentration of

<sup>39</sup> Franklin Roosevelt, “State of the Union Message to Congress,” January 1944, <https://www.presidency.ucsb.edu/documents/state-the-union-message-congress>.



economic power and other elements of monopoly. The appropriation of sufficient funds to permit proper enforcement of the present antitrust laws is essential. Beyond that we should go on to strengthen our legislation to protect competition.”<sup>40</sup> In 1961, President Eisenhower boasted how a “major factor in strengthening our competitive enterprise system, and promoting economic growth, has been the vigorous enforcement of antitrust laws over the last eight years and a continuing effort to reduce artificial restraints on competition and trade and enhance our economic liberties.”<sup>41</sup> In 1962, President Kennedy stated that “[t]his administration has helped keep our economy competitive by widening the access of small business to credit and Government contracts, and by stepping up the drive against monopoly, price-fixing, and racketeering.”<sup>42</sup> In 1976, President Ford stressed the need to foster competition and lower prices in sectors such as airlines, trucking, railroad and financial institutions, affirming that “[t]his administration, in addition, will strictly enforce the Federal antitrust laws for the very same purposes.”<sup>43</sup> Finally, President Carter stated in 1978 that “[o]ur Nation's anti-trust laws must be vigorously enforced”,<sup>44</sup> and again in 1979 that “[f]ree enterprise and competition, protected by the antitrust laws, are the central organizing principles of our economic system.... These [historical] fines and sentences [of the past year] are significantly larger than in past years, and are consistent with my strong commitment to vigorous antitrust enforcement....”<sup>45</sup>

In contrast, the silence of the post-1980 presidents gave no indication of their position, positive or negative, on antitrust enforcement.

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<sup>40</sup> Harry Truman, “Annual Message to the Congress on the State of the Union,” January 1948, <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-14>.

<sup>41</sup> Dwight Eisenhower, “Annual Message to the Congress on the State of the Union,” January 1961, <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-7>.

<sup>42</sup> John F. Kennedy, “Annual Message to the Congress on the State of the Union,” January 1962, <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-4>.

<sup>43</sup> Gerald Ford, “Address Before a Joint Session of the Congress Reporting on the State of the Union,” January 1976, <https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-reporting-the-state-the-union>.

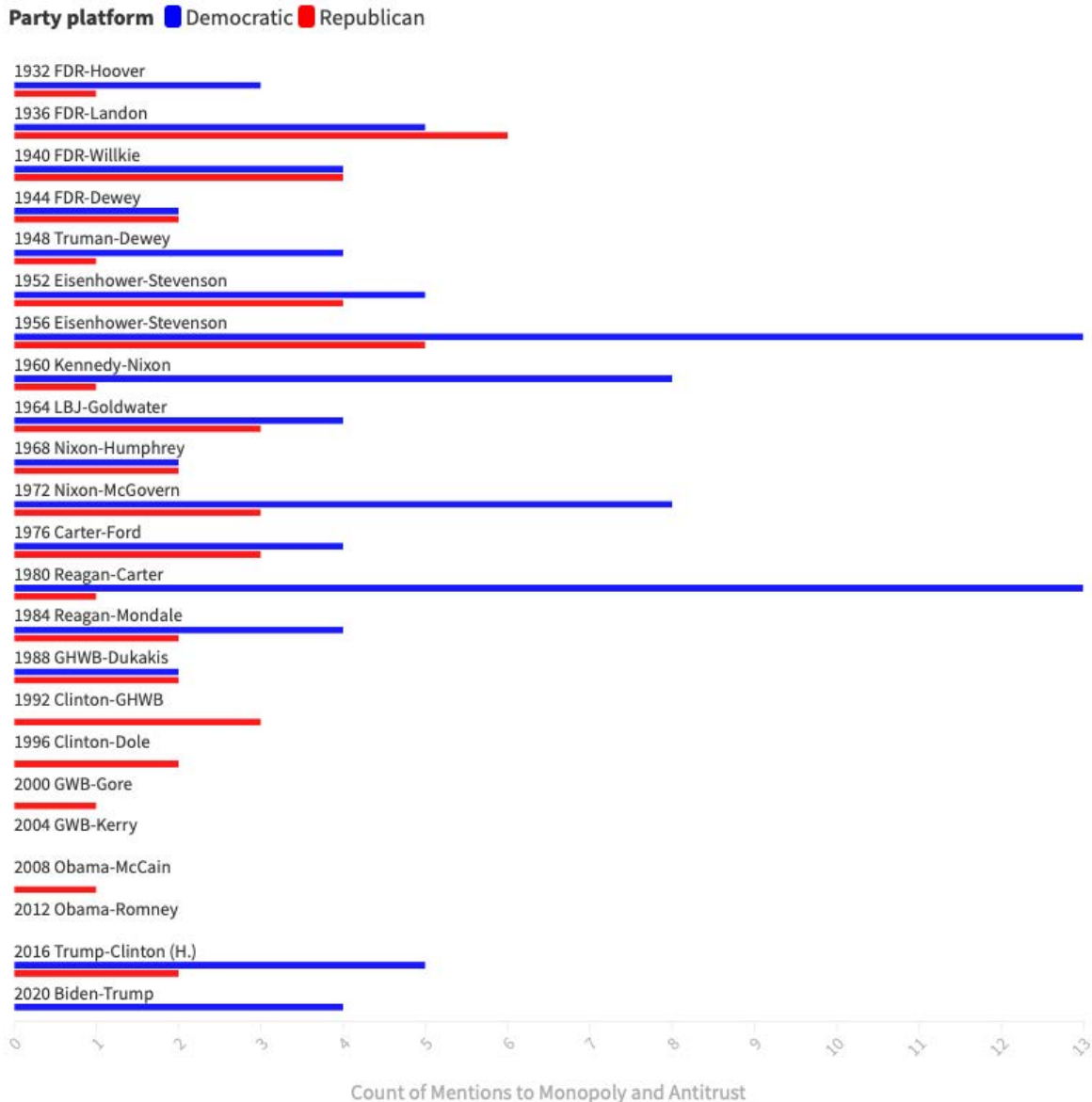
<sup>44</sup> Jimmy Carter, “The State of the Union Annual Message to the Congress,” January 1978, <https://www.presidency.ucsb.edu/documents/the-state-the-union-annual-message-the-congress-2>.

<sup>45</sup> Jimmy Carter, “The State of the Union Annual Message to the Congress,” January 1979, <https://www.presidency.ucsb.edu/documents/the-state-the-union-annual-message-the-congress-1>.

## Part II.B.2 Party Platforms

We also analyzed all pre-election party platforms for the Republican and Democratic candidates from 1932 to 2021. Their references to monopoly and antitrust are depicted in Figure 5 below.<sup>46</sup>

**Figure 5: References to Monopoly and Antitrust - Party Platforms per Election (1932-2020)**



Source: The American Presidency Project of The University of California Santa Barbara

<sup>46</sup> We employed the same methodology as described in footnote 38 above.

The figure shows that from FDR until Carter, the winning platform mentioned antitrust and monopoly an average of 3.7 times. After 1980, this number falls to an average 0.8 mentions. All references to antitrust are positive—that is, they are pro-enforcement.<sup>47</sup> For example, the 1964 Democratic Platform said that during LBJ’s presidency “[t]he Federal Trade Commission has stepped up its activities to promote free and fair competition in business, and to safeguard the consuming public against both monopolistic and deceptive practices. The reorganized Antitrust Division of the Department of Justice has directed special emphasis to price fixing, particularly on consumer products, by large companies who distribute through small companies. These include eyeglasses, salad oil, flour, cosmetics, swimsuits, bread, milk, and even sneakers.”<sup>48</sup> Both the 1968 and the 1972 Republican Presidential Platforms promised vigorous antitrust enforcement, with the 1972 platform stating that “[w]e will press on for greater competition in our economy. The energetic antitrust program of the past four years demonstrates our commitment to free competition as our basic policy. The Antitrust Division has moved decisively to invalidate those ‘conglomerate’ mergers which stifle competition and discourage economic concentration. The 87 antitrust cases filed in the fiscal year 1972 broke the previous one-year record of more than a decade ago, during another Republican Administration.”<sup>49</sup>

This pattern of positive references to antitrust enforcement continues even after the 1980s. Faced with rising inflation and a stagnant economy, Carter’s losing agenda focused on economic fairness, with strong antitrust enforcement earning a dedicated page in his 126-page program. Yet, while Reagan ran on a small government platform, one of his priorities was the promotion of small businesses. The Republican platform did not attack antitrust enforcement; on the contrary, the platform argued that deregulation of sectors such as transportation would require vigorous enforcement of antitrust laws: “[c]onsequently, the role of government in transportation must be redefined. The forces of the free market must be brought to bear to promote competition, reduce

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<sup>47</sup> With two minor exceptions discussed below.

<sup>48</sup> Democratic party, “1964 Democratic Party Platform,” August 1964, <https://www.presidency.ucsb.edu/documents/1964-democratic-party-platform>.

<sup>49</sup> See Republican Party, “Republican Party Platform of 1972,” August 1972, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1972>. The 1968 Republican Platform stressed “A new Republican Administration will undertake an intensive program to aid small business, including economic incentives and technical assistance, with increased emphasis in rural and urban poverty areas. In addition to vigorous enforcement of the antitrust statutes, we pledge a thorough analysis of the structure and operation of these laws at home and abroad in the light of changes in the economy, in order to update our antitrust policy and enable it to serve us well in the future.” See Republican Party, “Republican Party Platform of 1968,” August 1968, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1968>.

costs, and improve the return on investment to stimulate capital formation in the private sector. The role of government must change from one of overbearing regulation to one of providing incentives for technological and innovative developments, while assuring through anti-trust enforcement that neither predatory competitive pricing nor price gouging of captive customers will occur;”<sup>50</sup> The 1988 Republican platform stated that “[w]e have been tough on white-collar crime, too. We have filed more criminal anti-trust cases than the previous Administration.”<sup>51</sup>

The only negative mentions of antitrust occur in the 1992 and 1996 Republican party platforms, both of which promised to repeal “outdated antitrust laws” which prevented mergers and cooperation in healthcare markets, something that would help bring costs down.<sup>52</sup> In both elections, the platform was rejected by the voters who preferred Bill Clinton, running on a Democratic platform that did not criticize antitrust.

In sum, the political platforms of winning Republicans and Democratic presidential candidates (and nearly all losing candidates) did not support a weakening of antitrust enforcement. Together with the polling data, we find no evidence of public support for a reduction in antitrust enforcement though the reduction of the saliency of antitrust after 1980 may indicate less public interest in the topic than before.

### Part III. Indirect Forms of Democratic Accountability

Even when candidates do not run on specific proposals, they may adopt them once in office in response to public pressure. Thus, the actions of elected officials may provide a clue to voter preferences. We assume that elected officials try to make popular choices in the most visible way while trying to make the unpopular ones in the least visible ways. This relies on the fact that politicians and other high-level officials have significant capacity to elevate the public profile of certain topics whenever they believe this is aligned with the overall interests of the public. The

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<sup>50</sup> Republican Party, “Republican Party Platform of 1980,” July 1980, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980>.

<sup>51</sup> Republican Party, “Republican Party Platform of 1988,” August 1988, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1988>.

<sup>52</sup> The 1992 Republican Party Platform stated that “We will modify outdated antitrust rules that prohibit hospitals from merging their resources to provide improved, cost-effective health care.”; the 1996 promised to “change anti-trust laws to let health care providers cooperate in holding down charges.” See Republican Party, “Republican Party Platform of 1992,” August 1992, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1992>. and Republican Party, “Republican Party Platform of 1996,” August 1996, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1996>.

opposite is also true—under our framework, decisions made in the shadows of public opinion are the least likely to reflect the interest of a majority of voters.

Following this rationale, we infer that the public supports antitrust enforcement when elected officials publicly advance antitrust enforcement in law and enforcement actions, and when they hide efforts to reduce antitrust enforcement—and vice versa. We start with legislation, which is highly salient except when choices are buried in omnibus or budgetary bills. We then discuss presidential actions, including nomination of high-level FTC and DOJ officials and of supreme court justices, where the nomination itself and hearings expose elected officials to public scrutiny, though they may not be held responsible for the policy and legal choices that the appointees eventually make.

### Part III.A. Legislation

During our sample period (1930-2021) Congress passed many antitrust laws, including: the Celler-Kefauver Act (1950); the Antitrust Procedures and Penalties (Tunney) Act (1974); the Consumer Goods Pricing Act (1975); the Hart-Scott-Rodino Antitrust Improvements Act (1976); the Federal Trade Commission Improvements Act (1980); the Foreign Trade Antitrust Improvement Act (1982); the International Antitrust Enforcement Assistance Act (1994); the updated amendments to the HSR of 2000; and the Antitrust Criminal Penalty Enhancement and Reform Act (2004), which was later extended by the repeal of sunset provisions in 2020.

Most of these statutes clearly expanded the scope of antitrust law and strengthened enforcement.<sup>53</sup> The Celler-Kefauver Act closed gaps in the Clayton Act's restrictions on mergers. The Consumer Goods Pricing Act repealed laws that allowed states to abrogate the per se prohibition on resale price maintenance. The Hart-Scott-Rodino Act strengthened merger enforcement by requiring large merging firms to give notice to the antitrust authorities and directing the antitrust authorities to review mergers ahead of their consummation. The Tunney Act strengthened judicial review of consent decrees and increased penalties for antitrust violation. The International Antitrust Enforcement Act facilitated cooperation between the U.S. and foreign antitrust authorities. Finally, the Antitrust Criminal Penalty Enhancement and Reform Act greatly

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<sup>53</sup> See Daniel A. Crane, "Antitrust Antitextualism," *Notre Dame Law Review* 96, no. 1 (2021): 1204.

increased criminal fines for corporations and prison sentences for individuals engaged in cartels as well as strengthened leniency programs to help detect violations.

Four of the statutes are more ambiguous or contain some anti-enforcement language but on balance either strengthened antitrust law or had little effect on it.<sup>54</sup> The final section of the Tunney Act of 1974 prevented the DOJ from directly requesting supreme court review of lower court rulings.<sup>55</sup> But the law also expedited proceedings at the district court level,<sup>56</sup> and thus it was felt that there was no longer need to empower the DOJ to seek immediate supreme court review.<sup>57</sup>

The Federal Trade Commission Improvements Act of 1980 trimmed the FTC's rulemaking power and clarified exemptions for insurance markets and agricultural cooperatives that had been enacted by the McCarran-Ferguson Act and the Capper-Volstead Act, respectively. However, the bulk of the Act was targeted at the FTC's consumer protection division, which earned expanded powers as a result of the Magnuson-Moss Warranty Act of 1975 (and a topic we do not study). As commentators at the time noted, "[t]he Commission's basic enforcement powers remain unchanged [after the Act]."<sup>58</sup>

The Foreign Trade Antitrust Improvement Act limited the rights of foreign victims of anticompetitive behavior to challenge that behavior in U.S. courts. This norm, however, only eliminated double enforcement, since American companies remained subject to the domestic law of the affected foreign states.<sup>59</sup> Moreover, Congress made clear in the FTAIA that foreign-oriented

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<sup>54</sup> A possibly more important exception to this pattern of increasing antitrust liability and enforcement was a series of early New Deal statutes, including the National Industrial Recovery Act of 1933, which gave the federal government power to authorize and regulate cartels. But this short-lived experiment was a response to an economic emergency, and placed cartelization under the authority of the government, and so was not really an exception to the overall trend toward limiting the power of private corporations to collude or monopolized markets on their own.

<sup>55</sup> The Expediting Act authorized the Department of Justice to appeal any antitrust case directly to the supreme court, which was required to take the case. It was widely used in the 1960's to expedite the enforcement of antitrust laws.

<sup>56</sup> House of Representatives, "H.R. Report 93-1463 on the Antitrust Procedures and Penalties Act," October 11, 1974, <https://www.justice.gov/sites/default/files/jmd/legacy/2013/10/23/houserept-93-1463-1974.pdf>. at 5. As the House Report Stated at the time: "Present relevant law has been criticized as obstructing rather than expediting the movement of antitrust cases from filing to trial. The bill is intended to eliminate potential and alleged clogs on antitrust litigation in this regard." House of Representatives. at 10.

<sup>57</sup> House of Representatives, "H.R. Report 93-1463 on the Antitrust Procedures and Penalties Act."

<sup>58</sup> Earl W. Kintner, Christopher Smith, and David B. Goldston, "The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority," *Wash. ULQ* 58 (1980): 847. at 847.

<sup>59</sup> See 15 U.S. Code § 6a.

behavior that caused harm to American markets remained subject to U.S. antitrust enforcement—that is, it did not envision a weakening of U.S. antitrust laws in the domestic market.<sup>60</sup>

The 2000 amendment to the Hart-Scott-Rodino Act marginally raised the threshold for reporting mergers to the government. Many public officials and commentators at the time argued that the amendment enhanced enforcement by relieving the FTC and the DOJ from the burden of devoting an “ever-expanding portion of their resources to the [merger review] program”.<sup>61</sup> Moreover, the 2000 HSR amendment passed in the twilight of the Clinton Presidency (on December 21), as four pages buried within the 320-page omnibus bill for the Fiscal Year 2001 Commerce-Justice-State Appropriations Bill.<sup>62</sup> This law was not an important, publicly transparent effort by Congress to weaken antitrust enforcement.

During this period, Congress also rejected attempts to weaken enforcement through new legislation. Approved in 1936, the Robinson-Patman Act aimed to “[protect] small business firms from competitive displacement by mass distributors at a time of general economic distress.”<sup>63</sup> Its repeal or substantial overhaul has been recommended at least four times, in 1955, 1969, 1977, and 2005.<sup>64</sup> In spite of all these attempts, the Robinson-Patman Act is still on the books. Yet it is not enforced: public litigation fell from a peak of 758 cease-and-desist orders between 1960-1972 to close to zero in modern times, thanks to hostile judicial decisions and regulatory attitudes.<sup>65</sup> The collapse of enforcement of the Act has been denounced by members of Congress on numerous occasions.<sup>66</sup>

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<sup>60</sup> Op. cit.

<sup>61</sup> Andrew G. Howell, “Why Premerger Review Needed Reform-and Still Does,” *Wm. & Mary L. Rev.* 43 (2001): 1703. at 1703-04.

<sup>62</sup> Howell. at 1704.

<sup>63</sup> Frederick M. Rowe, “Political Objectives and Economic Effects of the Robinson-Patman Act: A Conspicuous US Antitrust Policy Failure,” *Zeitschrift Für Die Gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics*, no. H. 3 (1980): 499–509. at 500.

<sup>64</sup> “Antitrust Commission Recommends Repeal of Robinson-Patman Act,” *NAW - National Association of Wholesale Distributors* (blog), December 2007, <https://www.naw.org/advisory/antitrust-commission-recommends-repeal-robinson-patman-act/>.

<sup>65</sup> Roger D. Blair and Christina DePasquale, “‘Antitrust’s Least Glorious Hour’: The Robinson-Patman Act,” *The Journal of Law and Economics* 57, no. S3 (2014): S201–15. at S212.

<sup>66</sup> As summarized in the Statement of Congressmen Henry Gonzales from Texas in the nomination hearing of FTC Chairman Collier (in March 1976): “The widely reported efforts on the part of some officials of the Antitrust Division of the Department, of Justice to urge and persuade others to support their views to amend or repeal the Robinson-Patman Act, which has long been a part of the Clayton Antitrust Act-since 1936-have resulted in a very strong and negative response from representatives of the small business sector of the economy. Indeed, alarm and concern were expressed to members of both bodies of the congress that an important law is again under its most severe attack, and, as a direct consequence, it became the subject of the current investigation and hearings in-depth by the Ad Hoc Subcommittee. The importance of this matter cannot be too strongly emphasized when it is realized

The Reagan administration also sought to repeal section 7 of the Clayton Act, fearing that because “neither the courts nor private litigants are bound” by the changes it implemented in the Merger Guidelines (discussed in more detail below), the supreme court’s aggressive posture toward mergers in the 1960s might be revived.<sup>67</sup> Nevertheless, the administration never sought repeal in Congress. As the Special Assistant to the President, Michael Uhlmann, wrote to the Assistant to the President for Policy Development Edwin L. Harper: “we should pay special attention to the legislative and political risks which will necessarily arise if we send a major antitrust reform package to the Hill. I am, I must confess, something of a pessimist on this point and, despite my enthusiasm and support for what Bill [Baxter] is trying to do, believe we should proceed with caution. I will provide you with greater detail on this point when we meet and suggest a possible alternative.”<sup>68</sup> Thus, even at the height of the Reagan administration officials recognized that a broad reform of the Antitrust Laws would not pass congressional muster.

While the historic pattern of antitrust legislation in the United States was overwhelmingly in the direction of greater liability and enforcement, this trend petered out in the 1970s. All of the statutes after the Hart-Scott-Rodino Act were minor. Congress’ and the public’s attitude toward antitrust enforcement shifted from its post-Depression enthusiasm to something like indifference or neglect in the 1980s. However, the legislative activities of Congress provides no evidence of congressional or public hostility to antitrust enforcement during the post-war period.<sup>69</sup>

### Part III.B. Presidential Executive Orders

The president issues executive orders (and related documents, including proclamations), which typically set goals and priorities for agencies in the executive branch and, where the president has authority, directly order them to take certain actions. We analyzed all the executive orders and proclamations that mentioned antitrust or monopoly from 1932 until 2021.

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that this Nation's 91,6 million small businessmen would be very adversely affected by the repeal or the emasculation of a statute long known as the "Magna Carta of small business." It should also be noted that these businessmen are consumers and entitled to the benefit of competition secured by the antitrust laws.” (at 88-89).

<sup>67</sup> Erik Peikert, “Mergers and Smoking Guns,” *ProMarket* (blog), 05/13/2022, <https://www.promarket.org/2022/05/13/mergers-and-smoking-guns/>.

<sup>68</sup> Peikert.

<sup>69</sup> As this paper goes to press, Congress is considering a budget that greatly expands resources for antitrust enforcement, among other potential changes to laws that would expand enforcement. Consistent with our findings elsewhere, the pro-antitrust legislation is publicly salient and democratically supported; and the Biden campaign touted its support for stronger antitrust laws.



In 1957 and 1959, Eisenhower ordered the IRS to share any data on income and profits with the Senate Committee on the Judiciary in connection with its investigation of whether antitrust laws were being adequately enforced.<sup>70</sup>

In 1961, Kennedy ordered federal agencies to share public bidding data with the Attorney General to increase the enforcement of antitrust laws against bid-rigging.<sup>71</sup>

In 1977, Carter created a “National Commission for the Review of Antitrust Laws and Procedures,” and directed it to draft recommendations on how to expedite the enforcement of antitrust laws in complex cases and increase the effectiveness of antitrust remedies.<sup>72</sup>

In 2016, Obama ordered executive agencies to “identify specific actions that they can take in their areas of responsibility to build upon efforts to detect abuses such as price fixing, anticompetitive behavior in labor and other input markets, exclusionary conduct, and blocking access to critical resources that are needed for competitive entry.”<sup>73</sup>

In 2021 Biden ordered numerous government agencies, including the DOJ and the FTC, to strengthen antitrust enforcement, with a special focus on labor, agriculture, and big tech.<sup>74</sup> While, between 1977 and 2016, no president issued a pro-antitrust executive order, no president issued an executive order cutting back on antitrust enforcement either (with two minor exceptions).<sup>75</sup>

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<sup>70</sup> See Dwight Eisenhower, “Executive Order 10712—Inspection of Income, Excess-Profits, Declared-Value Excess-Profits, Capital-Stock, Estate, and Gift Tax Returns by the Senate Committee on the Judiciary,” 1957, <https://www.presidency.ucsb.edu/documents/executive-order-10712-inspection-income-excess-profits-declared-value-excess-profits>; Dwight Eisenhower, “Executive Order 10855—Inspection of Income Tax Returns by the Senate Committee on the Judiciary,” 1959, <https://www.presidency.ucsb.edu/documents/executive-order-10855-inspection-income-tax-returns-the-senate-committee-the-judiciary>.

<sup>71</sup> John F. Kennedy, “Executive Order 10936—Reports of Identical Bids,” 1961, <https://www.presidency.ucsb.edu/documents/executive-order-10936-reports-identical-bids>.

<sup>72</sup> Jimmy Carter, “Executive Order 12022—National Commission for the Review of Antitrust Laws and Procedures,” 1977, <https://www.presidency.ucsb.edu/documents/executive-order-12022-national-commission-for-the-review-antitrust-laws-and-procedures>.

<sup>73</sup> Barack Obama, “Executive Order 13725—Steps To Increase Competition and Better Inform Consumers and Workers To Support Continued Growth of the American Economy,” 2016, <https://www.presidency.ucsb.edu/documents/executive-order-13725-steps-increase-competition-and-better-inform-consumers-and-workers>.

<sup>74</sup> Joseph Biden, “Executive Order 14036—Promoting Competition in the American Economy,” 2021, <https://www.presidency.ucsb.edu/documents/executive-order-14036-promoting-competition-the-american-economy>.

<sup>75</sup> Two minor exceptions are Reagan’s Executive Order 12430, which revoked Kennedy’s order on information sharing among agencies because it proved ineffective and consumed resources “that could be employed in a more effective manner to prevent antitrust violations” and Executive order 12661, which among others instructed a new National Commission on Superconductivity to assess whether the United States should grant semi-conductor companies a partial exemption to antitrust laws to increase research and development and improve competitiveness. See Ronald Reagan, “Executive Order 12430—Reports of Identical Bids,” 1983, <https://www.presidency.ucsb.edu/documents/executive-order-12430-reports-identical-bids>. and Ronald Reagan, “Executive Order 12661—Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related

This somewhat sparse post-1980 record can be contrasted with the various executive orders that advanced deregulation by requiring agencies to use cost-benefit analysis to evaluate regulations. Significant cost-benefit executive orders were issued by Reagan (1981), Clinton (1993), GW Bush (2007), Obama (2011), and Trump (2017).<sup>76</sup> The comparatively limited efforts to advance (or curtail) antitrust law in executive orders suggest that if president sought to curtail antitrust law, they preferred to avoid voter backlash.

### Part III.C. Appointments to the DOJ and the FTC

Ronald Reagan's director of personnel, Scott Faulkner, once said, "personnel is policy."<sup>77</sup> Presidents (with the acquiescence of the senate) can influence antitrust policy by appointing DOJ Assistant Attorneys General for Antitrust and FTC commissioners who can be trusted to fulfill a mandate from the president. To assess this channel of influence, we collected and analyzed the content of all the nomination hearings for DOJ AAGs and FTC commissioners between 1969-2021 to understand whether nominees articulated clear policy views for or against enforcement.<sup>78</sup>

Because all hearings on nominations to an antitrust post involve discussions of "monopoly" and "antitrust," we cannot use those terms as we did before as proxies for the salience of antitrust issues. We used three different variables. First, we use the duration of hearings as an indication of whether the hearing was perfunctory (short duration) or substantive (long duration).<sup>79</sup> Second, one of us coded every hearing as substantive if it involved discussions of antitrust policy, and non-substantive if the hearing was perfunctory.<sup>80</sup> Third, one of us also coded every hearing based on

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International Trade Matters," 1988, <https://www.presidency.ucsb.edu/documents/executive-order-12661-implementing-the-omnibus-trade-and-competitiveness-act-1988-and>.

<sup>76</sup> See Executive Order 12,291/81 (Reagan), Executive Order 12,866/93 (Clinton), Executive Order 13,422/07 (Bush), Executive Order 13,563/11 (Obama) and Executive Order 13,771/17 (Trump).

<sup>77</sup> Scot Faulkner, "Personnel Is Policy," *Washington Examiner*, February 2, 2016, <https://www.washingtonexaminer.com/personnel-is-policy>.

<sup>78</sup> Our database starts with the nomination hearing for Richard McLaren for antitrust AAG in 1969 and ends with the nomination hearing of Jonathan Kanter for antitrust AAG in 2021. When nominees have been reappointed, we consider each appointment as an independent process. We have been unable to obtain the nomination documents for Donald Baker (AAG 1976) and Paul McGrath (AAG 1983), so this analysis excludes them.

<sup>79</sup> Whenever nominees had a dedicated nomination hearing we just calculated the duration of the hearing based on Congressional records (which state when the hearing started and when it was adjourned) or C-SPAN nomination movies. Many nominees shared their hearing with several other witnesses. When this was the case, we calculated the total time for the hearing and then divided it equally among all witnesses, using this average time as the time per nomination.

<sup>80</sup> Many nominations were too short to host any meaningful debate. Others, in particular for FTC nominees, focus mostly on the consumer protection or data privacy functions of the FTC rather than on its antitrust mandate. For

whether the nominee expressed mostly pro-enforcement views, mostly anti-enforcement views, or mixed views.<sup>81</sup> These hand-coded variables are inherently subjective, but they provide us with a more granular assessment of the discussions that took place in the nomination hearings. All of the variables turn out to be consistent with each other.

As Table 1 shows, the average duration of the hearings dropped steeply over the period, with the sharpest drop taking place from Carter to Reagan. The modest uptick during the Trump and Biden administrations matches the revival of interest in antitrust over the last half decade.

Table I – Average and Median Duration of Nomination Hearings for FTC/DOJ Officials Per Appointing President (1969-2021)

<i>Appointing President (tenure)</i>	<i># of hearings</i>	<i>Average duration (in minutes)</i>	<i>Median duration (in minutes)</i>
<i>Nixon (69-74)</i>	9	83.7	90.0
<i>Ford (74-76)</i>	3	55.0	50.0
<i>Carter (77-80)</i>	5	61.6	48.0
<i>Reagan (81-88)</i>	10	45.6	33.0
<i>GHWB (89-92)</i>	7	31.7	26.0
<i>Clinton (93-00)</i>	8	39.1	26.0
<i>GWB (01-08)</i>	9	33.9	22.0
<i>Obama (09-16)</i>	7	25.7	20.0

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some, the nominees were asked direct questions on their antitrust views, but provided mostly vague answers (e.g. that because they had not been confirmed they were not familiar with the agencies' activities and could not answer the questions or that they may face cases discussing that topic and they did not want to provide answers that may be deemed a pre-judgement). When this was the case, we coded hearings as hosting non-substantive antitrust discussions. When nominees received many significant and substantive questions and engaged with them, we coded the variable as the hearing hosting substantive antitrust discussion.

<sup>81</sup> While we analyzed all hearings, the coding considered only those that hosted substantive discussions. Anti-enforcement views were coded as such when in the majority of substantive answers the nominee consistently expressed views that generally aligned with the anti-enforcement views of the Chicago School—in particular, a focus on enforcement against horizontal restraints and horizontal mergers (as defined in Kovacic, “The Modern Evolution of US Competition Policy Enforcement Norms.”). Pro-enforcement views reflected hearings where in the majority of substantive answers nominees consistently affirmed their intent to strongly enforce antitrust laws in areas beyond horizontal restraints/mergers, with a particular focus on vertical restraints, large/conglomerate mergers and in protecting small business/ensuring that markets remain open. Mixed views reflect a mix of both, depending on the question asked.

<i>Trump (17-20)</i>	6	33.0	37.0
<i>Biden (21-)</i>	2	34.5	34.5

Source: authors' construction based on Congressional records

The duration of the hearings bottomed out during the Obama administration, when the hearings averaged a remarkably short duration of 25.7 minutes. The hearings normally start with opening remarks by the chair of the committee. The chair then usually allows a fellow senator or representative from the nominee's state to make additional remarks about the character and qualifications of the nominee. Then the nominee is sworn in and reads a statement. Only then does the questioning start, but senators frequently use their time to discuss the economy, the administration, and other matters. FTC nominees will be asked about privacy, consumer protection, and other matters outside antitrust. The preliminaries and distractions aside, a 25 to 30 minutes hearing will include little of substance relating to antitrust enforcement.

Table 2 shows our other two variables over time. Consistent with the findings on duration, the percentage of antitrust hearings devoted to substantive antitrust discussion (meaning that nominees provided responsive rather than vague answers and took clear positions) nosedived. Most hearings were substantive through the Reagan administration, but then the percentage declined rapidly, bottoming out at 17% during the Trump administration.

Table II – Substantive Discussions and Expressed Views on Antitrust on FTC/DOJ Officials Nomination Hearings, Per Appointing President (1969-2021)

<i>Appointing President (Tenure)</i>	<i># of Hearings</i>	<i>% of Substantive Antitrust Discussions</i>	<i># of Pro, Anti and Mixed Enforcement Views (When Discussion Is Substantive)</i>		
			Pro	Mixed	Anti
<i>Nixon (69-74)</i>	9	78%	5	2	0
<i>Ford (74-76)</i>	3	67%	2	0	0
<i>Carter (77-80)</i>	5	100%	4	1	0
<i>Reagan (81-88)</i>	10	60%	2	2	2
<i>GHWB (89-92)</i>	7	43%	2	1	0

<i>Clinton (93-00)</i>	8	38%	0	2	1
<i>GWB (01-08)</i>	9	22%	1	0	1
<i>Obama (09-16)</i>	7	29%	1	0	1
<i>Trump (17-20)</i>	6	17%	0	0	1
<i>Biden (21-)</i>	2	100%	2	0	0

Source: authors' construction based on Congressional records

Nominees were relatively supportive of antitrust enforcement from Nixon through Carter; this pattern breaks down during the Reagan administration. Of all the nominees, Bill Baxter<sup>82</sup> and James Miller<sup>83</sup> are clearest in their opposition to traditional antitrust enforcement. They received significant pushback from members of Congress, both during the hearing and afterwards. During the Baxter nomination, Senator Specter rejected Baxter's views on conglomerate mergers, saying that not only they are against the law of the United States but also that they would hamper the prosecution of mergers in the energy sector.<sup>84</sup> During the Miller nomination, Senator Danforth (a

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<sup>82</sup> Baxter says that "I think the antitrust laws have a very sound and solid core insofar as they attack horizontal collusive agreements. I do not mean to suggest that is the only part that is sound, although I do think that is perhaps the most important. (...) At the very same time, I think it is true that there have been developments in antitrust since the Second World War which have not been, in my judgment, well considered. There has been an enormous growth of doctrine, as a result primarily of judicial decisions, which was not the inescapable consequence of the statutes that the Congress has passed-and which does interfere with the efficient organization of business enterprises. In the vocabulary of the antitrust bar, these are often called the various vertical prohibitions, and essentially what they interfere with is the efficient vertical structuring of our economy, relationships between buyers and suppliers." He also states that many mergers that were previously challenged as vertical or conglomerate mergers should be better assessed on whether they end up impacting horizontal competition and should be challenged as such. Committee on the Judiciary--U.S. Senate, "Confirmation Hearing on William F. Baxter, Nominee, to Be Assistant Attorney General--Antitrust Division," March 19, 1981. at 5-6, 16.

<sup>83</sup> Miller says that the FTC has adopted an "unnecessarily adversarial posture towards business" and that it would revise the FTC's views that "bigness is bad" to bigness is neutral and some of the FTC's work in vertical relations and conglomerate mergers. Committee on Commerce, Science and Transportation--U.S. Senate, "Nominations: Federal Trade Commission and Department of Commerce," July 24, 1981. At 8-9, 12-13.

<sup>84</sup> Senator Specter. "I think that would be a very important consideration because, if your view is reflected in the quotation that I just read to you [that merger review should focus on horizontal mergers], dealing solely with horizontal competitive cases and then ruling out vertical mergers or conglomerate mergers. The reality is that you have the oil companies acquiring the coal companies. If that is not viewed as a horizontal competitive situation, to be ruled out of antitrust action by your view as quoted, that would be a very substantial field of potential antitrust action which would be excluded--

Mr. BAXTER. Yes.

Senator SPECTER [continuing]. And would be very, very questionable at a time when we are seeking alternative sources of energy. It is really very hard to make a decision regarding the extent coal does compete with oil, but it certainly is plain that there is at least some competition. (...) Professor Baxter, the Clayton Act covers all mergers that substantially lessen competition. As I read the interpretations of the Clayton Act by the Supreme Court of the

Republican) also attacked the nominee for his views on antitrust, saying that deregulation should mean stronger antitrust enforcement (a view that is aligned with Reagan's party platform).<sup>85</sup>

These significant exchanges provide indirect democratic legitimacy for policy changes. But they all but disappear in subsequent hearings. After them, only Joel Klein (Clinton appointment to AAG), Timothy Muris (GW Bush appointment to FTC), and Joshua Wright and William Baer (Obama appointment to FTC Commissioner and AAG, respectively) openly advocated reduced antitrust enforcement.

Weak antitrust enforcement views start receiving significant public pushback from members of Congress even after the Baxter and Miller nomination. Senator Metzenbaum criticized Douglas Ginsburg's anti-enforcement stance in his nomination hearing for Assistant Attorney General in 1985.<sup>86</sup> Metzenbaum would continue to press this theme during many other hearings, including those of Charles Rule, James Rill and Anne Bingaman. Senator Bryan questioned Dennis Yao in similar lines, and so did Senator Cantwell in Charles James' nomination (focusing on concentration in agribusiness); Senator Hollings in the Timothy Muris nomination, and Senator Kohl in the nominations of Pate Hewitt, Charles James, Christine Varney, and William Baer

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United States, that would include vertical or conglomerate mergers as well as horizontal mergers. Would it be your intention to enforce the Clayton Act against vertical and conglomerate mergers as well?" Baxter responds that he would attack vertical and conglomerate mergers to the extent that they impact horizontal competition. Committee on the Judiciary--U.S. Senate, "Confirmation Hearing on William F. Baxter, Nominee, to Be Assistant Attorney General--Antitrust Division." at 16-17.

<sup>85</sup> Senator Danforth: "And you also believe that the whole matter of antitrust enforcement and the antitrust laws should be studied. I must say that that does not give me great encouragement that either you are going to be vigorous enforcer of the antitrust laws or that the administration is committed to vigorous enforcement of the antitrust laws. Some feel that the tone of the administration is to a much looser view of antitrust enforcement than has historically been the case. My own view is that if the administration is going to take the position that it wants to reduce the quantity of regulation-and I certainly support it, as you knowing that effort-then we have to rely to even a greater extent on competition within the market--place to be a self-regulator. And so I have to tell you that I am not encouraged by what you are telling me, because it seems as though we are headed in the direction of not only less regulation but perhaps less competition as well or at least less policing of competition by this administration." Committee on Commerce, Science and Transportation--U.S. Senate, "Nominations: Federal Trade Commission and Department of Commerce." at 8.

<sup>86</sup> Senator Metzenbaum: "Now, President Reagan's first nominee to enforce the antitrust laws, William Baxter, took the position that he simply was not going to enforce laws, such as the per se prohibition on vertical price fixing, with which he personally disagreed. The next nominee, Paul McGrath, publicly stated that he would enforce these laws and abide by the Supreme Court's per se rule. Although the record shows no cases actually brought. I thought that, Mr. Ginsburg, we ought to have you on the record concerning your position with respect to vertical price-fixing". Ginsburg assures that the DOJ would "continue to enforce the law as it is handed down by the courts, including the law against resale price maintenance which was most recently interpreted and implicitly affirmed in the Monsanto case last term." Yet, the DOJ does not bring any Resale-Price-Maintenance case under his tenure. Committee on the Judiciary--U.S. Senate, "Confirmation Hearings on Federal Appointments," July 24, 1985. at 221-222.

(among others). Metzenbaum denounced Baxter in an opinion piece for the New York Times,<sup>87</sup> and other members of Congress followed his example.<sup>88</sup>

The nominees learned to give vague answers to secure an easier confirmation. Senators complained about this lack of candor:

Senator FORD: Do you believe that small businesses are entitled to the protection of the antitrust laws and the Federal Trade Commission Act by enforcing the law against unfair competition and predatory acts by larger, more powerful competitors?

Mr. OLIVER: Well, Senator, I think that those laws should be enforced. Just exactly what the effect is in any particular case is hard to say. I think that the laws should be enforced. I think it is probably hard to say always how the chips fall when the law is enforced as it is written.

...

Senator FORD: Let me ask you this: Do you support amending the antitrust laws so that treble damages are eliminated except for horizontal price fixing cases?

Mr. OLIVER: Senator, I understand the administration has a proposal like that, if it is not exactly like that. I was not consulted, clearly, obviously, as the administration constructed that proposal. I have not read any background papers, reports or studies or statistics in connection with it. And I, therefore, really have no informed opinion of whether that is necessary or not. I am perfectly happy to look at it and it may well be a good idea, but it, is not a matter that I have studied myself and I hesitate to give an answer without having an informed opinion.

Senator FORD: You are going to be chairman. While I understand that you haven't been there yet, and you haven't had an opportunity to study these questions, once you become Chairman, that is the end of it. And we don't know what your attitude is prior to going in. That is one of the reasons for the hearings. And we seem to always get evasive answers.<sup>89</sup>

This pattern of evasion only grows as the nominations shrink in length and lose substance—in particular after the 1990s. During this period, pre-hearing Q&A forms (where nominees provide general/vague answers) gain in importance and so do closed-door meetings between Senators and nominees prior to the hearing itself. These closed-door meetings, however, are the antithesis of democratic accountability, in particular in a world where antitrust enforcement continues to weaken.

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<sup>87</sup> Howard M. Metzenbaum, "IS WILLIAM BAXTER ANTI-ANTITRUST?," *The New York Times*, October 18, 1981, sec. Business, <https://www.nytimes.com/1981/10/18/business/is-william-baxter-anti-antitrust.html>.

<sup>88</sup> John F. Seiberling, "Congress Makes Laws; The Executive Should Enforce Them," *Antitrust LJ* 53 (1984): 175.

<sup>89</sup> Committee on Commerce, Science and Transportation--U.S. Senate, "Nomination--Federal Trade Commission," February 25, 1986. at 5.

One might wonder whether the public paid much attention in any event. To assess this, we randomly selected four appointments for each decade (1970-2020) and checked whether the nomination had been covered in the New York Times. Only half of the 20 nominations was covered by the Times. Only one of the 20 nominations hearings received coverage in a dedicated article.

In sum, with the limited exception of the early 1980s, there was no indirect democratic accountability for the weakening of antitrust enforcement through the nomination of FTC and DOJ officials. The decline of antitrust enforcement after the early 1980s took place at the hands of regulators who avoided public scrutiny of their views at the time of their appointments.

### Part III.D Supreme Court Nominations

Presidents (with the acquiescence of the senate) can influence policy by appointing supreme court justices with a particular ideological bent. Most presidential candidates promise, in more or less veiled terms, to nominate jurists who share their ideological agenda. Senators who vote on nominations may or may not share that agenda. Here we analyze whether the antitrust views of supreme court nominees have played a role in their confirmation—another institutional ritual that could provide indirect democratic backing for the policy changes.

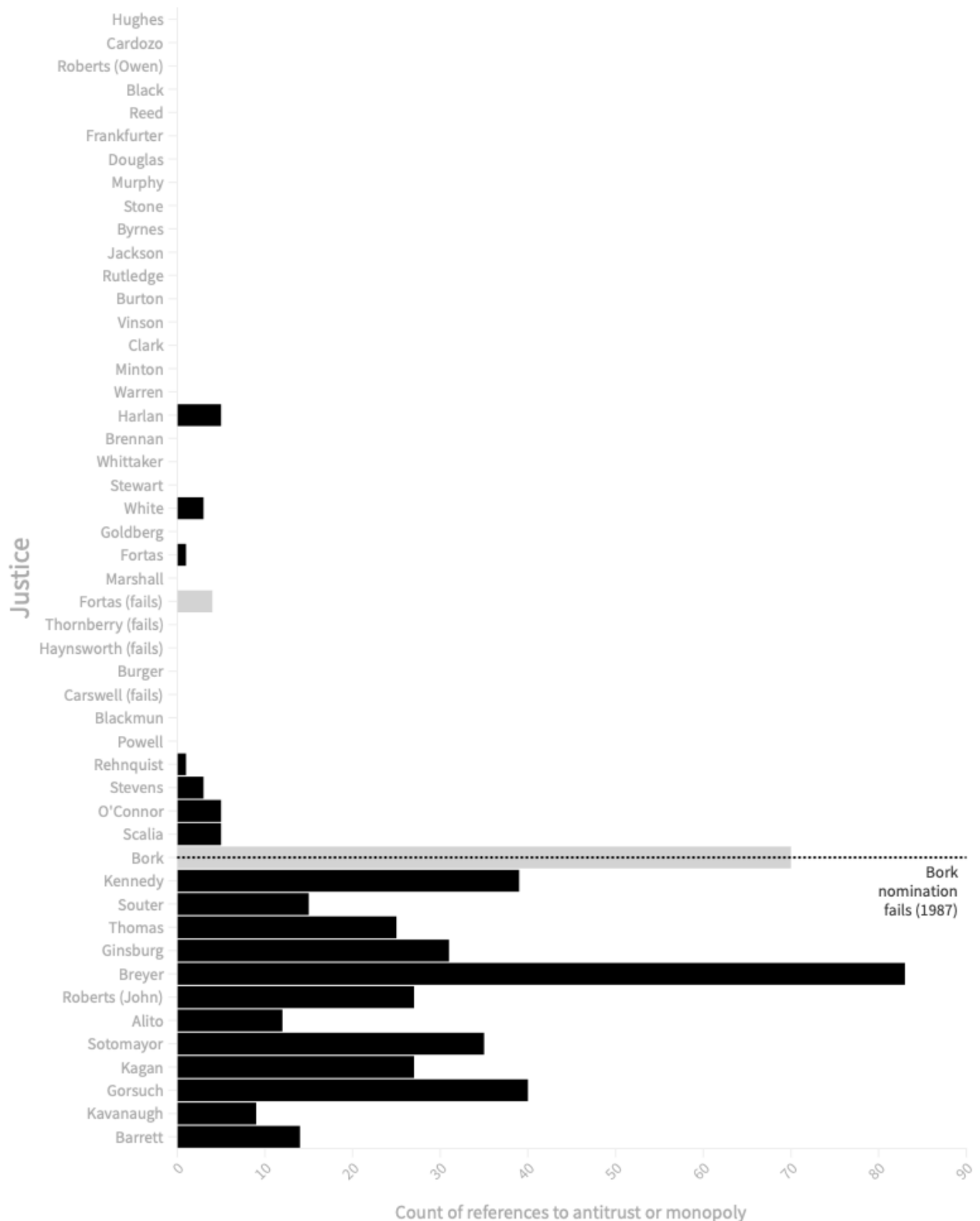
To answer this question we analyzed all the public records of nomination hearings for supreme court justices starting with the nomination of Chief Justice Charles Hughes in the 1930s until 2020. We wanted to determine antitrust law's degree of saliency in the nomination process, and whether nominees were questioned on their views about the goals of antitrust and the importance of strong enforcement. Figure 6 reports the frequency of the words “antitrust” and “monopoly” during the supreme court nomination hearings over the past 90 years.<sup>90</sup>

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<sup>90</sup> Including “anti-trust” and variations of the root “monopol” such as of the monopolies, monopolize, etc. as per the methodology explained in footnote 38 above. It is worth noting that until the nomination of Justice Harlan in 1955, many nominees received no hearing, or simply a perfunctory hearing, or the Senate hosted hearings that did not involve a direct Q&A with the nominee—just a discussion among Senators and other witnesses on the nominee's record. Since our focus is on direct Q&A exchanges, we coded these nominations as hosting no mentions. Still, of those, only in the nomination hearing of Clark in 1949 there are some considerations on his record on antitrust policy. This is a lateral topic to the hearings, and Justice Clark is praised by his support for strong antitrust enforcement.



**Figure 6: Total References to Antitrust and Monopoly in Supreme Court Nomination Hearings, per Nominee (1930-2020)**



As the data show, antitrust was rarely discussed in supreme court nomination hearings until the rejection of Robert Bork by a 58-42 vote in October 1987. During his nomination process, Bork was extensively challenged on his antitrust views, which many senators saw as dangerous and extreme. For example, Democratic Senator Metzenbaum from Ohio repeatedly rejected Bork's views of antitrust enforcement:

I am concerned, Judge [Bork], as to what assurance can you give us that the antitrust laws will be enforced and consumers protected if you should become a member of the Supreme Court? ... The fact is, you would accept total concentration of economic power in just a couple of companies, maybe three, depending upon which day you were writing, and I am not questioning that point. But the point that bothers me is, competition is so vital to this free enterprise system, as I said earlier, and if we were to follow your line of reasoning there will not be any competition in this country because two companies will not effectively compete against each other. It will sort of be a laissez-faire approach where they will let each do their own thing.<sup>91</sup>

Bork also received pushback from Senator Specter, and Bork was ultimately rejected by a bipartisan majority. While antitrust was not the main reason for his rejection—his involvement in Watergate and his views on abortion played a more important role<sup>92</sup>—antitrust was covered at length and contributed to his depiction as an ideological extremist, suggesting that even during the height of the Reagan presidency, the weakening antitrust enforcement was not a popular policy goal.

After Bork, antitrust enforcement became a topic in all judicial nominations albeit a minor one. The pattern in appointments to the FTC and DOJ recurred: nominees spoke positively but also vaguely and evasively about antitrust enforcement. Scalia provides an amusing example:

Senator, antitrust law has never been one of my fields. Indeed, in law school, I never understood it. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then. As to whether the Court has—so I really am in no position. All I can tell you is hearsay, Senator, from those who follow the field. I do understand that the rules have changed in recent years, and that the Court is applying the principles and the data that economists have accumulated over the years regarding the sensible application of the antitrust laws.

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<sup>91</sup> United States Senate Committee on the Judiciary, "Hearings Before the Committee on the Judiciary--United States Senate," September 15, 1987. at 366.

<sup>92</sup> Jonathan Fuerbringer, "Byrd Says Bork Nomination Would Face Senate Trouble," *The New York Times*, June 30, 1987, sec. U.S., <https://www.nytimes.com/1987/06/30/us/byrd-says-bork-nomination-would-face-senate-trouble.html>.

But I have not had a single antitrust case since I have been on the D.C. Circuit. And I have not complained about that, either.<sup>93</sup>

Yet, whenever nominees expressed an opinion, it was generally in favor of stronger enforcement and the protection of small businesses. For example, Sandra O'Connor recognized the key role antitrust plays in eliminating monopolies and protecting small businesses;<sup>94</sup> so did David Souter, who further affirmed antitrust law's key role in preventing the consolidation of economic power.<sup>95</sup> The same idea was echoed by Thomas;<sup>96</sup> Ginsburg;<sup>97</sup> and Kagan.<sup>98</sup> Roberts also defended the importance of antitrust enforcement, including private enforcement.<sup>99</sup> There

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<sup>93</sup> Committee on the Judiciary--U.S. Senate, "Hearings Before the Committee on the Judiciary--United States Senate," August 5, 1986. at 36.

<sup>94</sup> O'CONNOR: "Certainly I recognize that the object of the Sherman Act was to reduce or eliminate monopolies. To that extent, of course it has the effect of encouraging competition and encouraging smaller units to be in operation."

<sup>95</sup> SOUTER: "I also have been well educated by Senator Rudman over the years in the value of small business. Small business has no better friend than he has, and I think one of the lessons that I have absorbed from a long period of my professional lifetime with him, if I needed to absorb that from anyone else, is the importance of a degree of competition which will allow small business to emerge and allow for diversity in the American economy, which it is the object of the antitrust laws to secure, as much as that is possible.

Senator KOHL. Do you agree, Judge Souter, that an important purpose of the Sherman Act is to protect against consolidation of economic power and make sure that consumers are not abused by companies engaged in monopolistic business practices?

Judge SOUTER. There is simply no question about it, either as an historical matter or as a strictly legal matter, as one examines the precedents. The ultimate object of the system, it seems to me, has to be judged on its systemwide effects. I do not think the antitrust laws should even be seen as merely consumer laws or as anti-business laws, but as laws intended to assure a free and open and competitive economic system for everyone."

<sup>96</sup> THOMAS. "Senator, I think that all of our efforts, including the antitrust laws, to keep a free and open economy, one in which there is competitiveness, where the smaller businesses can have an opportunity to compete, and where consumers can benefit from that—those efforts, including the antitrust laws, have been beneficial to our country from my standpoint.

Senator KOHL. Judge, do you believe that an important purpose of the Sherman Act is to protect against consolidation of economic power to make sure that consumers are not charged high prices by large companies that have swallowed up their competition; that an important purpose of the Sherman Act is to protect against consolidation of economic power?

Judge THOMAS. Yes, Senator."

<sup>97</sup> GINSBURG. "Senator Metzenbaum, I think your recitation of the purposes of the antitrust law—to protect consumers, to protect the independent decision making of entrepreneurs—is entirely correct. I am pleased that you like my opinion in the *Michigan Citizens* (1989) case. It is a decision that I wrote. I think it gives the best picture of my views in this area. (...) You asked me if the only purpose of the antitrust law is efficiency. The cases indicate that the antitrust laws are focused on the interests of the consumer. There is also an interest in preserving the independence of entrepreneurs. I don't think the antitrust laws call into play only one particular economic theory. The Supreme Court made that clear in the *Kodak* (1992) case. But out of the context of a specific case, I can't say much more. No, I don't think efficiency is the sole drive."

<sup>98</sup> KAGAN. "[I] think on the one hand it is clear that antitrust law needs to take account of economic theory and economic understandings, but it needs to do so in a careful way and to make sure that it does so in a way that is consistent with the purposes of the antitrust laws, which is to ensure competition, which is, as you say, to be a real charter of economic liberty."

<sup>99</sup> "Senator KOHL: Do you agree that government enforcement of antitrust law is crucial to ensuring that consumers are protected from anticompetitive practices, such as price fixing and illegal maintenance of monopolies?"

were two limited exceptions. Breyer said that while strong enforcement is important, antitrust is all about getting lower prices for consumers;<sup>100</sup> while Gorsuch discussed the role of economics in helping antitrust prevent deadweight loss.<sup>101</sup> The coded references to Chicago-school precepts could hardly have given members of the public or even senators the impression that they opposed antitrust enforcement.

In sum, in the confirmation hearings, nearly all antitrust-related questions sought assurances from the nominee that he or she would respect the enforcement of the antitrust laws, and in all cases (except Bork, whose nomination collapsed in spectacular fashion) the nominee either evaded the questions or granted those assurances. Thus, there was no democratic backing for the changes in policy towards weaker enforcement of the antitrust laws by means of supreme court appointments.

### Part III.E. Budgets

Congress can greatly influence the activity of antitrust enforcement by shaping the budgets of the DOJ and FTC. These decisions, however, are rarely politically salient, as few constituents follow the details of budgetary allocations.

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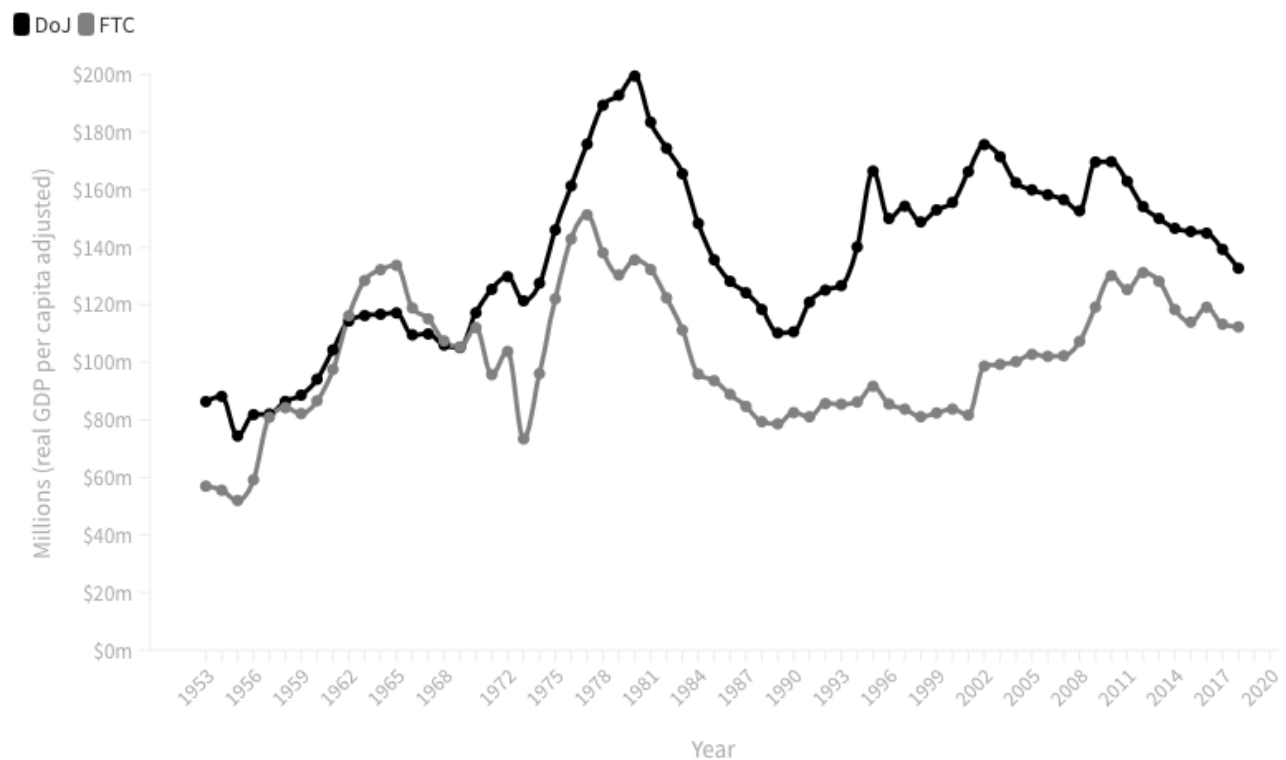
Judge ROBERTS. Yes, I do, Senator. In fact, when I was in private practice, one of the cases I handled was the Microsoft antitrust case on behalf of government officials, the States in particular. A number of States retained me to argue that case before the D.C. Circuit en banc. So I certainly appreciate the role of governments, both State and Federal, in enforcing the protections of the antitrust laws, because as you know, there is concurrent authority in that area, the Sherman Act, of course, on the Federal level and then what people call the “Baby Sherman Acts” on the State level. (...) I do think that the system established under the Sherman Act of private antitrust enforcement, and, of course, the opportunity to recover additional damages and attorneys’ fees and other aspects, has been an effective tool in enforcing the law.”

<sup>100</sup> BREYER: “The point that I would frequently make in those conversations is that if you are going to have a free enterprise economy, if you are not going to have the Government running everything, then you must have a strong and effective antitrust law. If you are not going to regulate airlines, you must have a strong antitrust law for airlines. The reason is that antitrust law is the policeman. Antitrust law aims, through the competitive process, at bringing about low prices for consumers, better products, and more efficient methods of production. (...) Those three things, in my mind, are the key to antitrust law and really a strong justification for an economy in which there are winners and losers, and some people get rich and others do not. The justification lies in the fact that that kind of economy is better for almost everyone, and it will not be better for almost everyone unless the gains of productivity are spread. And the gains of productivity are spread through competition. That brings about low prices, better products, and more efficient methods of production. And that is what I think antitrust law is about, and that is what I think that policeman of the free enterprise system has to do. It is called protect the consumer.”

<sup>101</sup> GORSUCH: “Well, the real problem at the end of the day, I mean, you have a problem of lack of competition between competitors, and then of course that filters down to the consumer level. And what that yields are higher prices, and lower output, the dead weight loss to the economy, loss of production, and those are real harms. And the antitrust laws, as you know, were the original Federal regulatory regime. That was it for the national economy for a long time, and they are still vital and brilliant in their simplicity and design.”

Even adjusting for GDP growth, the budgets of both agencies' competition mission rose sharply from 1955 to 1980. As Figure 7 shows, however, the budget plunged during the first Reagan Administration, and the resources available for the agencies never recovered in GDP terms. This reduction in resources took place at the same time that antitrust enforcement became significantly more expensive as a result of the rise in cases tried under the rule of reason and the increased reliance on economic modeling and rigorous data analysis.<sup>102</sup> The budgetary shortfall thwarted enforcement actions and could signal indirect democratic accountability for the new enforcement priorities, though of an exceedingly weak form given the obscurity of budgetary allocations and changing circumstances that would have been invisible to virtually everyone outside the antitrust community.

**Figure 7: FTC's and DOJ's Antitrust Budget (1953-2018)**



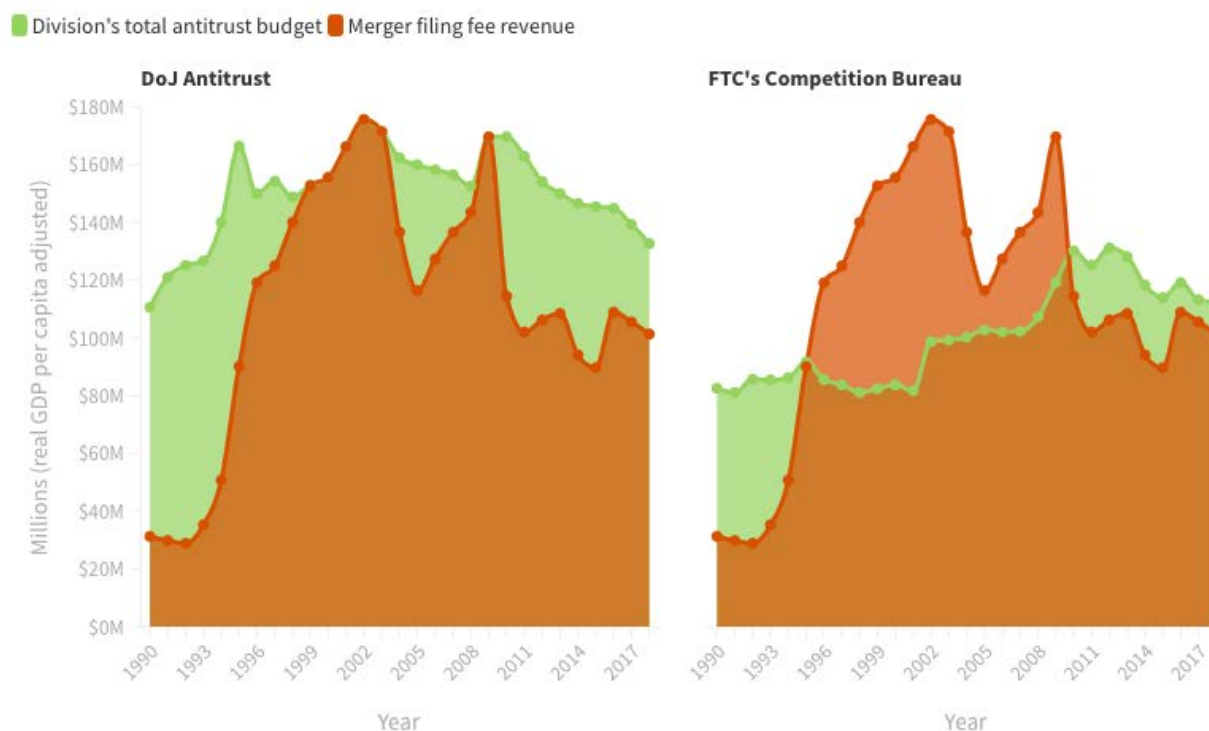
Sources: FTC Annual Reports, FTC Annual Budget requests, [DOJ Congressional Appropriation](#) • Adjusted for real GDP per capita growth - in 2011 dollars. FTC budget represents the FTC's Competition Mission, DOJ's is the Antitrust Division

<sup>102</sup> Ramsi Woodcock, "The Hidden Rules of a Modest Antitrust," *Minn. L. Rev* 105 (2021): 2095.; Paul A. Pautler, "A History of the FTC's Bureau of Economics," in *Healthcare Antitrust, Settlements, and the Federal Trade Commission* (Emerald Publishing Limited, 2018).

Yet, even in the budget area there is a constant contradiction between the public actions of Congress and budget cuts that are largely hidden from the public. In 1989, concerned that a merger boom associated with the lack of budgetary resources would restrict the regulators' enforcement capacity, Congress enacted the Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Bill for Fiscal 1990. This law introduced an independent source of agency revenue in the form of merger filing fees.<sup>103</sup> The purpose was to protect merger review and other forms of antitrust enforcement from steep budget cuts like those that took place during the Reagan administration. Given the direct connection between the funding source and the merger review caseload, one might have expected the new filing fees to cover the FTC and DOJ's merger review program, while Congressional appropriations covered the other antitrust enforcement actions.

Figure 8 below, however, tells a different story.

**Figure 8: Composition of the FTC's and the DOJ's Antitrust Budgets**



Source: FTC Annual Reports and Congressional Budget Justifications, DOJ Annual Reports and Congressional Budget Justifications • In Constant 2011 Dollars

<sup>103</sup> See Federal Trade Commission, "Hart-Scott-Rodino Act Antitrust Improvements Act of 1976 and Regulations Thereunder; Statement Concerning Hart-Scott-Rodino Filing Fees," November 24, 1989, [https://www.ftc.gov/sites/default/files/documents/hsr\\_statements/54-fr-48726/891124-54fr48726.pdf](https://www.ftc.gov/sites/default/files/documents/hsr_statements/54-fr-48726/891124-54fr48726.pdf).

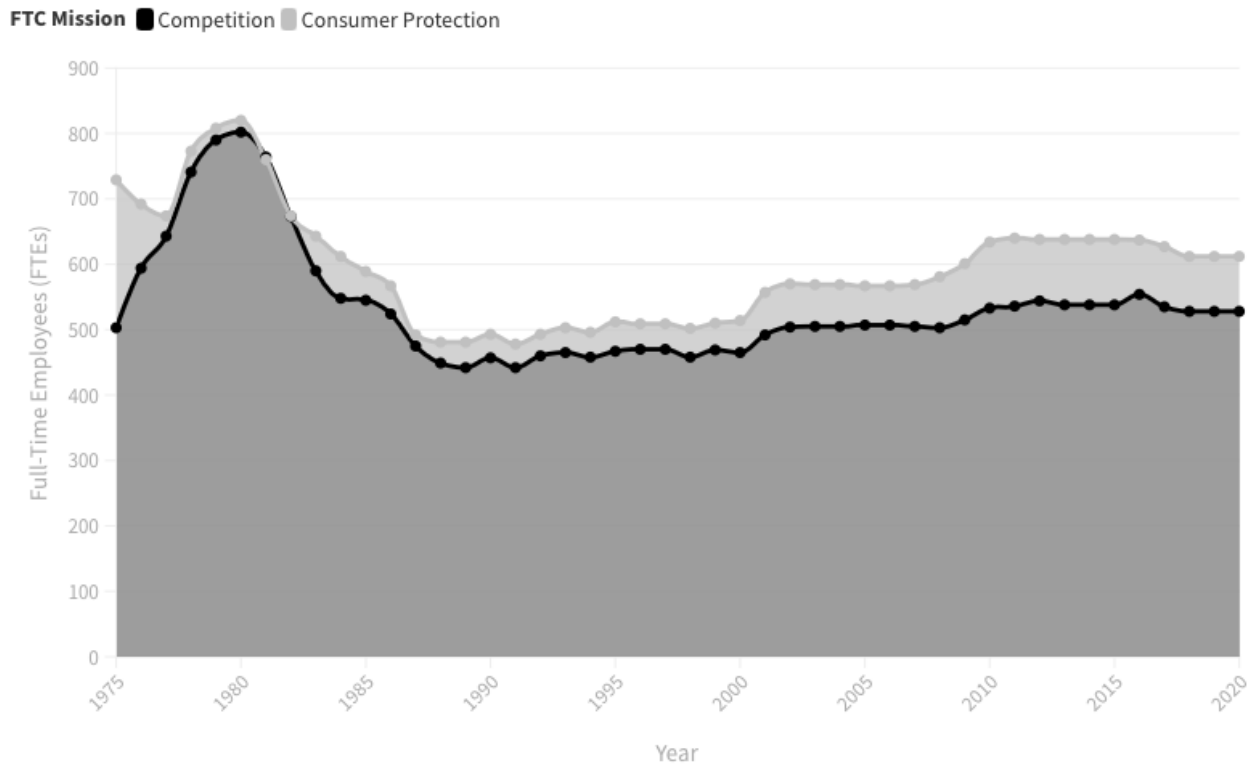
In the beginning, the merger filing fees did their intended work in ensuring that FTC/DOJ resources at least partially tracked increases in M&A activity in the US economy. Yet, a couple of years after, Congress stealthily but also drastically reduced appropriations for the agencies, requiring them to depend on the filing fees as the primary and many times sole source of funding. During the early 2000s, these fees accounted for the entirety of the DOJ antitrust division budget, and for more than the total budget of the FTC antitrust activities, meaning that despite the heavy workload in merger review, the budget for the antitrust program subsidized the FTC's consumer protection division. Thus, Congress sapped the enforcement capacity of the agencies, but did so via budget reallocations—the Congressional decisions least visible to the public at large—and in open contradiction with the guidance given by the passage of a law specifically aimed at ensuring proper agency funding.

The budgetary limitations resulted in a dramatic reduction in staffing and enforcement capacity. For example, data compiled by Paul Pautler indicate that from 1940 to 1980 each FTC full-time employee (FTE) was responsible for overseeing approximately 3 to 4 billion of USD real GDP. By 1990, this number was almost one FTE for \$9 billion. By 2013 it had risen to \$12 billion.<sup>104</sup> Figure 9 below shows the drop in FTC FTE staff after disaggregating for the antitrust and consumer protection missions.

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<sup>104</sup> Pautler, "A History of the FTC's Bureau of Economics."

**Figure 9: FTC's Full Time Employee by Mission**



Source: FTC Annual Reports, FTC Congressional Budget Justifications

In her 1991 re-nomination hearing, Commissioner Azcuenaga<sup>105</sup> acknowledged the stealthy but deep impact of budget constraints imposed during the 1980s.:

Perceptions of the Commission's commitment to enforcement and the number of cases brought by the Commission have varied over the last seven years. It is my belief, however, that overall during this period, the Commission and its staff have been committed to an effective enforcement program. For some time, the need substantially to reduce the Commission's budget presented a major impediment to strong enforcement efforts. Not only did these budget constraints necessitate a severe reduction in the number of staff the Commission employed, with all the wrenching decisions and disruption that process entails, but also the Commission was forced to reduce the staff and resources allocated to particular investigations and cases. This in turn caused practical hardships and adverse effects on the morale of the remaining staff, the lingering effects of which continued for some time. During those years, because of a perception by some that it was not sufficiently committed to enforcing the law, the agency also was beset by criticism from various outside sources.

<sup>105</sup> Commissioner Azcuenaga served two terms in the FTC, being originally nominated by President Reagan in 1984 and re-nominated in 1991 by President Bush.



Yet even during the darkest periods of budget-cutting and criticism, our staff persevered and the Commission continued to bring cases, and I believe they were good cases. The staff of the Commission deserves an enormous amount of credit for continuing to believe in the mission of the agency and continuing their work on behalf of the public interest. The dedication and persistence of many true public servants enabled the Commission to survive those times, with an essential corps of expert: experienced and dedicated professionals.<sup>106</sup>

Other data confirm the extent of the damage done by these (somewhat hidden) budget cuts. Pautler describes how the FTC's Bureau of Economics lost approximately 115 FTEs in the 1980s, half of which resulted from a decision to curtail the activities of the agency's economic research department—in particular its independent data collection activities for sector-wide studies.<sup>107</sup> While Pautler also documents that the decrease in supporting staff is partially associated with increases in computing power, he stresses how the reassignment of FTC obligations and budget cuts played a more significant role.<sup>108</sup> He also stresses how the FTC Bureau of Economics was understaffed (also in relation to supporting staff), given that by 1992 it had fewer Research Assistants than even the least RA-intensive private economics consulting firm.<sup>109</sup> The steep cuts in the economics division come exactly when courts started to require increased economic sophistication from antitrust enforcers. With fewer employees, the remaining personnel had to be almost all allocated to the increasing workload of economics analysis in merger review and litigation support.

The limitation in the number of FTEs also contributed to the elimination of the FTC Bureau of Economics' so-called 6(b) studies, where the agency requested information from private parties and issued comprehensive reports on the competitive status of many sectors of the U.S. economy.<sup>110</sup> Another cause of the reduction in 6(b) studies was the Paperwork Reduction Act of 1980. This statute requires most Federal agencies to obtain special authorization from the White House, whenever they request information from a large number of private parties. The burdensome authorization process can drag out over six to nine months.<sup>111</sup>

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<sup>106</sup> Azcuenaga: Committee on Commerce, Science and Transportation--U.S. Senate, "Nomination of Mary L. Azcuenaga to Be a Federal Trade Commissioner - Hearing," October 29, 1991.

<sup>107</sup> Pautler, "A History of the FTC's Bureau of Economics." At 296.

<sup>108</sup> Pautler. at 232-233; 297, 314-315; 318-320.

<sup>109</sup> Pautler. at 320.

<sup>110</sup> Pautler. at 164-67. some reporting in particularly sensitive areas such as hospitals, oil and credit industries continued, but it mostly used publicly available data.

<sup>111</sup> See United States Government, "PRA Approval Process | A Guide to the Paperwork Reduction Act," January

## Part IV. The Role of the Agencies and the Supreme Court in the Decline of Antitrust Enforcement

Since the 1970s, no president advocated for a reduction in antitrust enforcement, no Congress voted for reduced enforcement except indirectly in obscure budget bills, and no senate knowingly confirmed nominees to the FTC or DOJ, or to the supreme court, who openly promised to reduce antitrust enforcement (again, with some limited exceptions). The decline of antitrust enforcement took place at the hands of regulators and judges with little to no open political support, as we now discuss.

### Part IV.A: Administrative Changes

The FTC and the DOJ have significant authority to shape antitrust policy through guidance documents and other decisions on enforcement priorities. The most important guidance documents have been the horizontal merger guidelines, which were first issued in 1968, and updated in 1982, 1992, and 2010.<sup>112</sup>

The 1968 guidelines, following supreme court precedent at the time, imposed strict standards on mergers, among other things prohibiting firms with at least 15 percent of the market from acquiring firms with at least 1 percent of the market where the four-firm concentration was at least 75%. The 1982 guidelines, issued during the Reagan administration, greatly weakened the standards while introducing a higher level of economic sophistication (for example, by incorporating the hypothetical monopolist test for market definition). The 1992 guidelines somewhat liberalized the agencies' approach; the 2010 guidelines increased the HHI thresholds while innovating in other respects. The higher HHI thresholds were not based on economic theory or evidence, but simply on the pattern of merger enforcement, which prioritized mergers involving very large firms.<sup>113</sup> Writing in 2010, Carl Shapiro observes that “[o]ne cannot marvel at how far merger enforcement has moved over the past forty years, with no change in the substantive

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2022, <https://pra.digital.gov/clearance-process/>.

<sup>112</sup> For a summary, see Volker Nocke and Michael D. Whinston, “Concentration Thresholds for Horizontal Mergers,” *American Economic Review* 112, no. 6 (2022): 1915–48.

<sup>113</sup> Nocke and Whinston. at 1919.

provisions of the Clayton Act and very little new guidance on horizontal mergers from the Supreme Court.”<sup>114</sup> Shapiro and many others today believe that merger enforcement has become too lax.<sup>115</sup>

In addition, the agencies brought fewer section 1 and section 2 cases during the past decades, preferring (in the case of the DOJ) to shift resources to criminal enforcement.<sup>116</sup> Both the DOJ and the FTC stopped bringing Robinson-Patman cases between the mid 1970’s and early 1980s (despite no change in statutory text),<sup>117</sup> partially as a result of changes in case law that made it harder to win cases. For example, during the hearing of future FTC Commissioner Deborah Owen, Senator Ford asked her why there has been no litigation involving the Robinson-Patman Act, to which the Owen responded:

Well, it is a question of prioritizing, Senator, and as I indicated in my answers, that being the case it seems to me that rather than saying well, you know, this is more important, this particular area is more important than another area, I would like to see the Commission focus on the best cases that we can find in any of the areas that are under the Commission's mandate. So many times there are problems with proof and things like that...<sup>118</sup>

Similarly, the agencies became reluctant to bring resale price maintenance cases even before the Supreme Court dealt its death blow in 2007. As with Robinson-Patman, nominees hedged at their hearings rather than admit they disagreed with the law. A good example is the exchange between Senator Metzenbaum and Douglas Ginsburg during his nomination hearing:

Now, President Reagan's first nominee to enforce the antitrust laws, William Baxter, took the position that he simply was not going to enforce laws, such as the per se prohibition on vertical price fixing, with which he personally disagreed. The next nominee, Paul McGrath, publicly stated that he would enforce these laws and abide by the Supreme Court's per se rule. Although the record shows no cases actually brought. I thought that,

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<sup>114</sup> Carl Shapiro, “The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,” *Antitrust LJ* 77 (2010): 49. at 51.

<sup>115</sup> Shapiro, “Antitrust in a Time of Populism.”; Nancy L. Rose and Jonathan Sallet, “The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right,” *U. Pa. L. Rev.* 168 (2019): 1941.; Nocke and Whinston, “Concentration Thresholds for Horizontal Mergers.” at 1937, 1940-42, 1945-46.

<sup>116</sup> See Part I.

<sup>117</sup> Crane, “Antitrust Antitextualism.” at 1239.

<sup>118</sup> Committee on Commerce, Science and Transportation--U.S. Senate, “Hearings before the Committee on Commerce, Sciences and Transportation--U.S. Senate,” July 31, 1989. at 273.

Mr. Ginsburg, we ought to have you on the record concerning your position with respect to vertical price-fixing.<sup>119</sup>

In his answer, Ginsburg assures that the DOJ would “continue to enforce the law as it is handed down by the courts, including the law against resale price maintenance which was most recently interpreted and implicitly affirmed in the Monsanto case last term.”<sup>120</sup> Yet, as far as we could identify, the DOJ did not bring any resale price maintenance cases under his tenure.<sup>121</sup>

#### Part IV.B: Shifts in the Supreme Court

Changes within the administration, however, are only one of the reasons behind the decline in antitrust enforcement. As has been widely documented by scholars, the courts have relentlessly narrowed the scope of the antitrust statutes from the very beginning.<sup>122</sup> However, there were periods of judicial enthusiasm for antitrust enforcement, above all from the late New Deal until the 1960s. Starting in the early 1970s, the court reversed course yet again and embarked on a relentless quest to cut back antitrust enforcement that continues to the present day.

In rough outline, the court imposed standing requirements on private plaintiffs that eliminate cases brought by people who are harmed by antitrust violators but are not in privity with them (“indirect purchasers”) or whose injuries do not follow a direct causal pathway from the violations.<sup>123</sup> It imposed pleading requirements that block antitrust actions where much of the evidence is not already public—contrary to the practice in other areas of the law.<sup>124</sup> These requirements prevented many plaintiffs from obtaining needed evidence through discovery, which has further harmed antitrust enforcement as the Court has also imposed a higher threshold for proving agreement among cartel members.<sup>125</sup>

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<sup>119</sup> Committee on the Judiciary--U.S. Senate, “Confirmation Hearings on Federal Appointments.” at 221-222.

<sup>120</sup> *Op cit.*

<sup>121</sup> Indeed, in 1983 the House Judiciary Committee would go as far as decrying that the Justice Department’s involvement in the Supreme Court’s Monsanto decision “may prove to be a wholly unjustified allocation of resources in a bold attempt to circumvent the Congress”, which was clearly in favor of maintain a per se rule for Vertical Resale Price Maintenance. See Seiberling, “Congress Makes Laws; The Executive Should Enforce Them.” at 178.

<sup>122</sup> See, for example, Crane, “Antitrust Antitextualism.” at 1207; Nicolas Petit, “A Theory of Antitrust Limits,” *George Mason Law Review* 28, no. 1939 (2021).

<sup>123</sup> *Illinois Brick Co. v. Illinois*, 431 US 720 (1977); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 US 519 (1983). See also Smith, “The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment.”

<sup>124</sup> *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007).

<sup>125</sup> *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986).

The Court eliminated or weakened the per se rule for a range of conduct, including most vertical arrangements, leaving plaintiffs to the mercy of the rule of reason, which enables defendants to escape liability by asserting (often dubious) business justifications, and magnifies expenses for plaintiffs who must pay expert witnesses for complex data analysis.<sup>126</sup>

The court weakened the Robinson-Patman Act as a freestanding source of law,<sup>127</sup> and imposed extremely high thresholds of liability for predatory pricing.<sup>128</sup> Its holdings have generated hostility to virtually all section 2 cases in the lower courts. By requiring plaintiffs to allege anticompetitive harm on both sides of two-sided markets, the court helped platform monopolists immunize themselves from liability.<sup>129</sup>

Finally, the Court allowed companies to protect themselves from antitrust liability to consumers and workers by requiring them to sign arbitration clauses that block class actions, undermining the incentive to sue.<sup>130</sup> In many cases, lower courts, following the lead of the supreme court, have further weakened antitrust enforcement.<sup>131</sup>

While virtually every commentator agrees that the overall trajectory in the direction of more limited antitrust liability and weaker enforcement is unmistakable,<sup>132</sup> here we put some empirical meat on the anecdotal bones. Building on Epstein, Landes, and Posner's empirical demonstration of growing business-friendliness on the supreme court,<sup>133</sup> we focus on what might be called "antitrust hostility" or what, for convenience, we will call "monopoly-friendliness." By monopoly-

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<sup>126</sup> T. V. Continental, Inc. v. GTE Sylvania (Inc, 1977); Leegin Creative Leather Products v. PSKS, Inc. (2007); Jefferson Parish Hospital Dist. No. 2 v. Hyde (1984). State Oil Co. v. Khan, 522 S.Ct 3 (Supreme Court 1997). and many others. It is worth stressing the long-lasting impacts of these shifts to antitrust enforcement. Michael Carrier reviewed 222 cases where Federal Courts applied the rule of reason in antitrust cases and concluded that plaintiffs lost in 221 of them. 97% of the cases are dismissed in the first stage because plaintiffs fail to show anticompetitive effects. Michael A. Carrier, "Rule of Reason: An Empirical Update for the 21st Century," *Geo. Mason L. Rev.* 16 (2008): 827. at 829-830.

<sup>127</sup> Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (1993); Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 US 164 (2006).

<sup>128</sup> Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509.

<sup>129</sup> Ohio et al vs. American Express Co et al, No. 585 (June 25, 2018).. See also Caio Mario Pereira Neto and Filippo Lancieri, "Towards a Layered Approach to Relevant Markets in Multi-Sided Transaction Platforms," *Antitrust Law Journal* 83, no. 2 (2020): 701. (discussing the many problems with the decision)

<sup>130</sup> American Exp. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

<sup>131</sup> See, for example, recent decisions such as FTC v. Qualcomm Inc., 969 F. 3d 974 (2020); US v. AT&T, INC., 916 F. 3d 1029 (2019)., and many other decisions that make it generally harder to challenge mergers and conduct by dominant firms.

<sup>132</sup> See, for example, Crane, "Antitrust Antitextualism.", Khan, "Amazon's Antitrust Paradox."

<sup>133</sup> Lee Epstein, William M. Landes, and Richard A. Posner, "How Business Fares in the Supreme Court," *Minn. L. Rev.* 97 (2012): 1431.

friendliness, we mean the tendency to rule in favor of defendants in antitrust actions, including cartel members as well as monopolies. Monopoly-friendliness is a subset of business-friendliness: as we will see, a justice who votes in favor of business defendants in business cases generally may not necessarily vote in favor of antitrust defendants to the same extent. We collected all Supreme Court decisions that mention the Sherman Act or the Clayton Act over the past 70 years and the votes of individual justices in each case.<sup>134</sup> This yielded 262 cases<sup>135</sup> where the Court directly dealt with antitrust enforcement, from *Besser* in 1952 to *NCAA* in 2021.<sup>136</sup> We then hand-coded a dummy variable on whether the decision was pro or against antitrust enforcement.<sup>137</sup> Figure 10 shows our data.

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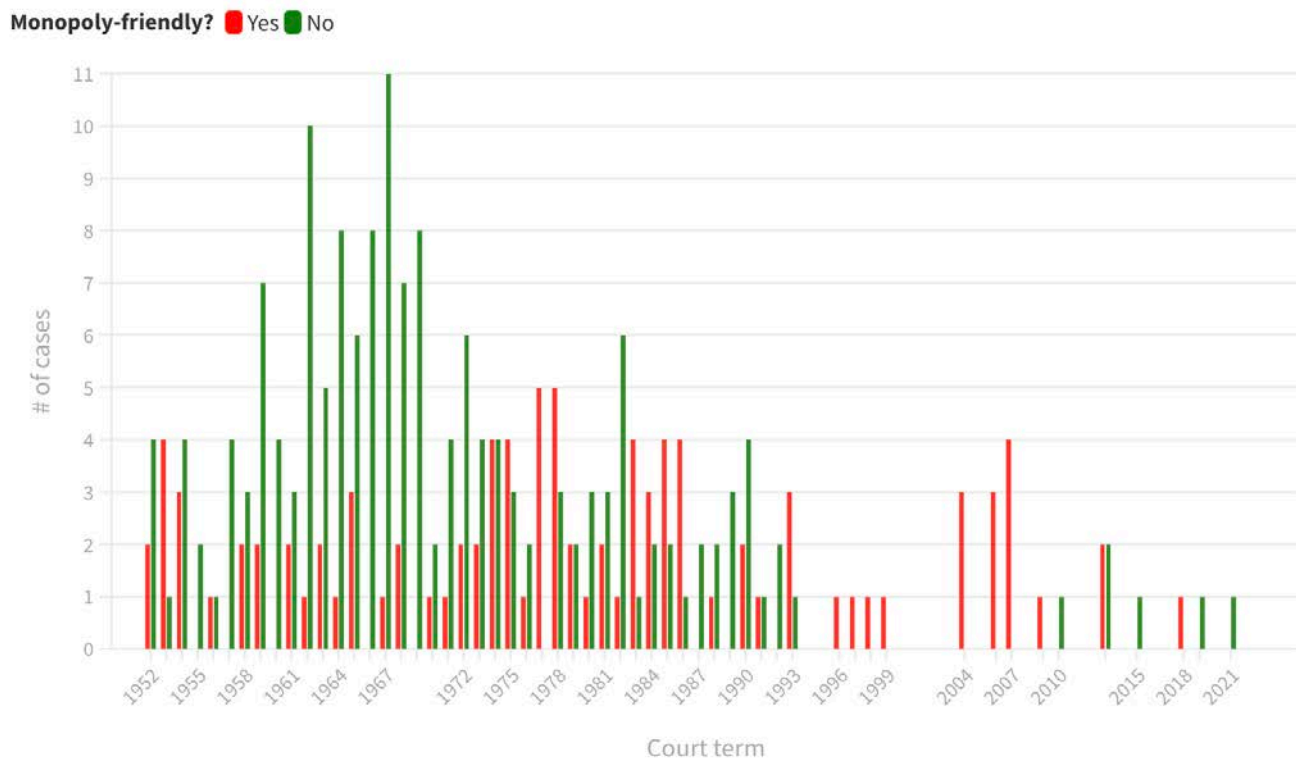
<sup>134</sup> Our sample starts in the 1951-1952 term (capturing the beginning of the Warren Court which starts in 1953) and goes until the 2021 term. The individual justice vote data comes from Washington University Supreme Court database: Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2020 Supreme Court Database, Version 2021 Release 01. URL: <http://Supremecourtdatabase.org>.

<sup>135</sup> The initial search for all Supreme Court decisions since 1952 that mentioned the word “Sherman” in any way yielded 411 cases. We then read all of them to remove cases where antitrust was not the main topic under discussion (for example, many decisions in which the Sherman Act was only mentioned in a footnote). The clean database resulted in a total of 227 cases. We then did the same for all decisions that mentioned the word “Clayton”. This added 35 antitrust decisions to database, for a total of 262.

<sup>136</sup> *Besser Mfg. Co. v. United States*, 343 US 444 (1952). and *National Collegiate Athletic Assn. v. Alston*, 141 S. Ct. 2141 (2021).

<sup>137</sup> The Monopoly-friendliness variable generally took the value of 0 if the initial plaintiff won the antitrust litigation and 1 otherwise. More precisely, the variable took the value of 0 if: (i) the decision was in favor of the government against a private party (generally); and (ii) the decision was in favor of a smaller business/individual/class action against a larger business (in general); with the exceptions of: (iii) if a private party or Federal Government won a case challenging State Regulation (State Action) case; (iv) the FTC/DOJ or a private party won a case challenging regulations that fixed prices or other competitive conditions (ICC, shipping or insurance cases, for example); (v) a private party lost a case affirming *Noerr-Pennington* or other antitrust exemptions; and (iv) a plaintiff lost a case challenging a Union contract and the Union claimed a labor exemption.

**Figure 10: The Evolution of the Supreme Court’s Antitrust Jurisprudence (1952-2021)**



Note: Based on Justices votes on antitrust cases mentioning the Sherman and Clayton Acts.

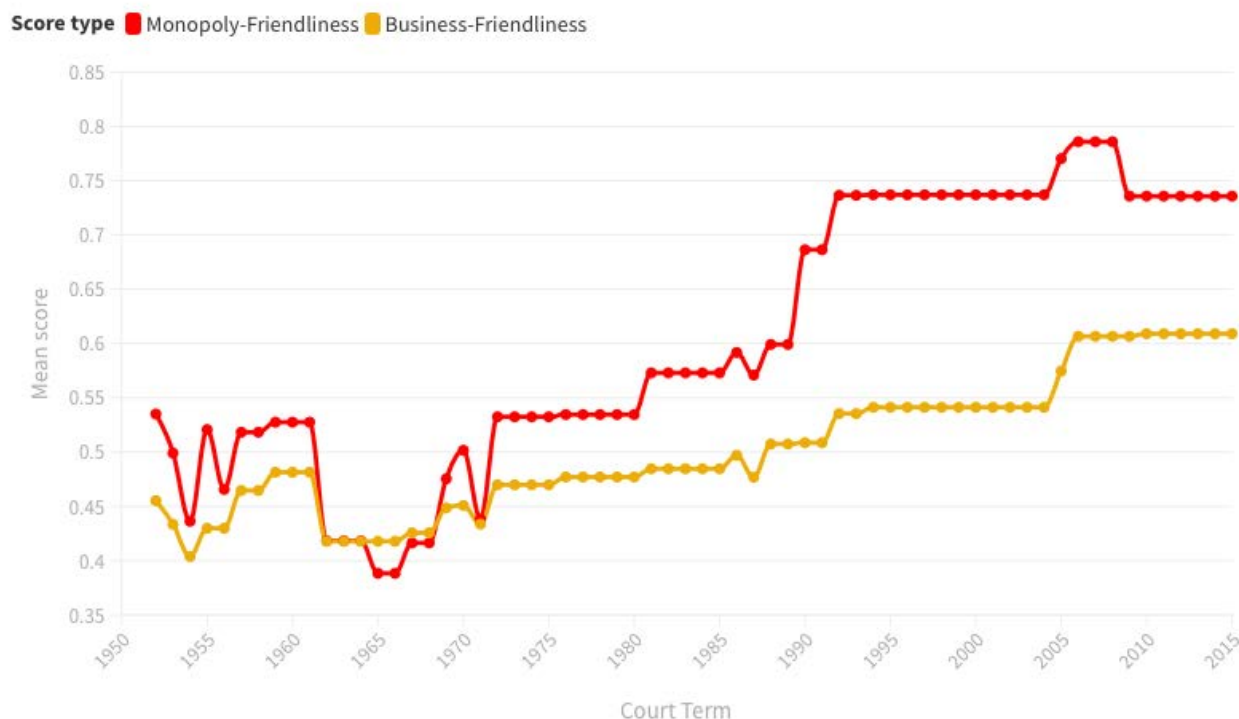
Building on Epstein, Landes, and Posner, we can construct a series that maps evolution of the supreme court’s business friendliness over time. The pro-business bias is correlated with the anti-enforcement stance in antitrust cases. Pre-1975, when the court mostly expanded enforcement, 41% of justices’ votes were, on average, pro-business. Post-1975, when antitrust enforcement begins to be curtailed, this average rises to 59%. While this trend is particularly pronounced for Republican appointees (from 43% to 52%), it is also present among Democratic-appointed justices (from 35% to 38%).

However, the supreme court’s shift on antitrust is significantly more pronounced than its pro-business shift. Figure 11 compares the mean business-friendliness and monopoly-friendliness for the majority of supreme court justices since the 1950s.<sup>138</sup> As can be seen, the Burger Court

<sup>138</sup> Epstein, Landes, and Posner, “How Business Fares in the Supreme Court.” The original Epstein, Landes and Posner’s analysis cover the period from 1946 to 2011. However, Lee Epstein was kind to provide us access to an updated dataset that covers the 2020 Supreme Court term. We are thankful to her for making the data available.

(near the start of which Lewis Powell joined the Supreme Court) marks the beginning of a widening gap between both scores.

**Figure 11: Moving Average of the Top Five Monopoly-Friendliness and Business-Friendliness Scores Over SCT Terms (1952-2015)**



Source: Business-Friendly - Epstein, Landes and Posner (2013), updated in 2020; Analysis of Supreme Court Antitrust Decisions

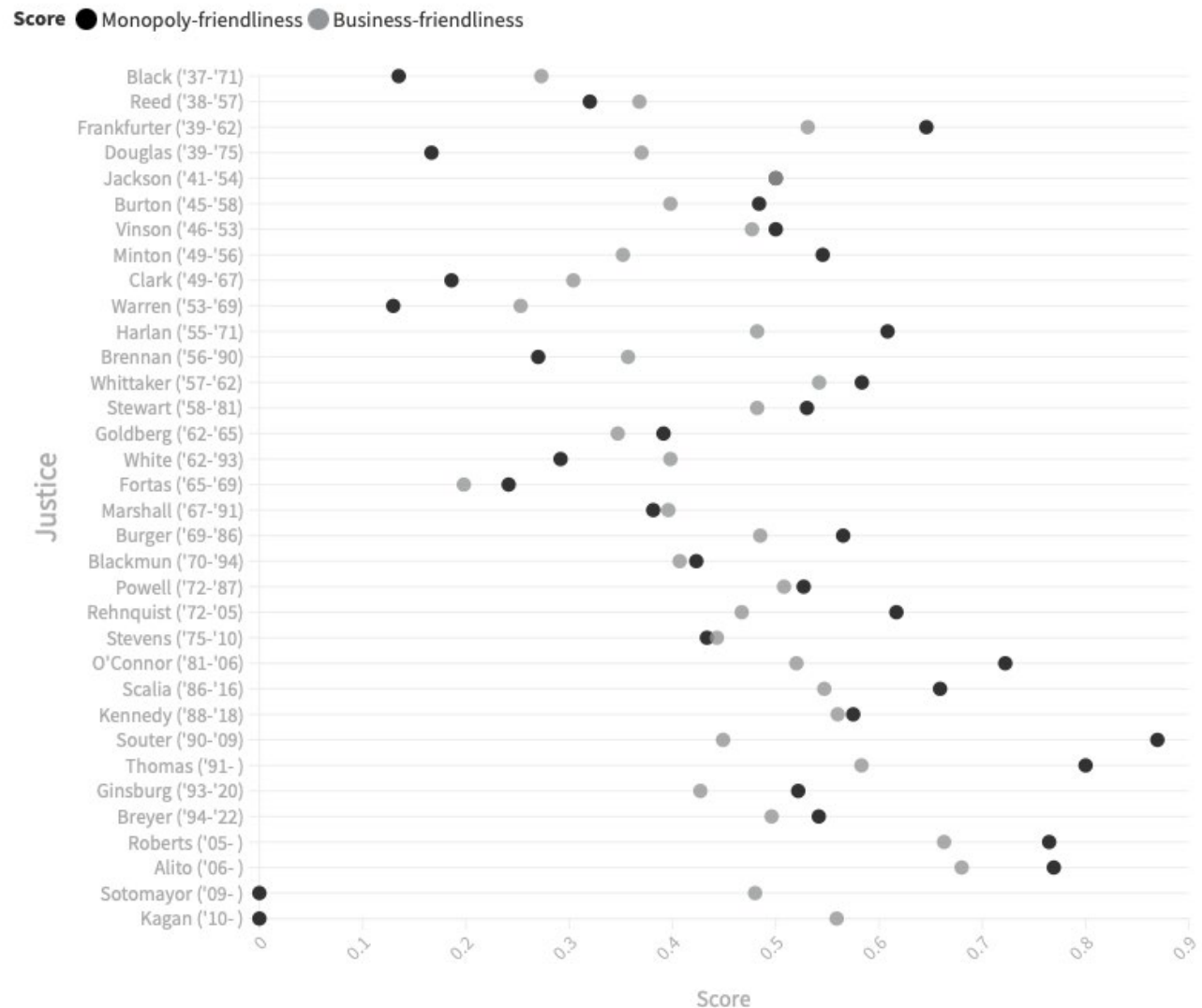
To build the Court's average, the author's first build a Justice specific score. A score of 1 means that a given Justice voted in favor of businesses in all (100%) of the business-related cases in which she participated during her entire tenure at the Supreme Court. For example, if throughout her tenure Justice X participated in 10 judgments that included businesses and voted in favor of these companies in 6 cases, her business-friendly score is 0.6. This is fixed for that Justice. The Court score then reflects the average composition at the Court in a specific term. More specifically, if on the terms 62'-64' (for example) the Court was composed of two justices with scores  $X=0.6$  and  $Y=0.2$ , then the Court score for those years is 0.4. Imagine then that on 1965 Justice Y retires and is replaced by Justice Z, who has an overall business-friendly score of 0.8 (throughout his entire tenure). Then on 1965 and for all the years for which the Court composition was  $X + Z$ , the Court score is 0.7 ( $(X's\ 0.6 + Z's\ 0.8) / 2$ ).

We employed the same methodologies for the antitrust scores presented below, but in there we coded antitrust decisions. A score of 1 means that a given Justice voted against antitrust or in favor of large business in all (100%) of the antitrust cases in which she participated. Therefore, the closer to 1, the more anti-antitrust enforcement (or the more monopoly-friendly) the justice is.



Figure 12 provides a more granular view, breaking down this division for each individual justice.<sup>139</sup>

**Figure 12: Relationship Between Justices' Monopoly-Friendliness and Business-Friendliness Score Over Time**



Source: Based on Justices votes on antitrust cases mentioning the Sherman Act and data from Epstein, Landes, and Posner. (2013), as updated by Lee Epstein until 2020; Our analysis of Supreme Court antitrust decisions

The appointments of Justices Powell and Rehnquist in 1972 start a trend of justices being significantly more monopoly-friendly than business-friendly. To better understand whether the

<sup>139</sup> We excluded Gorsuch, Kavanaugh, and Barrett from our analysis of the individual behavior of justices because they voted in too few cases.

justices are simply against antitrust enforcement in general or particularly in favor of large businesses, we also coded a second dummy variable for whether a decision was for or against big business.<sup>140</sup> Interestingly, the justices also become significantly more prone to rule in favor of large companies which are sued for antitrust violations by small companies or consumers. Indeed, since the 1990s the majority of the court has consisted of justices who voted against antitrust enforcement in more than 70% of all cases before them. Yet the court becomes even more hostile to private enforcement—that is, litigation when a smaller company is challenging a big business—with the majority of the Court voting against the small player in impressive 80% of their rulings.

To account properly for the magnitude of this shift, one must take into account selection bias.<sup>141</sup> One would expect that the court would revert to the mean anti-enforcement ratio of 0.5 after it had promoted an initial shift in antitrust doctrine. As the court signals its hostility to enforcement, plaintiffs adapt their expectations and only file new cases that conform to the Court’s antagonistic stance.<sup>142</sup> Still, as Figures 11 and 12 show, the Court continues again and again to position itself against antitrust liability creating a dynamic anti-enforcement effect that is much stronger than a simple, once in a generation, shift.

As noted in Part III, the dramatic rise in judicial hostility toward antitrust enforcement was never disclosed in the confirmation hearings. In many cases, justices who affirmed in hearings that antitrust law protects small business turned around and voted against small businesses repeatedly in cases that came before them: O’Connor, Souter, Thomas, and Ginsburg are all examples. Souter’s remarks during his nomination hearing are a good example:

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<sup>140</sup> The pro-big business variable is restricted to antitrust litigation involving at least two private parties (no Government involvement), or 114 cases in our dataset—it can also be interpreted as an “against private enforcement” variable. We analyzed all cases and hand-coded the relatively smaller party, which in almost all cases is the plaintiff. Formally, the pro-big business variable took the value of 0 if the smaller company or the individual/class action party won the litigation, and 1 otherwise. For the vast majority of cases, this coding is straightforward as it involves, for example, a local retailer suing a larger distributor/chain for a potential antitrust violation. It is worth noting, though, that this determination of size is relative, as we do not have absolute data on turnover or market capitalization. For two cases we could not determine relative sizes, so the 114 cases sample excludes them. These were *Tampa Electric Co. v. Nashville Co.*, 365 US 320 (1961); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 US 1 (1979).

<sup>141</sup> George L. Priest and Benjamin Klein, “The Selection of Disputes for Litigation,” *The Journal of Legal Studies* 13, no. 1 (1984): 1–55.

<sup>142</sup> That is, if in the past an agency would challenge a merger from 5 to 4 players, as the Court shifts the case law the agency starts challenging only 4-3 or even 3-2 mergers. The same happens in private litigation,

Justice SOUTER: I also have been well educated by Senator Rudman over the years in the value of small business. Small business has no better friend than he has, and I think one of the lessons that I have absorbed from a long period of my professional lifetime with him, if I needed to absorb that from anyone else, is the importance of a degree of competition which will allow small business to emerge and allow for diversity in the American economy, which it is the object of the antitrust laws to secure, as much as that is possible.

Senator KOHL. Do you agree, Judge Souter, that an important purpose of the Sherman Act is to protect against consolidation of economic power and make sure that consumers are not abused by companies engaged in monopolistic business practices?

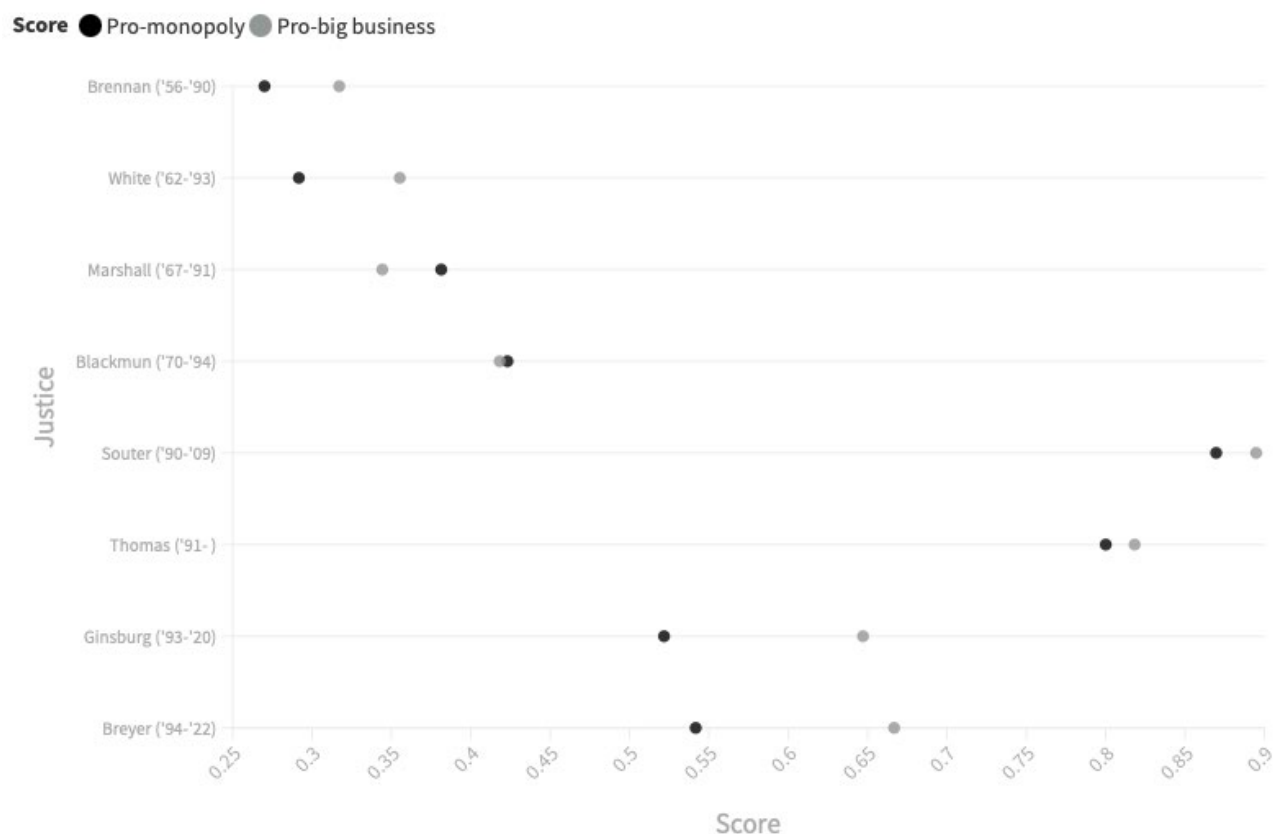
Justice SOUTER. There is simply no question about it, either as an historical matter or as a strictly legal matter, as one examines the precedents. The ultimate object of the system, it seems to me, has to be judged on its systemwide effects. I do not think the antitrust laws should even be seen as merely consumer laws or as anti-business laws, but as laws intended to assure a free and open and competitive economic system for everyone.”<sup>143</sup>

Yet, as Figure 13 shows, Souter’s nomination was actually one of the turning points in hostility against antitrust enforcement—as he himself is the most anti-enforcement, pro big-business supreme court Justice in the past 70-years. Souter voted against smaller companies in 18 out of the 19 cases in which he participated, and against antitrust enforcement in general in 20 out of the 23 cases in which he participated. Indeed, the replacement of Brennan, White, Marshall and Blackmun by Souter, Thomas, Ginsburg and Breyer in the 1990s shifts the court decisively against antitrust enforcement—and in particular against private antitrust enforcement.

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<sup>143</sup> United States Senate Committee on the Judiciary, “Hearings Before the Committee on the Judiciary--United States Senate,” September 13, 1990. at 297.

**Figure 13: Pro-Monopoly and Pro-Big Business Score for Selected Justices**



O'Connor, Thomas, and Roberts are also among the most anti-antitrust justices that ever sat on the supreme court, voting against enforcement in the large majority of their rulings and in contradiction with their statements at the time of their nomination.

Not all Supreme Court cases are equal: some only incrementally change policy, while others promote a revolution. Justice Ginsburg authored the decision in *Volvo Trucks* that puts the final nail in the coffin of the Robinson-Patman Act as a standalone source of enforcement. O'Connor, Souter, Thomas and Ginsburg (together with Breyer) are all part of the unanimous vote in *Trinko* that all but shut the door on the enforcement against refusals to deal—a particularly important tool for small businesses that depend on dominant companies. Roberts, Souter, and Thomas joined the majority in *Twombly* (which greatly restricted private enforcement), also together with Breyer. Roberts and Thomas joined the majority in *Italian Colors*, which further restricted private enforcement of antitrust laws. O'Connor, Souter, Thomas, and Ginsburg all joined the unanimous court in *State Oil v. Khan*, which changed the law on maximum Resale Price Maintenance. Roberts

and Thomas also joined the majority in *Leegin*, which eliminated the antitrust restrictions on resale price maintenance and in *American Express*, which will negatively affect public and private enforcement in digital markets for decades to come.<sup>144</sup>

## Part V. Taking Stock

If a policy decision is made by an elected official who campaigned on it, we consider it democratically sanctioned and presumptively in the interest of the public. A decision made by a delegated expert (judge or regulator) whose appointment was publicly vetted and whose views were endorsed by elected officials is also democratically sanctioned, albeit less so. The democratic sanction starts to be in question when the decision is made by an elected official who did not advocate for this measure in her campaign, or it is included in general omnibus legislation to shield it from public scrutiny, or it is made through obscure procedural shortcuts. When an appointed official makes policy decisions in the absence of public attention, that decision receives a still lower level of democratic sanction. At the lowest level stand federal judges with lifetime tenure whose views on antitrust law were unknown at the time of their appointment.

Table III summarizes this framework and matches it with the evidence presented in Parts II and III. Our evidence shows that the decline in antitrust enforcement was achieved through decisions made at the lowest three levels of democratic accountability.

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<sup>144</sup> See Caio Mario Pereira Neto and Filippo Lancieri, “Towards a Layered Approach to Relevant Markets in Multi-Sided Transaction Platforms,” *Antitrust Law Journal* 83, no. 2 (2020): 429–81. Steven C. Salop et al., “Rebuilding Platform Antitrust: Moving on from *Ohio v. American Express*” *SSRN*, 2021.

**Table III: The Lack of Public Support for the Weakening of Antitrust Law**

<b>Level of public visibility / democratic legitimacy</b>	<b>Role of Agents</b>	<b>Evidence from period of decline (mid-1970s to present)</b>
Highest	Elected officials run on policy or publicly endorse it	No clear congressional or presidential authority to reduce antitrust enforcement
High	Elected officials appoint regulators or judges who promote policy	Very limited statements by nominees in hearings that they intended to reduce antitrust enforcement <sup>145</sup>
Low	Elected officials implement policy in low-visibility way	Budgetary reductions for regulators buried in appropriation bills
Lower	Regulators implement policy without endorsement from public officials, including legislative guidance	Regulators adopt stricter antitrust enforcement guidelines and priorities despite repeated protests from members of Congress
Minimal/none	Courts change law based on policy considerations	Courts erode antitrust doctrine by overturning precedents, many times in contradiction to views expressed during nomination hearings

The notion that unpopular policies must be implemented by appointed officials outside the glare of publicity is hardly a new one, not even in the field of antitrust. In 1980, Richard Posner and George Stigler applied this precept to antitrust in a memorandum to Martin Anderson, an economist serving on President Reagan transition team in December of 1980. The memorandum, which was entitled “Throttling Back on Antitrust: A Practical Proposal for Deregulation,” argued that the Reagan Administration should weaken antitrust enforcement without turning to Congress and thus “antagonizing politically influential constituencies” by relying on DOJ and FTC appointments and curtailing enforcers’ budgets. While it is unclear that the memo itself influenced antitrust policy, its thinking was representative of what eventually took place.

The memo recalls our initial enquiry on whether policymaking that is not sanctioned democratically will reflect the public interest as interpreted by technocrats or powerful private interests such as those of big business. We now turn to this question.

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<sup>145</sup> Exceptions to the rule of no clear statements against antitrust enforcement are Bork, who was rejected, Breyer and Gorsuch at the Supreme Court, and then Baxter, Miller, Klein, Muris, Wright and Baer at the FTC/DOJ. These are clearly a fraction of confirmations.

## Part V.A: The Impact of Reduced Antitrust Enforcement on the Economy

One way to answer this question is to examine the impact of the decline of antitrust enforcement on the economy. Chicago-school technocrats predicted that reduced antitrust enforcement would enhance economic efficiency and growth. Public choice theory would predict that reduced antitrust enforcement would benefit relevant interest groups (big business) at the expense of the public. Which prediction was correct?<sup>146</sup>

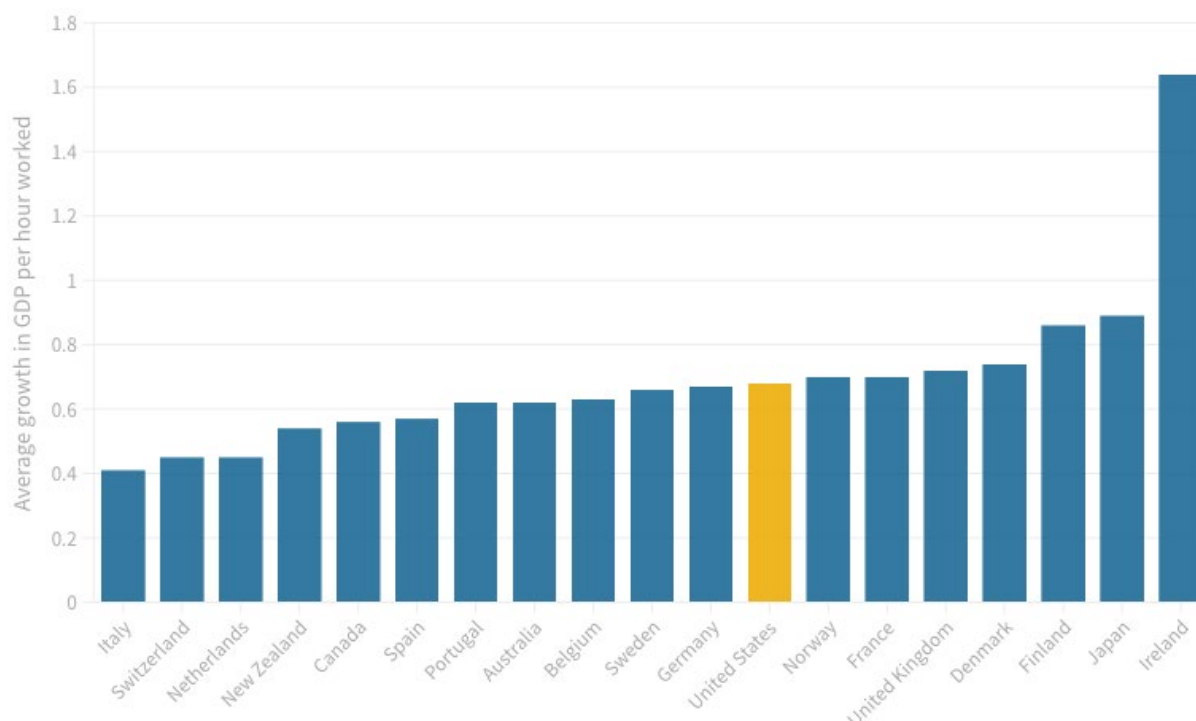
First, there is no evidence that productivity growth increased as a result of the relaxation of antitrust. Robert Gordon shows that the annual growth in output per hour worked *decreased* from 2.82% during the period 1920-1970 to 1.75% during the period 1970 to 2006, to 0.97% between 2006 and 2016.<sup>147</sup> This decline has many causes, so it cannot be attributed just to the reduction in antitrust enforcement. Yet many of the technological factors are common to other developed countries, while this significant reduction of antitrust enforcement is unique to the United States. Did the US perform significantly better than other countries at a similar level of development at the end of the 1970s? We answer this question in Figure 14, where we plot the average growth in GDP per hour worked from 1980 to 2020 from the OECD dataset. The United States is in the middle of the pack, inferior to comparable economies like those of the UK, France, and Japan.

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<sup>146</sup> We assume that the technocratic theory implies that academics both believed that their theories advanced the public good and that their beliefs were correct, or that they would have corrected them in response to normal criticism. Obviously, this assumption could be contested.

<sup>147</sup> Robert J. Gordon, “Why Has Economic Growth Slowed When Innovation Appears to Be Accelerating?” (National Bureau of Economic Research, 2018).

**Figure 14: Average Growth in GDP Per Hour Worked - Select Countries (1980-2020)**



Source: OECD Dataset

Moreover, growth in productivity did not bring benefits to the less well-off. While median earnings of male full-time workers in the United States grew 36% in real terms between 1960 and 1980, they did not change at all between 1980 and 2016.<sup>148</sup> During the same later period, the median earnings of male workers in the United Kingdom grew by 25%.<sup>149</sup> In France, the data is available only for the period 1991-2016, during which period the median earnings of male workers grew by 10%.<sup>150</sup>

The public choice hypothesis would have predicted that the decline of antitrust should produce higher prices, higher profits, a higher share of profits over income, and especially a higher concentration of profits among large companies. Indeed, the weighted average markup of U.S.

<sup>148</sup> Emily A. Shrider et al., “Income and Poverty in the United States: 2020,” *US Census Bureau, Current Population Reports*, no. P60-273 (2021). Table A-7, at 46-47.

<sup>149</sup> Brian Bell, Nicholas Bloom, and Jack Blundell, “Income Dynamics in the United Kingdom 1975-2020,” *GID Working Paper*, 2021.

<sup>150</sup> Francis Kramarz, Elio Nimier-David, and Thomas Delemtotte, “Inequality and Earnings Dynamics in France: National Policies and Local Consequences,” *Center for Research in Economics and Statistics*, 2021.



Compustat firms rose from 1.1 in 1980 to 1.6 in 2016.<sup>151</sup> The profit share of value-added in the United States rose from 2.2 percent in 1984 to 15.7 percent in 2014.<sup>152</sup> A disproportionate amount of these profits are concentrated among larger firms. In 1980 only 21% of small publicly traded firms reported negative earnings (versus 6% of the large). In 2011 47% did (versus 17% of the large).<sup>153</sup> Since 1980, median markups are flat or even falling, while the weighted-average markups have risen substantially from about 1.2 in 1982 to 1.8 in 2012, driven by the markups of the largest firms.<sup>154</sup> As a consequence, during the 1980-2020 period, the share of income earned by the top 1% of the income distribution grew from 10% to 19% in the United States, versus an increase from 8% to 13% in the United Kingdom and from 7% to 10% in France.<sup>155</sup>

The aggregate economic evidence is more consistent with the public choice theory than the technocratic theory. And while it can be given only a little weight because of a host of confounding factors, micro-level evidence comes to similar conclusions. Merger studies uniformly find that mergers have resulted in higher prices and/or assume too high efficiencies as a result of the merger.<sup>156</sup> Data from the U.S. Census Bureau of Manufacturing show that after an acquisition markups increased between 15 percent and 50 percent in acquired plants relative to non-acquired plants.<sup>157</sup>

Industry-level studies provide further support for this view. Unchallenged mergers in the dialysis market led to higher prices and reduced availability of dialysis facilities, which caused a 3.1 percentage point higher hospitalization rate and 1.6-2.0 percentage point lower survival rate in those markets.<sup>158</sup> Between 5.3% and 7.4% of acquisitions in pharmaceutical markets are “killer

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<sup>151</sup> Jan De Loecker, Jan Eeckhout, and Gabriel Unger, “The Rise of Market Power and the Macroeconomic Implications,” *The Quarterly Journal of Economics* 135, no. 2 (2020): 561–644.

<sup>152</sup> Simcha Barkai, “Declining Labor and Capital Shares,” *The Journal of Finance* 75, no. 5 (2020): 2421–63.

<sup>153</sup> Xiaohui Gao, Jay R. Ritter, and Zhongyan Zhu, “Where Have All the IPOs Gone?,” *Journal of Financial and Quantitative Analysis* 48, no. 6 (2013): 1663–92.

<sup>154</sup> David Autor et al., “The Fall of the Labor Share and the Rise of Superstar Firms,” *The Quarterly Journal of Economics* 135, no. 2 (2020): 645–709.

<sup>155</sup> Lucas Chancel and Thomas Piketty, “Global Income Inequality, 1820–2020: The Persistence and Mutation of Extreme Inequality,” *Journal of the European Economic Association* 19, no. 6 (2021): 3025–62.

<sup>156</sup> John Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of US Policy* (MIT Press, 2014).; Orley Ashenfelter, Daniel Hosken, and Matthew Weinberg, “Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers,” *The Journal of Law and Economics* 57, no. S3 (2014): S67–100.; Nocke and Whinston, “Concentration Thresholds for Horizontal Mergers.” at 1937, 1940-42, 1945-46.

<sup>157</sup> Bruce A. Blonigen and Justin R. Pierce, “Evidence for the Effects of Mergers on Market Power and Efficiency” (National Bureau of Economic Research, 2016).

<sup>158</sup> Thomas G. Wollmann, “How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare” (National Bureau of Economic Research, 2020).

acquisitions” aimed at preventing future competition, which disproportionately occur just below merger notification thresholds.<sup>159</sup> Between 1996 and 2012 within-state hospital mergers led to decreased competition and price increases of 7-9% when compared to out-of-state mergers.<sup>160</sup> After an acquisition in the pharmaceutical industry, prices increase 2.2% more for drugs whose market overlaps with that of an acquisition target than for matched control drugs, and the merger leads to no significant increase in the approval of new drugs.<sup>161</sup> Finally, lax antitrust enforcement has permitted the U.S. mobile phone service industry to move from one of the most fragmented to one of the most concentrated in the world. As a result, between \$44 and \$65 billion a year are transferred from consumers to shareholders.<sup>162</sup> Forcing divestitures in beer markets where antitrust authorities did not intervene would have reduced the US beer price index by 4–7%.<sup>163</sup>

In sum, the evidence supports the public choice theory, not the technocratic theory. While it is possible to argue in response that regulators and judges were influenced by ideas (just wrong ideas), the technocratic theory implies that regulators and judges would have adjusted as the limitations of Chicago school came into focus. They have not.

## Part V.B: Evidence of Political Pressure by Big Business

Large business interests have always been opposed to strong enforcement of antitrust law. If we want to attribute the decline of antitrust enforcement to the pressure exerted by big business, we need to explain why starting in the mid-1970s these interest groups succeeded where they had failed before. We do so by presenting evidence on changes in motivation that justified a renewed engagement of large businesses in antitrust policy in the 1970s (Part V.B.1). We will then discuss the ways that businesses developed new methods of influence and took advantage in concurrent changes in the political, economic, and ideological environment (Part V.B.2).

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<sup>159</sup> Colleen Cunningham, Florian Ederer, and Song Ma, “Killer Acquisitions,” *Journal of Political Economy* 129, no. 3 (2021): 649–702.

<sup>160</sup> Leemore Dafny, Kate Ho, and Robin S. Lee, “The Price Effects of Cross-market Mergers: Theory and Evidence from the Hospital Industry,” *The RAND Journal of Economics* 50, no. 2 (2019): 286–325.

<sup>161</sup> Alice A. Bonaime and Ye Emma Wang, “Mergers, Product Prices, and Innovation: Evidence from the Pharmaceutical Industry,” *Working Paper*, 2022, [https://www.hec.edu/sites/default/files/documents/Bonaime\\_Wang\\_202204.pdf](https://www.hec.edu/sites/default/files/documents/Bonaime_Wang_202204.pdf).

<sup>162</sup> Mara Faccio and Luigi Zingales, “Political Determinants of Competition in the Mobile Telecommunication Industry,” *The Review of Financial Studies* 35, no. 4 (2022): 1983–2018.

<sup>163</sup> Vanessa Alvarez, Keith Head, and Thierry Mayer, “Global Giants and Local Stars: How Changes in Brand Ownership Affect Competition,” 2020.

## Part V.B.1: Motives

In spite of strong antitrust enforcement in the 1950s and 1960s, corporate profits remained high. This picture changed at the beginning of the 1970s. First, the quadrupling of oil prices in 1973 increased production costs, squeezing margins. Second, international competition dramatically intensified. Import penetration in manufacturing (the percentage of U.S. manufacturing consumption accounted by imports) rose from 5.5% in 1970 to 12.9% in 1985.<sup>164</sup> Pre-tax profitability (EBITDA to assets), which had reached a peak of 16% in 1966, averaged 9.4% in the first six years of the 1970s.<sup>165</sup> Thus, American firms, especially large American firms that had dominated the world in the previous 30 years, found themselves under challenge.

This decline in the relative competitiveness of large American businesses provided both a motive and an opportunity to lobby for reduced antitrust enforcement. The motive was reduced profitability. The opportunity was the fear that American businesses might succumb to foreign competitors. For example, in Part II.A. above we discussed how one of the few opinion polls that showed declining support for antitrust enforcement was Gallup's survey asking respondents whether American firms should be allowed to "coordinate" among themselves as foreign firms did.<sup>166</sup> The Reagan administration memos cited above also referenced the pressures of foreign competition. However, while worries about foreign competition surfaced in the confirmation hearings of FTC and DOJ officials, most nominees affirmed their support for enforcement of the antitrust laws.<sup>167</sup>

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<sup>164</sup> Maria Papadakis, "Did (or Does) the United States Have a Competitiveness Crisis?," *Journal of Policy Analysis and Management* 13, no. 1 (1994): 1–20.

<sup>165</sup> Daniel Mark Holland and Stewart C. Myers, "Trends in Corporate Profitability and Capital Costs," *Working Paper - Sloan School of Management*, 1978, <https://dspace.mit.edu/bitstream/handle/1721.1/49294/trendsincorporat00holl.pdf?sequence=1>.

<sup>166</sup> See footnote 35 above.

<sup>167</sup> Sanford Litvack's hearing for DOJ AAG in 1979 is a good example:

"Senator Cochran: [W]e apparently do have a serious problem. We are bailing out Chrysler, United States Steel is staggering, if not falling. The Nation's textile industry is earning 3.3 percent rate of return on investment compared with over 10 percent for manufacturing generally in the Nation, mainly because of increasing our imports of textiles. The balance is getting larger and larger in favor of foreign firms who are either just out and out competing more effectively with us or maybe taking advantages of unfair practices, practices that are defined as illegal under our law, cartelization, transshipments, export subsidies and the likes are being used to undermine the economy of the Nation. I think that it is a matter that ought to concern us. It needs our attention and our best minds need to be focused on how we go about saving the economy of the United States. Do we do it by attacking all of our business interests under some notion that not only is monopoly bad, but shared monopoly is worse, whatever that is. (...) Perhaps we should just take a completely new and fresh look at our entire theory of antitrust."

To which Litvack answers: "With all due deference, Senator Cochran, I think I am comfortable with our laws and our methods of enforcing them. Maybe it is something the Senate should consider, but based on my experience, I do

Finally, one can argue that in the early 1970s big business felt threatened by the antitrust authorities as never before. While restrictions on mergers and on same sale practices are annoying, the threat of a stand-alone break-up of a dominant firm is existential. That is why it is quite rare in U.S. history.<sup>168</sup> Still, in the late 1960's/early 1970s, the antitrust authorities asked for a break-up of both IBM and AT&T, posing a significant threat to two of the largest companies at the time.

## Part V.B.2: Means and Opportunities

With a motive to oppose antitrust enforcement, big business developed new means for doing so and seized opportunities offered by changes in the economic, political, and ideological environment.

### *1: Relaxation in campaign financing*

The 1925 Federal Corrupt Practices Act, as amended by section 304 of the 1947 Taft-Hartley Act, stated that: "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office."<sup>169</sup> During the 1950s and the 1960s, labor unions won a number of cases that enabled them to create segregated campaign funds financed by voluntary donations of employees. In response to this development, in 1971 "corporate leaders pushed Congress to add provisions to the Federal Election Campaigns Act (FECA) clearly codifying their ability to form voluntarily funded political committees."<sup>170</sup> In the following years, corporations established Political Action Committees (PACs) in great numbers. As Figure 15 shows, in 1974 there were 2.3 Labor PACs for every corporate PAC. By 1976, the ratio was inverted. By 1985, there were 4.4 corporate PACs for every Labor PAC.

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not feel that it is appropriate or wise to support American business by keeping out competition or somehow limiting it or involving the Government more. I think antitrust is a compromise, a compromise between total chaos and a laissez-faire society and total Government control. It is finely balanced. I think we ought to keep it that way. I think we keep it that way by enforcing our laws. I am comfortable with where we are."

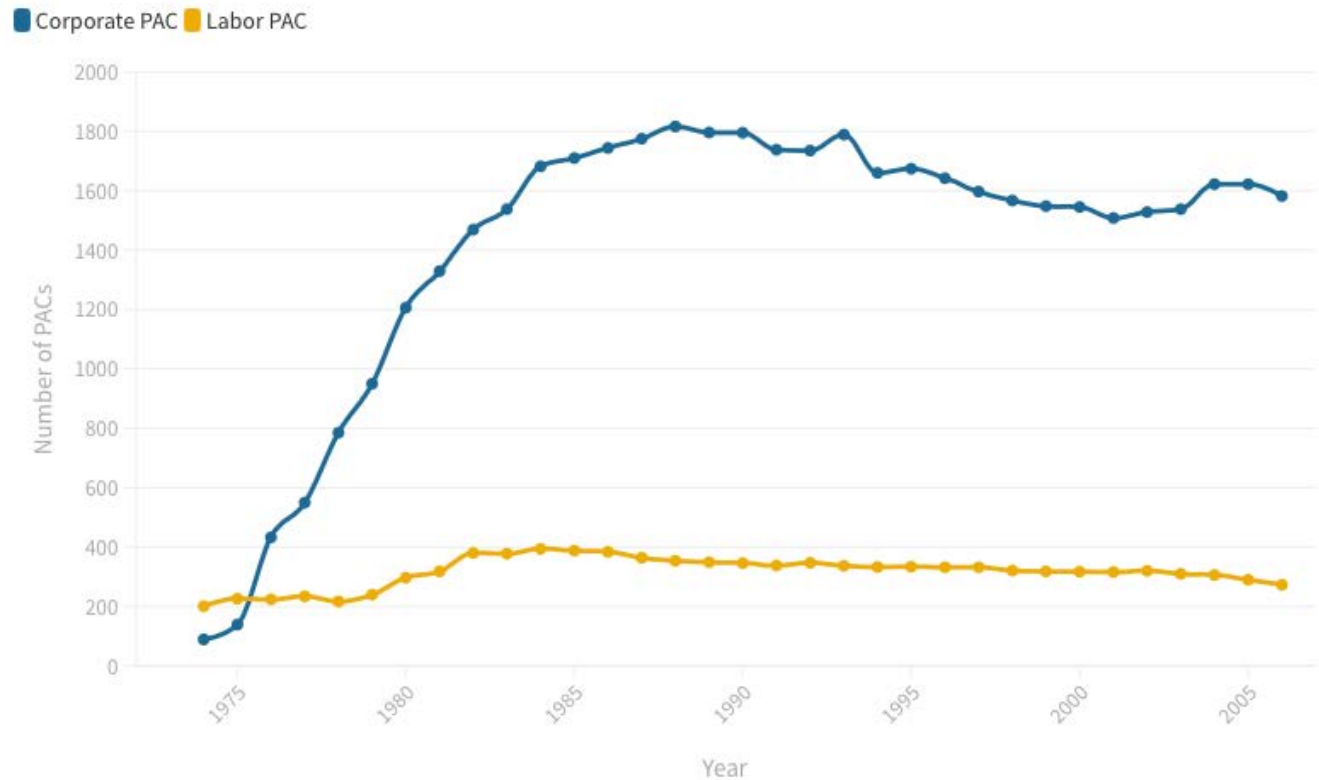
See Committee on the Judiciary--U.S. Senate, "Hearings Before the Committee on the Judiciary -- United States Senate," December 20, 1979. at 427-29.

<sup>168</sup> See Robert W. Crandall, "The Failure of Structural Remedies in Sherman Act Monopolization Cases," *Or. L. Rev.* 80 (2001): 109. at 121 (surveying U.S. monopolization cases since 1890 and finding 95 structural remedies in total, but finding only three that arose as a result of a single firm being charged with monopolization).

<sup>169</sup> Joseph E. Kallenbach, "The Taft-Hartley Act and Union Political Contributions and Expenditures," *Minn. L. Rev.* 33 (1948): 1.

<sup>170</sup> Adam Winkler, "Other People's Money: Corporations, Agency Costs, and Campaign Finance Law," *Geo. LJ* 92 (2003): 871.

**Figure 15: Number of Corporate and Labor PACs (1974-2006)**



Source: Federal Electoral Commission (2009) - Available at <https://web.archive.org/web/20160303221753/http://www.fec.gov/press/press2009/20090309PACcount.shtml>

The 1974 amendments to FECA introduced limits on both contributions and expenditures for political committees involved in federal elections. In 1976, however, the landmark Supreme Court decision *Buckley vs. Valeo* voided the limitations on expenditures.<sup>171</sup> Two years later, in *First National Bank of Boston v. Bellotti*,<sup>172</sup> the Court called into question the constitutionality of the federal law that barred corporations and labor unions from making a contribution or expenditure in connection with an election. This was the seed of the 2010 *Citizens United* decision, which further expanded the role of corporate money in politics.<sup>173</sup>

<sup>171</sup> *Buckley v. Valeo*, 424 US 1 (1976). For a summary of the evolution of the case law, see Library of Congress, “Campaign Finance and Elections | Constitution Annotated | Congress.Gov | Library of Congress,” 2022, [http://constitution.congress.gov/browse/essay/amdt1-3-20-1/ALDE\\_00000766/](http://constitution.congress.gov/browse/essay/amdt1-3-20-1/ALDE_00000766/).

<sup>172</sup> *First Nat. Bank of Boston v. Bellotti*, 435 US 765 (1978).

<sup>173</sup> *Citizens United v. Federal Election Com’n*, 558 US 310 (2010).

The growth in the number of PACs and the relaxation in the limits imposed on them led to an increase in the importance of corporate PACs in campaign financing. By the end of the 1970s, corporate and labor PACs were responsible for financing approximately sixty percent of federal campaign expenses.<sup>174</sup> The relative importance of corporate PACs vs labor PACs, however, changed dramatically. In 1972, labor PACs contributed \$6.4M to Democratic candidates for the House of Representatives, while corporate PACs contributed only \$3.9M to Republican candidates. By 1978, the ratio is inverted. Labor PACS contributed \$13.3M to Democratic candidates, while Corporate PACs contributed \$19.2M to Republican candidates. Most important, during the same period, corporate PAC support for Democratic candidates converged with labor PAC support. In 1972, Democratic candidates received only \$2M from corporate PACs (versus the \$6.4M obtained from Unions), while in 1978 they received \$13.4M from corporate PACs, as much as they received from Labor.<sup>175</sup> While the impact of corporate funding on electoral outcomes has not been rigorously measured because of data limitations, both common sense and anecdotal evidence suggest that the impact was profound. As former Senate Minority Leader and Republican presidential nominee Robert Dole warned, “When these political action committees give money, they expect something in return other than good government.”<sup>176</sup>

These trends would only intensify with the years. Over the period 1980-2012 political donations by members of the corporate elite (corporate executives and directors of publicly listed firms) increased 320-fold in real terms (while GDP increased by around three times in real terms).<sup>177</sup> Donations by members of the corporate elite also increased as a share of individual donations from 2% to 30%. In 2012, 50% of all corporate donations were made by just the top 0.01% of corporate donors.<sup>178</sup>

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<sup>174</sup> Daniel Hays Lowenstein and Richard L. Hasen, *Election Law: Cases & Materials* (Durham, N.C.: Carolina Academic Press, 1995). note 381, at 591.

<sup>175</sup> Campaign Finance Study Group, *An Analysis of the Impact of the Federal Election Campaign Act, 1972-1978: Final Report to the Committee on House Administration of the US House of Representatives*, 1979, [https://www.google.com/books/edition/An\\_Analysis\\_of\\_the\\_Impact\\_of\\_the\\_Federal/1EdAAAAIAAJ?hl=en&gbpv=0](https://www.google.com/books/edition/An_Analysis_of_the_Impact_of_the_Federal/1EdAAAAIAAJ?hl=en&gbpv=0).

<sup>176</sup> Robert G. Kaiser, *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* (Vintage, 2010). at 148.

<sup>177</sup> James Rockey and Nadia Zakir, “Power and the Money, Money and the Power: A Network Analysis of Donations from American Corporate to Political Leaders,” *Working Paper*, 2021.

<sup>178</sup> Rockey and Zakir.

Consistent with an increased influence of big business in the regulatory process, between 1998 and 2010 antitrust review outcomes were more favorable when a firm was headquartered in the electoral district of a member of the judiciary Committee of the House and the Senate. Interestingly, this was true for the bidder and for the target of friendly mergers. In hostile mergers, if the target was associated with a powerful judiciary committee member, the merger review was lengthier and the likelihood of regulatory obstacles higher.<sup>179</sup>

## 2: Lobbying

In 1971 a corporate lawyer and future supreme court justice, Lewis Powell, wrote a famous memo to the American Chamber of Commerce, which argued that:

As every business executive knows, few elements of American society today have as little influence in government as the American businessman, the corporation, or even the millions of corporate stockholders. If one doubts this, let him undertake the role of “lobbyist” for the business point of view before Congressional committees.<sup>180</sup>

The memo appears to have galvanized corporations and wealthy Americans.<sup>181</sup> The Chamber itself took on a greater role in influencing public officials, and other pro-business organizations were created in short order.<sup>182</sup>

Data on lobbying activity was not subject to mandatory disclosure until the 1990s. Still, the available data shows that from 1998 (the first time data were disclosed) to 2021, lobbying increased 64% in real terms.<sup>183</sup> Today, for every dollar spent on lobbying by both labor unions and public-interest groups, large corporations and their associations spend \$34.<sup>184</sup> In a self-

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<sup>179</sup> Mihir N. Mehta, Suraj Srinivasan, and Wanli Zhao, “The Politics of M&A Antitrust,” *Journal of Accounting Research* 58, no. 1 (2020): 5–53.

<sup>180</sup> Lewis F. Powell, “Powell Memorandum: Attack on American Free Enterprise System,” *Washington, DC: US Chamber of Commerce*, 1971.

<sup>181</sup> See Jane Mayer, *Dark Money: The Hidden History of the Billionaires behind the Rise of the Radical Right* (Anchor, 2017).

<sup>182</sup> E.g., in 1972 leading CEOs formed the Business Roundtable, an organization based on the premise that “the business sector should play an active and effective role in the formation of public policy.” Business Round Table, “History of the Business Round Table,” 2022, [https://s3.amazonaws.com/brt.org/archive/legacy/uploads/studies-reports/downloads/BRT\\_History\\_1172011.pdf](https://s3.amazonaws.com/brt.org/archive/legacy/uploads/studies-reports/downloads/BRT_History_1172011.pdf).

<sup>183</sup> <https://www.opensecrets.org/federal-lobbying/summary?inflation=Y>

<sup>184</sup> Lee Drutman, “How Corporate Lobbyists Conquered American Democracy,” *The Atlantic*, April 20, 2015, <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/>.

congratulatory note from 1997, at the retirement of its then CEO Richard Leshner, the Chamber declared that it “developed and successfully implemented a strategy based on the [Powell] memorandum. As a result, the Chamber has helped create a political climate in which the debate in Congress and between Congress and the White House is no longer on how much more to tax, spend, and regulate but on how much less to tax, spend, and regulate.”<sup>185</sup>

We do not have direct evidence that business lobbying reduced antitrust enforcement. Special interests do not publicize their efforts to persuade government to adopt unpopular policies.<sup>186</sup> One study, however, provides a clue. Analyzing 370 mergers that involved deals above \$100 million between 2008-2014, the article finds that companies that increased their general direct lobbying expenditures in the quarters before announcing a deal are significantly more likely to receive a favorable response from the antitrust authorities. The authors conclude that “acquiring firms seem to lobby preemptively to accommodate the expected antitrust review process.”<sup>187</sup> The study also shows that shareholders seem to anticipate this effect in their valuations: the stock price response to horizontal merger announcements is higher when the bidder has lobbied more in advance.<sup>188</sup> Another study finds that the opposite dynamic is also true: post-merger, firms increase their spending in lobbying activities by approximately 22%.<sup>189</sup>

### *3: Revolving doors*

There is a long-standing debate in economics about the costs and benefits of revolving doors. Revolving doors can provide much needed incentives for public sector workers to perform and bring private sector expertise in the public sector. The possible costs are that a regulator might exercise leniency in exchange for (or in the hope of) a future job from the regulated industry, or that a former regulator might intercede with her former colleagues to buy some slack for her new employer.

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<sup>185</sup> “Changing of the Business Guard,” *Nation’s Business Magazine*, August 1997. at 68-9.

<sup>186</sup> Pepper D. Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (Cambridge University Press, 2010).

<sup>187</sup> Jana P. Fidrmuc, Peter Roosenboom, and Eden Quxian Zhang, “Antitrust Merger Review Costs and Acquirer Lobbying,” *Journal of Corporate Finance* 51 (2018): 72–97. at 87.

<sup>188</sup> Fidrmuc, Roosenboom, and Zhang.

<sup>189</sup> Andrea Prat, Tommaso Valletti, and Bo Cowgill, “Political Power and Market Power,” *CEPR Discussion Paper Series*, 2022, <https://repec.cepr.org/repec/cpr/ceprdp/DP17178.pdf>.



A few studies support the negative view. Lawyers working at the patent office appear more lenient in approving patents of law firms that will later employ them.<sup>190</sup> State industry regulators are more lenient towards insurance companies, when they later move to work for the insurance industry.<sup>191</sup> Similarly, SEC enforcement lawyers appear more lenient towards large companies that might employ them after they leave the Commission.<sup>192</sup> Other evidence of a spirit of quid pro quo between government and business comes from studies of legislators. Firms who hire a former member of Congress experience a lower probability of being audited by the IRS.<sup>193</sup> U.S. Senators who are about to retire from Congress but expect to obtain a job in industry change their votes to favor companies that may potentially hire them.<sup>194</sup>

If the negative revolving door story is correct, then the question arises whether the antitrust revolving door has become stronger during our period. To test this idea, we collected and hand-coded information on all FTC commissioners and DOJ AAGs since the creation of the FTC in 1915,<sup>195</sup> including their term in office, education, position before appointment, and immediate employment in the 3-years after leaving the agency.

As Figure 16 shows, before the mid-1970s most FTC commissioners and DOJ AAGs came from government jobs and returned to government jobs or retired from antitrust litigation after their agency tenure (with some of them opening small law firm practices in their home states). After the mid-1970s, while a majority of appointees continue to come from government or academia, almost two-thirds accept a job either in law firms associated with the defendants' bar or in large industry *immediately* after leaving their position at the FTC or the DOJ.<sup>196</sup> Thus, the decline of antitrust enforcement coincides with a more rapidly spinning revolving door between antitrust enforcement and big businesses.

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<sup>190</sup> Haris Tabakovic and Thomas G. Wollmann, "From Revolving Doors to Regulatory Capture? Evidence from Patent Examiners" (National Bureau of Economic Research, 2018).

<sup>191</sup> Ana-Maria Tenekedjieva, "The Revolving Door and Insurance Solvency Regulation" (The University of Chicago, 2020).

<sup>192</sup> Stavros Gadinis, "The SEC and the Financial Industry: Evidence from Enforcement against Broker-Dealers," *The Business Lawyer*, 2012, 679–728.

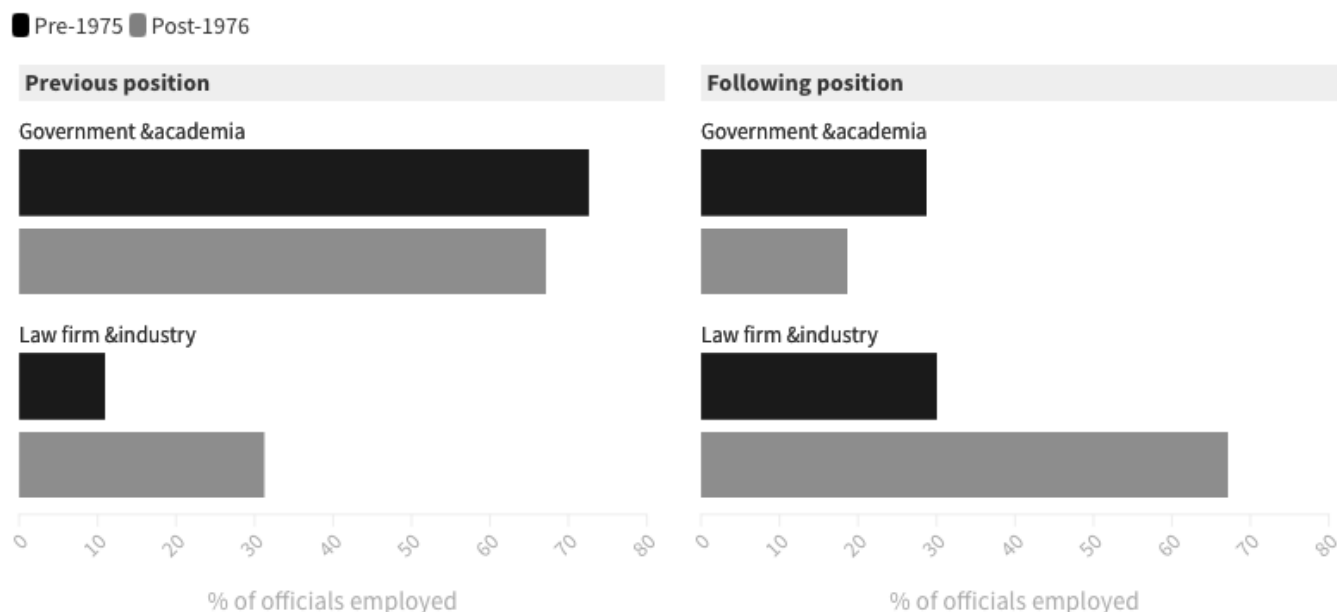
<sup>193</sup> Benjamin CK Egerod, *The Revolving Door and Regulatory Enforcement: Firm-Level Evidence on Tax Rates and IRS Audits* (George J. Stigler Center for the Study of the Economy and the State Working Paper Series, 2019).

<sup>194</sup> Benjamin CK Egerod, "Voting for a Career—The Revolving Door Moderates the US Senate," in *MPSA Annual Conference*, 2017.

<sup>195</sup> For two we could not find reliable information: Newell Clapp and Mayo Thompson.

<sup>196</sup> The graphic reports a 1975 breakpoint that is aligned with the estimations of structural breaks in enforcement described in Part I. However, the overall trends and levels are consistent with a 1980's breakpoint.

**Figure 16: Composition of Officials' Career Trajectories Separated by Enforcement Period**



Source: Based on multiple varied sources, such as newspaper articles, publicly available professional profiles, agency and Congressional bios and others. Omitted variable is others, which includes retirement, death, work as a journalist and others (such as cases where we cannot confirm which specific law firm the person came from/joined after leaving government).

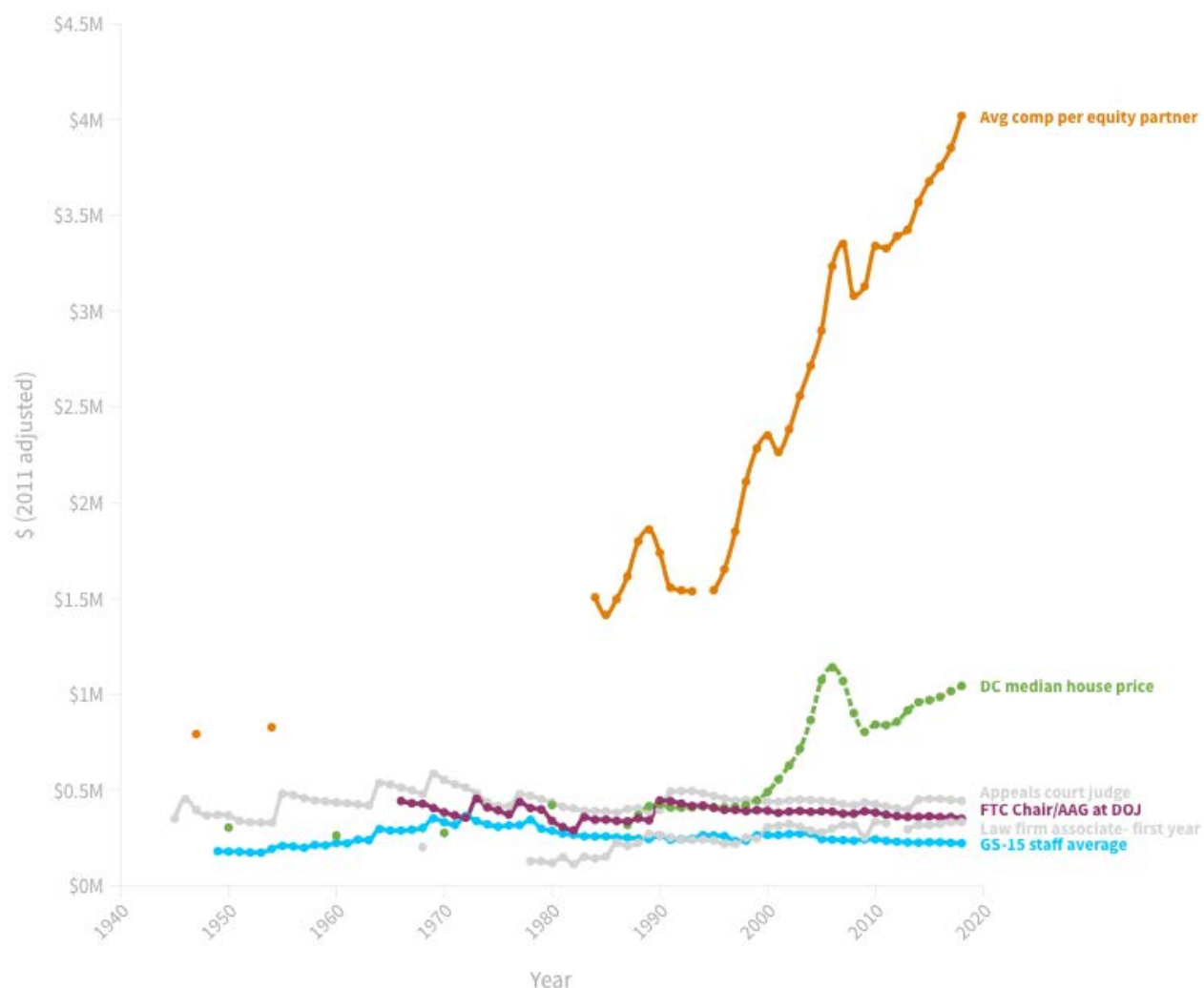
These numbers are conservative, as we consider only primary employment. Our impression is that today it is far more common for academics to rotate in and out of government and take paid consulting positions while maintaining their primary employment in academia than it was in the past<sup>197</sup> (though famously the great antitrust enforcer Thurman Arnold cofounded the law firm Arnold & Porter after he left the Justice Department).

A possible explanation for this trend is the widening of the gap between private-sector and public-sector compensations. Figure 17 plots the average compensation of equity partners in top-100 US law firms (usually associated with the antitrust defendants' bar) vis-à-vis the compensation of the FTC Chair, the DOJ AAG and senior personnel in both agencies (GS-15 Staff—all in

<sup>197</sup> While we do not have a time series data, the involvement of academics in consulting for antitrust defendants has received attention in recent years. Eisinger Jesse and Elliot Justin, "These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers," ProPublica, November 16, 2016, <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers?token=66qLWQOC8-aKmhZ5ZMZX7A6VtNhdKyrS>. (Describing the impact and prevalence of economics professors doing consulting in antitrust litigation.)

constant 2011 dollars). For reference, it also plots the median cost of a house sold in the Washington D.C. area and the salary of first year law firm associates.

**Figure 17: Real Salary and Housing Prices for Lawyers in the Public and Private Sector (1945 to 2018)**



Source: Based on governmental records, census data, St. Louis FED, AL 100 database and others; In 2011 dollars

In the 1960s a partner at a top law firm earned roughly twice as much as an FTC chair. In the 1980s, the ratio rose to five times. Today, it is ten times. While the salaries of the FTC chair, the DOJ AAG and the staff have remained roughly constant in real terms since 2000, the real price of a house in the DC area has quadrupled.<sup>198</sup> Thus, the standard of living of a key government

<sup>198</sup> The Federal Employees Pay Comparability Act of 1990 (FEPCA) introduced a Locality Pay Area Adjustment for

regulator has significantly decreased in the last 20 years, while the standard of living of their peers in the private sector has dramatically increased.

While government work has its own satisfactions, the growing salary differential made private sector jobs relatively more attractive, likely also accelerating the revolving door at the staff level.

#### *4: Participation in the Judicial Process: Appointments and Influence*

In highlighting the areas where the ACC needs to intervene, Powell states in his memo:

American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change. .... This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.

It is difficult to identify the role that the ACC and big business in general played in the appointments that took place in the 1970s and early 1980s. Then as now, cultural issues (especially race and crime) received more attention than economics. It was only with Robert Bork's failed nomination in 1987 that judicial confirmations became a major political ordeal, involving dozens of interest groups that engaged in intense lobbying. The role of money became clearer though, as far as we have found, only as a matter of anecdote.

A study of the nominations of Bork, Souter, and Thomas concludes that "judicial selection is prone to manipulation by forces outside the Senate, especially mobilization and counter-mobilization by organized interests."<sup>199</sup> This opinion is shared by practitioners as well. For example, Leonard Leo, the executive vice president of the Federalist Society and Trump's advisor on judicial nominations, stated in 2006: "It is sad to see that a judicial confirmation process needs to resemble a political campaign, but that is where we are."<sup>200</sup> On the same occasion, Leo

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certain geographic regions with a high cost of living, one of them being the Washington-Baltimore-Arlington region. This increases salaries in roughly 30%. The figure presents the base GS-15 schedule average, without the pay adjustment, as the data for partners is nation-wide. The main conclusions that salary differentials greatly increased in the period hold even with the linear increase introduced by the FEPCA.

<sup>199</sup> Gregory A. Caldeira and John R. Wright, "Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate," *American Journal of Political Science*, 1998, 499–523.

<sup>200</sup> Robin Cook, "Confirmation of High Court Justices Akin to Political Campaign, Leo Says," University of Virginia School of Law, October 2, 2006, <https://perma.cc/T35W-3AJV>.

proceeded to describe the tactics to be employed, starting with “aggressive fundraising” and concluding with “publishing white papers to paint the ground favorably when it comes to the questions that are appropriate for a nominee to answer.”<sup>201</sup>

All these tactics necessitate substantial amount of money, and Leo has not been shy in trying to grab all the money he could get. According to an investigation of the Washington Post, between 2014 and 2017 Leo and his allied collected more than \$250 million in donations, to be used in judicial nominations.<sup>202</sup>

In 2016-17 the Judicial Crisis Network (JCN) spent millions of dollars to oppose President’s Obama supreme court nominee Merrick Garland. It also spent millions supporting President Trump’s nominee Neil Gorsuch. During that period the JCN received almost 84% of its funds from the Wellspring Committee, a conservative 501(c)(4) social welfare organization. The Wellspring Committee itself received 90% of its revenue, nearly \$28.5 million, from a single anonymous donor in 2016.<sup>203</sup> In promoting Kavanaugh to business and industry leaders the Trump White house stated “There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin” and “Judge Kavanaugh protects American businesses from illegal job-killing regulation.”<sup>204</sup>

As noted before, insufficient data prevent us from showing that decline of antitrust enforcement, which began in the 1970s, can be traced to business spending that influenced supreme court nominations. But we do have data on another device that business has used to try to influence the law—the production of amicus briefs. Powell himself first advocated this strategy:

This [the judiciary] is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds. As with respect to scholars and speakers, the Chamber would need a highly competent staff of lawyers. In special situations it should be authorized to engage, to appear as counsel amicus in the Supreme Court, lawyers of national standing and

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<sup>201</sup> Cook.

<sup>202</sup> Robert O’Harrow Jr and Boburg Shawn, “A Conservative Activist’s behind-the-Scenes Campaign to Remake the Nation’s Courts,” Washington Post, May 21, 2019, <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>.

<sup>203</sup> Robert Maguire, “Group That Spent Millions to Boost Gorsuch Also Paid Mysterious Inaugural Donor,” OpenSecrets News & Analysis, May 16, 2018, <https://www.opensecrets.org/news/2018/05/group-that-spent-millions-to-boost-gorsuch-also-paid-mysterious-inaugural-donor/>.

<sup>204</sup> Robert Barnes, “White House Counts on Kavanaugh in Battle against ‘Administrative State,’” *Washington Post*, August 12, 2018, [https://www.washingtonpost.com/politics/courts\\_law/brett-kavanaugh-and-the-end-of-the-regulatory-state-as-we-know-it/2018/08/12/22649a04-9bdc-11e8-8d5e-c6c594024954\\_story.html](https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-and-the-end-of-the-regulatory-state-as-we-know-it/2018/08/12/22649a04-9bdc-11e8-8d5e-c6c594024954_story.html).

reputation. The greatest care should be exercised in selecting the cases in which to participate, or the suits to institute. But the opportunity merits the necessary effort.<sup>205</sup>

In 1977 the ACC founded the U.S. Chamber Litigation Center with the mandate to “fight[] for business at every level of the U.S. judicial system.”<sup>206</sup> As a result of this and other similar efforts—for example the creation of the Washington Legal Foundation in 1977—the historical liberal bias in amicus briefs, which existed in the 1960s, disappeared by the mid-1980s.<sup>207</sup>

How did the increased involvement of business in litigation play out in antitrust cases? To understand this better, we relied on data from the Amici Network project, which mapped all the amicus briefs filed in Supreme Court cases between 1912 and 2013—connecting those to our database on Supreme Court antitrust decisions.<sup>208</sup> The 159 antitrust cases that the Supreme Court heard pre-1976 involved 65 amici in total, or an average of 0.41 amicus briefs per case. The 99 cases heard between 1976-2013 (when the Amici database ends) involved 431 amici in total, or 4.35 per case. As Figure 18 shows, before 1975 the number of amici per case that support enforcement slightly outnumber the amici that oppose it. By contrast, after 1975 it is the opposite: amici that oppose enforcement significantly outnumber pro-enforcement amici.<sup>209</sup>

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<sup>205</sup> Powell, “Powell Memorandum: Attack on American Free Enterprise System.”

<sup>206</sup> U.S. Chamber Litigation Center, “Who We Are,” June 14, 2016, <https://www.chamberlitigation.com/who-we-are>.

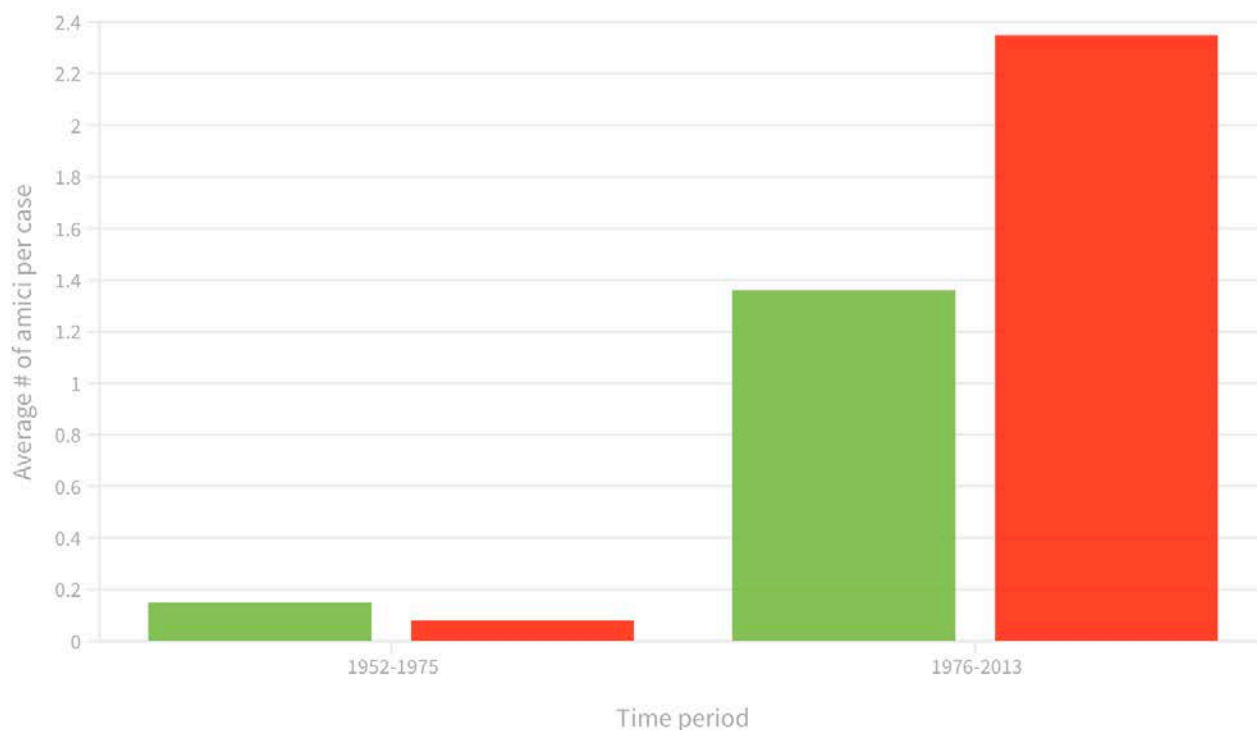
<sup>207</sup> Sahar Abi-Hassan, Janet M. Box-Steensmeier, Dino P. Christenson, Aaron R. Kaufman, Brian Libgober, “The Political Ideologies of Organized Interests & Amicus Curiae Briefs: Large-Scale, Social Network Imputation of Ideal Points,” 2021 working paper.

<sup>208</sup> Janet Box-Steensmeier and Dino P. Christenson, “Database on Supreme Court Amicus Curiae Briefs. Version 1.0 [Computer File]. <<http://Amicinetworks.Com>>,” 2022. The database contains information on whether the Amici filed their brief in support of petitioner, respondent or neither party. We then matched this information with our coding of the parties involved in the antitrust litigation and the final outcome of the case—monopoly-friendly or not.

<sup>209</sup> The effort advocated by Powell goes beyond the American Chamber of Commerce, which has a policy of not participating in litigation between two private businesses. As a result, the Chamber files only four Amici in antitrust cases, with an impressive 100% win ratio. The Washington Legal Foundation filed 11 briefs over this period. While all briefs opposed antitrust enforcement, their win ratio was 55%.

**Figure 18: Ratio of Amicus Brief's on Antitrust Cases by Enforcement Period**

**Position:** ■ Favors enforcement ■ Opposes enforcement



Source: Box-Steffensmeier, Janet & Dino P. Christenson. 2012. Database on Supreme Court Amicus Curiae Briefs. Version 1.0 [Computer file]. <<http://amicinetworks.com>>. • Omitted: Neither Favor nor Opposes; Not Determined

Businesses have been active in other areas as well: for example, by sponsoring law and economics short courses that many judges attended. The well-known program established by Henry Manne started in 1976 and was heavily financed by large corporations—in particular those companies that that were “almost always before a federal judge somewhere, often in antitrust, regulatory, or affirmative-action cases.”<sup>210</sup> Ash et al. found that federal appellate judges who attended these classes were more likely to vote against regulatory agencies and antitrust

<sup>210</sup> Fred Barbash, “Big Corporations Bankroll Seminars For U.S. Judges,” *Washington Post*, January 20, 1980, <https://www.washingtonpost.com/archive/politics/1980/01/20/big-corporations-bankroll-seminars-for-us-judges/8385bf9f-1eb7-451a-8f3d-bdabb4648452/>.

protection,<sup>211</sup> though results are imprecise and not confirmed by a second study of the impact of the classes on federal district judges.<sup>212</sup>

Corporations do not publicize their attempts to influence regulators, judges, and legislators, so any attempt to gauge corporate influence is bound to be speculative. Nonetheless, evidence indicates that starting in the early 1970s business mobilized significant resources and played a role, or at least tried to, in the judicial decisions that led to the decline of enforcement of antitrust law.

## Part V.C: A Synthesis

So far, we have contrasted the technocratic view and the public choice view and argued that the second is more aligned with the evidence. Yet, this contrast is too stark and possibly misses the entire picture. Ideas matter, especially when they can provide a reasonable argument why the policy desired by an interest group benefits everyone. Bork, for example, argued that the way antitrust was enforced in the 1960s protected inefficient businesses and harmed consumers (hence the “Antitrust Paradox” title of his book). His critics disagreed, based on different theories about how markets work and cases are decided.

In many public choice models, special interests are pitted against voters,<sup>213</sup> who cast their votes based on some understanding of how policies affect them. It follows that interest groups will seek to win the battle of ideas as well as exert influence behind the scenes.<sup>214</sup> This is the reason why big business and its allies funded Chicago school ideas even while they donated money to candidates and parties who advanced their interests.

The critiques of the way antitrust was enforced in the 1960s developed by the Chicago School were well-founded, both theoretically and empirically. At the time, many scholars, judges, and policymakers found the arguments persuasive and simple. Yet, it is unlikely that the Chicago

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<sup>211</sup> Elliott Ash, Daniel L. Chen, and Suresh Naidu, “Ideas Have Consequences: The Impact of Law and Economics on American Justice,” *NBER Working Paper* 29788, 2022. These findings, however, do not include Supreme Court justices, as only Justice Ruth Bader Ginsburg attended the program.

<sup>212</sup> Siying Cao, “Quantifying Economic Reasoning in Court: Judge Economics Sophistication and Pro-Business Orientation,” 2021, <https://drive.google.com/file/d/1U5tFHXqrcmNbCWOW5t7MqAcZ8BDMIMIN/view>.

<sup>213</sup> On the Form of Transfers to Special Interests, Stephen Coate and Stephen Morris, *Journal of Political Economy* 1995 103:6, 1210-1235

<sup>214</sup> This is the notion of cultural hegemony in Antonio Gramsci, “Il materialismo storico e la filosofia di Benedetto Croce”, Einaudi, Torino (1949).



School thinking would have spread to jurisprudence so fast or dominated the practice for so long without the economic support of big business.

It would be naive to think that regulatory capture relied only on financial incentives.<sup>215</sup> In some cases, the best strategy is the shaping of financial incentives. In others, it may be the promotion of ideas that benefit an interest group, often joined with the demotion (or ostracism) of ideas that undermine it. This is what some have coined “epistemological capture”<sup>216</sup> or “cultural capture”.<sup>217</sup> Finally, sophisticated policy entrepreneurs will employ both strategies simultaneously by providing financial incentives to the bearers of ideas that benefit an interest group, hoping that these incentives will help spread those ideas further.<sup>218</sup>

It is important to stress that epistemological capture can take place even in a world where experts are independent and well-intentioned, as special interest groups exploit large information asymmetries between industry and regulators to push their agenda.<sup>219</sup> In fact, this is the most insidious form because it is harder to detect: experts are acting in good faith.

In the weakening of US antitrust, we can indeed identify multiple different mechanisms at play. The Chicago School provided a legitimate intellectual foundation for what was, at the time, a plausible shift in policy—some antitrust doctrine involved rigid rules that had only a glancing relationship to economic reality.<sup>220</sup> Yet, the “enlightened technocrat” story stops there. It cannot explain why Chicago School views persisted in legal and policy circles long after they lost favor in academic circles.<sup>221</sup> Overall, it is hard to explain why the weakening of antitrust enforcement

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<sup>215</sup> Filippo Lancieri and Luigi Zingales, “The Mechanisms of Regulatory Capture,” *ProMarket* (blog), June 15, 2022, <https://www.promarket.org/2022/06/15/new-ebook-revisits-george-stiglers-theories-of-regulatory-capture-50-years-later/>.

<sup>216</sup> Lancieri and Zingales; Cass R. Sunstein, “Stigler’s Interest-Group Theory of Regulation: A Skeptical Note,” *ProMarket*, April 16, 2021, <https://promarket.org/2021/04/16/george-stigler-theory-regulation-capture-cass-sunstein/>.

<sup>217</sup> James Kwak, “Cultural Capture and the Financial Crisis,” *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 71 (2014): 79–81.; Jan Broulík, “Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU,” *World Competition* 45, no. 2 (2022).;

<sup>218</sup> Luigi Zingales, “Preventing Economists’ Capture,” in *Preventing Regulatory Capture*, D. Carpenter and D. A. Moss (eds.), New York: Cambridge University Press, 2014.

<sup>219</sup> Filippo Lancieri, “Narrowing Data Protection’s Enforcement Gap,” *Maine Law Review* 74, no. 1 (2022).

<sup>220</sup> *United States v. Von’s Grocery Co.* (1966); *Brown Shoe Co. v. United States*, 370 S.Ct 294 (Supreme Court 1962).

<sup>221</sup> Herbert Hovenkamp and Fiona Scott Morton, “Framing the Chicago School of Antitrust Analysis,” *U. Pa. L. Rev.* 168 (2019): 1843; Jonathan B. Baker, “Taking the Error out of Error Cost Analysis: What’s Wrong with Antitrust’s Right,” *Antitrust LJ* 80 (2015): 1. As Steve Salop, one of the leaders of the post-Chicago movement, summarized when discussing vertical mergers “Chicago School economics and laissez-faire ideology have intentionally targeted vertical merger enforcement. This assault has been largely successful. Enforcement has been infrequent, and remedies have been limited.” still it was based on three-main claims, of which “the first two claims

continued long after the case for weakening antitrust enforcement lost intellectual favor—at least, not without resorting to public choice theory.

## Conclusion

The decline of antitrust enforcement from the 1970s to the present was not achieved through legislative reform in response to public demand. It was the result of decisions made mostly in the shadow by politically unaccountable officials—judges and regulators—whose views of antitrust at the time of their appointment were (in most cases) not publicly known or perhaps even clear in their own minds.

To explore the potential forces behind this weakening, we considered two alternative hypotheses. The first is that these actions were the result of an enlightened elite of technocrats who promoted efficiency against the will of a Congress dominated by irrational populist hostility to big business. The alternative view is that big business drove a steady decline in antitrust enforcement against the public will to benefit itself. While we have no smoking gun, the evidence we collected provides more support to the second hypothesis than the first.

Chicago-school ideas played a role but not the role envisioned by the enlightened technocrat story. Business coopted and promoted the Chicago School's thinking because it advanced its interest: it is unlikely that the Chicago view would have spread so fast and would certainly not have dominated jurisprudence for so long without the financial support of powerful economic interests.

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never had a strong economic basis and have been steadily and powerfully debunked by economists, while the third cannot carry the burden to support nonenforcement.” Steven C. Salop, “Invigorating Vertical Merger Enforcement,” *The Yale Law Journal*, 2018, 1962–94., at 1963; 66.