

## THE PRESENT NEW ANTITRUST ERA

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### ABSTRACT

*Antitrust scholars frequently refer to an “ideological pendulum” to describe the rise and fall of trends in the evolution of antitrust law. This pendulum arguably swings between fairness and laissez-faire visions, while a technocracy vision moderates its motion. Mapping key phases in the evolution of antitrust law, I argue that a new antitrust era with distinctive characteristics has been forming in recent years.*

*The present new antitrust era is a product of growing tensions and contradictions among policy prescriptions. After several decades in which antitrust was a specialized field that drew little public attention, in the aftermath of the Great Recession, antitrust became a proxy for disagreements over economic policies. Today, antitrust law exemplifies striking discrepancies among positions advanced by the Supreme Court, the established antitrust technocracy, political populism, and economics. This resurrection of public and political interest in antitrust, I argue, marks the end of one antitrust era and the beginning of another.*

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## INTRODUCTION

Three conflicting visions have shaped the evolution of antitrust law—fairness, laissez faire, and technocracy.<sup>1</sup> I examine the evolution of antitrust law through the changes in the popularity and influence of these visions over the years. I argue that a new antitrust era with distinctive characteristics has been forming in recent years.

*The fairness vision* builds on a collection of ideas that condemn business size and portray profit-seeking commercial activities as a source of undesirable distributive effects.<sup>2</sup> Louis Brandeis's essays about trusts and combinations epitomize this line of thinking.<sup>3</sup> Donald Turner famously described the fairness attitude as “inhospitality in the tradition of antitrust law.”<sup>4</sup>

*The laissez-faire vision* recognizes that, in theory, restraints of trade may harm competition, but emphasizes the potential costs of antitrust enforcement and skepticism of the plausibility and viability of anticompetitive restraints.<sup>5</sup> Frank Easterbrook's influential formulation of antitrust's false positives typifies this line of thinking.<sup>6</sup> Easterbrook hypothesized that, in antitrust, “judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.”<sup>7</sup> The Supreme Court adopted this conjecture as a guiding principle for antitrust law.<sup>8</sup>

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1. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008); William H. Page, *The Ideological Origins and Evolution of U.S. Antitrust Law*, in 1 ISSUES IN COMPETITION LAW AND POLICY 1, 3-5 (Wayne Dale Collins et al., eds. 2008).

2. See Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 72-73.

3. Brandeis published some of the essays in a book that focused on the financial sector. See generally LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

4. Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B. ASS'N ANTITRUST L. SYMP. 1, 1-2.

5. See, e.g., George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 2-3 (2010).

6. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1-4 (1984).

7. *Id.* at 3.

8. See, e.g., *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007) (“[A]ntitrust courts are likely to make unusually serious mistakes.”); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (“Against the slight benefits of antitrust intervention ... we must weigh a realistic assessment of its costs.”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 594 (1986) (“[A]ntitrust law limits the

*The technocracy vision* provides that the exercise of government functions by experts insulates policies from ideological influences and populist sentiments, such as fairness and laissez-faire fads.<sup>9</sup> Antitrust technocracy rests on two beliefs. First, “antitrust law has had and still has some undesirable features that the courts or Congress should correct.”<sup>10</sup> Second, the “proper approach [for] government enforcement agencies [is] not to bring cases solely on the basis that they would be upheld because of past precedents.”<sup>11</sup> Rather, the government should bring cases because “they should be upheld,” including “for the purpose of persuading the Supreme Court to reverse precedents.”<sup>12</sup> Beliefs that antitrust expertise reached some plateau protected by a broad consensus among experts have resurfaced several times since the enactment of the Sherman Act. These beliefs have always been somewhat aspirational and much exaggerated. A technocracy hype during the 1920s and 1930s inspired the idea of antitrust technocracy.<sup>13</sup> Then, antitrust technocracy struggled with incoherent and conflicting policies.<sup>14</sup>

In 1964, when the fairness vision dominated antitrust law, Richard Hofstadter argued that with the “growing public acceptance of the large corporation,” antitrust had “lost its role in our society” and became “the almost exclusive concern of a technical elite of lawyers and economists.”<sup>15</sup> Similarly, in 1979, as the laissez-faire vision was ascending, Richard Posner claimed that “a shift from disagreement over basic premises, methodology, and ideology toward technical disagreements” built a “growing consensus” among

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range of permissible inferences from ambiguous evidence” because “mistaken inferences in [antitrust] cases ... are especially costly, [as] they chill the very conduct the antitrust laws are designed to protect.”). See generally Jonathan B. Baker, *Taking the Error out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1 (2015).

9. See generally John G. Gunnell, *The Technocratic Image and the Theory of Technocracy*, 23 TECH. & CULTURE 392 (1982).

10. Donald D. Turner, *The Virtues and Problems of Antitrust Law*, 35 ANTITRUST BULL. 297, 297 (1990).

11. *Id.* at 297-98.

12. *Id.* at 298.

13. See Gunnell, *supra* note 9, at 392-93.

14. See *infra* Part II.B.

15. Richard Hofstadter, *What Happened to the Antitrust Movement? Notes on the Evolution of an American Creed*, in THE BUSINESS ESTABLISHMENT 113, 113, 115, 151 (Earl F. Cheit ed., 1964).

antitrust experts.<sup>16</sup> In the past two decades, however, many antitrust experts argued that the decline of the Chicago School in the 1990s allowed professional technocracy to replace antitrust ideology, contributing to nuanced and balanced antitrust enforcement.<sup>17</sup> Nonetheless, the present technocracy has been facing an ideological jurisprudence that has persistently narrowed the substantive scope of antitrust law.<sup>18</sup> Since the Great Recession, antitrust enforcement has been facing growing criticism for its permissible standards and neglect of the rising concentration in the economy.<sup>19</sup>

The digital revolution, which began in the mid-1970s, gave new life to old fears of large businesses and beliefs that antitrust law should address the wealth effects caused by a rapid technological change.<sup>20</sup> These sentiments grew considerably in the aftermath of the Great Recession.<sup>21</sup> Commentators with varying degrees of expertise and understanding of antitrust law reintroduced the public to old beliefs that antitrust law could resolve many economic problems. Resentments of the new economic elite and its impact on society, as well as criticism of the technocracy that allegedly neglected the changes in the economy, offered political capital for attacks on the establishment and various elites. While it is far from clear that these sentiments and the recent populist surge will

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16. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925 (1979).

17. See, e.g., ANTITRUST MODERNIZATION COMM 'N, REPORT AND RECOMMENDATIONS, at x (2007), [https://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) [<https://perma.cc/MW7B-WR3N>]; HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 1 (2005); Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 522-23 (2006); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSP., Winter 2000, at 43, 46-49; Robert T. Pitofsky, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583 (2002); Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 ANTITRUST L.J. 601 (2014); Theodore Voorhees, Jr., *The Political Hand in American Antitrust: Invisible, Inspirational, or Imaginary?*, 79 ANTITRUST L.J. 557, 565-66 (2014).

18. See *infra* Part II.D.

19. See, e.g., *The Next Capitalist Revolution*, ECONOMIST (Nov. 15, 2018), <https://www.economist.com/leaders/2018/11/15/the-next-capitalist-revolution> [<https://perma.cc/3YB9-2VKX>].

20. See *id.*

21. See *id.*

dramatically influence antitrust policies, they demand reevaluation of antitrust law. Examined in the context of the evolution of antitrust law, the recent developments, I argue, account for the beginning of a new antitrust era.

## I. PAST ANTITRUST ERAS

Antitrust law has evolved through four primary phases: (1) the formative era (1890-1911); (2) the first rule of reason era (1911-1935); (3) the fairness era (1935-1975); and (4) the second rule of reason era (1975 to some point in recent years). Each phase began and ended gradually, rather than through events that established sharp turns in the direction of antitrust law. Thus, references to the beginning and end of each period are somewhat imprecise. Correspondingly, descriptions of transition points in the literature are not uniform, yet hardly present meaningful disagreements among scholars.

### A. *The Formative Era, 1890-1911*

Antitrust's formative era took place from the 1890 enactment of the Sherman Act to the 1911 adoption of the rule of reason. During this period general antitrust norms formed through judicial interpretations of the Sherman Act. These norms utilized public restraints on businesses to protect the vitality of markets from private restraints of trade. The process produced debates and controversies over the constitutionality and reach of the Sherman Act.<sup>22</sup> *Standard Oil* (1911) and *American Tobacco* (1911) concluded the core controversies.<sup>23</sup> In each case, the Court ordered the dissolution of a massive trust, demonstrating that the Sherman Act may be used to impose meaningful restrictions on businesses.<sup>24</sup> At the same time, the Court used both decisions to soften the sweeping language of the

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22. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 100-237 (1965).

23. The Supreme Court handed down both decisions in the second half of May 1911. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

24. *Standard Oil*, 221 U.S. at 72-74; *Am. Tobacco Co.*, 221 U.S. at 181.

Sherman Act, ruling that only “unreasonable” restraints of trade violate the Sherman Act.<sup>25</sup>

The impetus for the enactment of antitrust legislation in the United States was the Second Industrial Revolution that took place from 1870 to 1914.<sup>26</sup> New technologies enabled, for the first time in history, the development of mass production and mass distribution in many industries.<sup>27</sup> Industrial giants emerged and displaced small businesses, automation eliminated numerous jobs, and tensions between capital and labor soared.<sup>28</sup> The enactment of the Sherman Act responded to growing public demands to address the influence of large businesses on the economy, then known as the “trust problem.”<sup>29</sup> Nonetheless, the Sherman Act was a “curious phenomenon.”<sup>30</sup> A Republican Congress supportive of the trusts passed anti-trust legislation.<sup>31</sup> When the Sherman Act was drafted and debated, the Republican Party controlled the White House and Congress.<sup>32</sup> The party was “dominated ... by many of the very industrial magnates most vulnerable to real antitrust legislation.”<sup>33</sup> The idea of antitrust measures, thus, had a broad public support but was not a high priority for the Republican Party. Rather, under a Republican leadership, Congress focused on tariffs that protected American monopolies from competition.<sup>34</sup> As a result, the Sherman Act was anything but well-considered legislation.<sup>35</sup>

During antitrust’s formative era, courts developed general standards for the interpretation of antitrust law. Most importantly, the Supreme Court ruled that the Sherman Act prohibits only

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25. *Standard Oil*, 221 U.S. at 54-55.

26. *See, e.g.*, ALFRED D. CHANDLER JR., *SCALE AND SCOPE* 51-53 (1990).

27. *See id.* at 53-56.

28. *See id.* at 194-96.

29. *See* LETWIN, *supra* note 22, at 7.

30. MERLE FAINSOD & LINCOLN GORDON, *GOVERNMENT AND THE AMERICAN ECONOMY* 450 (1948).

31. *See id.*

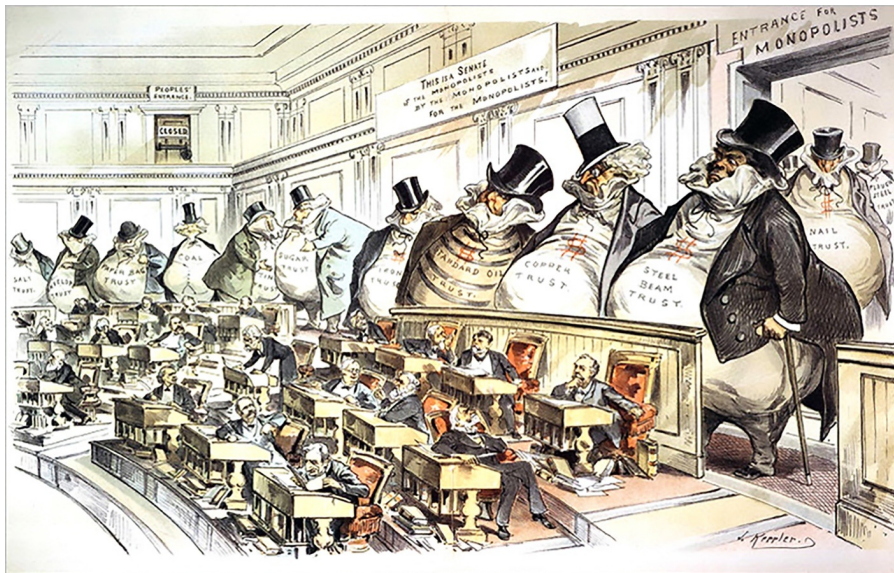
32. *See id.*

33. *Id.*

34. *See generally* JOANNE REITANO, *THE TARIFF QUESTION IN THE GILDED AGE: THE GREAT DEBATE OF 1888* (1994).

35. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY* 164-224 (1954); *see also* *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 318 (1897) (“[It is] impossible to say what were the views of a majority of the members of each house in relation to the meaning of the [Sherman Act].”)

unreasonable restraints of trade, not all restraints,<sup>36</sup> and that restraints of trade may include mergers and restraints on production.<sup>37</sup> Notably, the Supreme Court also adopted a per se rule—a ban on resale price maintenance (RPM).<sup>38</sup> In a nonantitrust case, *New York Central Railroad* (1909), the Supreme Court held that corporations might be criminally liable for acts committed by employees acting within the scope of their employment.<sup>39</sup> This ruling is one of the most consequential decisions of the Court, establishing a path for criminal prosecution of businesses.



### *Trusts at the Senate*

*The Bosses of the Senate*, Puck, January 1889.

Depicting a wide open “entrance for monopolists,” a bolted and barred small “people’s entrance,” a sign stating “This is the Senate of the Monopolists by the Monopolists and for the Monopolists!,” and the large trusts looming over small senators.

36. *Standard Oil*, 221 U.S. at 54 (adopting the rule of reason).

37. *N. Sec. Co. v. United States*, 193 U.S. 197 (1904), *overruling* *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (holding that unlawful restraints of trade may include restraints of production and mergers).

38. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

39. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

Many scholars have pointed out that the formative era of antitrust law and the formative era of laissez-faire constitutionalism overlapped.<sup>40</sup> The formative era of laissez-faire constitutionalism was longer, stretching from *The Slaughter-House Cases* (1873) to *West Coast Hotel* (1937),<sup>41</sup> with *Lochner* (1905) symbolizing the era and its spirit.<sup>42</sup> It began before the enactment of the Sherman Act and defined the Supreme Court's jurisprudence long after the formative era of antitrust law ended. The overlap accounts for the limited effectiveness of the fairness vision during antitrust's formative era. Rising antitrust sentiments pressured politicians across the political spectrum to condemn large businesses.<sup>43</sup> The Supreme Court, however, was captured by laissez-faire sentiments.<sup>44</sup> Importantly, in *Santa Clara* (1886), the Court declared that the Equal Protection Clause of the Fourteenth Amendment intended to protect corporations, not only "natural persons."<sup>45</sup> But, as Justice Black pointed out (decades after *Santa Clara*), "[n]either the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection."<sup>46</sup>

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40. Alan Meese wrote the two most significant works on this point. Alan J. Meese, *Standard Oil As Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783 (2012); Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1 (1999); see also RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992*, at 9-58 (rev. ed. 2000); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

41. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83-101 (1873) (Field, J., dissenting); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *The Slaughter-House Cases* addressed the question of whether the Fourteenth Amendment was intended to protect business interests. Writing for the Court, Justice Miller wrote that the Fourteenth Amendment's "pervading purpose" was "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *The Slaughter-House Cases*, 83 U.S. at 71.

42. *Lochner v. New York*, 198 U.S. 45 (1905). See generally Meese, *Liberty and Antitrust in the Formative Era*, *supra* note 40.

43. See Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2257-68 (2013).

44. Several scholars documented ethical conflicts and ideological rigidity that defined Justice Stephen Field, a laissez-faire icon. See, e.g., Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 870, 874-875 (1943).

45. *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394, 409 (1886).

46. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85-86 (1938) (Black, J., dissenting).

The far-reaching effects of this constitutional interpretation continue to shape national economic policies.<sup>47</sup>

*B. The First Rule of Reason Era, 1911-1935*

Antitrust's first rule of reason era took place from 1911 to the 1935 invalidation of the National Industrial Recovery Act (NIRA), which partially suspended the enforcement of the antitrust laws.<sup>48</sup> During this period, the Supreme Court developed reasonableness standards primarily to narrow the scope of antitrust law.<sup>49</sup> In 1914, Congress passed the Clayton and Federal Trade Commission (FTC) Acts responding to concerns that the rule of reason emasculated the Sherman Act.<sup>50</sup>

Two threads of ideas curbed antitrust enforcement during the first rule of reason era. First, the majority of the Supreme Court Justices were committed to laissez-faire constitutionalism and saw in antitrust enforcement a threat to economic liberties. Second, critics of the trusts advanced theories about "new competition" as an alternative to "crude and brutal competition."<sup>51</sup>

Proponents of laissez-faire constitutionalism successfully opposed prosecution of dominant firms.<sup>52</sup> For example, in *United Shoe* (1918),<sup>53</sup> *Colgate* (1919),<sup>54</sup> *U.S. Steel* (1920),<sup>55</sup> and *Kodak* (1927),<sup>56</sup>

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47. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

48. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down NIRA). See generally PERITZ, *supra* note 40, at 59-110; Kovacic & Shapiro, *supra* note 17, at 46-49.

49. See, e.g., Hofstadter, *supra* note 15, at 115 (naming the period the "era of neglect").

50. See Clayton Act, Pub. L. No. 94-435, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-17 (2012)); Federal Trade Commission Act, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 42-58 (2012)).

51. ARTHUR JEROME EDDY, *THE NEW COMPETITION* 59-79 (1914); see also LAURA PHILLIPS SAWYER, *AMERICAN FAIR TRADE* 149-95 (2018).

52. PERITZ, *supra* note 40, at 59-110; Kovacic & Shapiro, *supra* note 17, at 46-49 (arguing that the era represented "the longest lapse for the enforcement of antitrust controls on dominant firm behavior").

53. *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918) (rejecting the possibility that a dominant firm had the power to coerce customers to accept its terms).

54. *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (establishing the right to unilateral refusal to deal).

55. *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920) (refusing to condemn a dominant firm that had competitors).

56. *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927) (finding that acquisitions of a

the Supreme Court dismissed claims that dominant firms violated Section 2 of the Sherman Act. At the same time, beliefs that collaborations among competitors could combat the illnesses of industrialization and protect democracy made heavy inroads into antitrust law. “Associationalism,” also known as the “fair trade movement,” was an influential political-economic movement that prescribed collaborations among competitors through civic associations, such as trade associations, professional societies, labor unions, and cooperatives, to promote constructive competition.<sup>57</sup>

Consistent with this vision, the federal government actively encouraged collaborations among competitors and courts developed the rule of reason in a pursuit of an elusive distinction between constructive and destructive collaborations among competitors.<sup>58</sup> NIRA’s “codes of fair competition” and suspension of antitrust restrictions on collaborations among competitors were products of this vision.<sup>59</sup> Many antitrust landmarks from the era examine the legality of various collaborations among competitors and, specifically, “open price associations.”<sup>60</sup> For example, *Chicago Board of Trade* (1918) examined trading rules that a commodity exchange set for its members;<sup>61</sup> *U.S. Steel* (1920) concerned, in part, social events in which steel executives exchanged information;<sup>62</sup> *Eastern States* (1914), *American Column & Lumber* (1921), and *Maple Flooring* (1925) examined information exchanges and other collaborative standards of trade associations;<sup>63</sup> *National League* (1922) created the so-called Baseball Exemption;<sup>64</sup> *Pacific States Paper Trade* (1927) condemned price-fixing arrangements of trade associations;<sup>65</sup>

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dominant firm were unlawful but disapproving the FTC’s order of divestiture).

57. SAWYER, *supra* note 51.

58. See David M. Hart, *Herbert Hoover’s Last Laugh: The Enduring Significance of the “Associative State” in the United States*, 10 J. POL’Y HIST. 419 (1998).

59. See E. W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966).

60. See Gerald Berk, *Communities of Competitors: Open Price Associations and the American State, 1911-1929*, 20 SOC. SCI. HIST. 375 (1996).

61. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 237-41 (1918).

62. *United States v. Steel Corp.*, 251 U.S. 417, 440 (1920); see William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 S.M.U. L. REV. 597 (2009).

63. *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600 (1914); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Maple Flooring Mfrs.’ Ass’n v. United States*, 268 U.S. 563 (1925).

64. *Fed. Baseball Club v. Nat’l League*, 259 U.S. 200, 209 (1922).

65. *FTC v. Pac. States Paper Trade Ass’n*, 273 U.S. 52, 62 (1927).

*Trenton Potteries* (1927) held that price-fixing by a trade association was unlawful per se;<sup>66</sup> *Paramount Famous Lasky* (1930) reviewed the legality of mandatory arbitration clauses set by a trade association;<sup>67</sup> *Standard Oil* (1931) upheld a patent pool;<sup>68</sup> and *Appalachian Coals* (1933) upheld the legality of a miners' cooperative.<sup>69</sup>

"Open price associations," namely, information exchanges among competitors that were loosely affiliated through a trade organization, were one of the key mechanisms that associationalists promoted; these associations intended to "stabilize" prices and prevent "unfair competition."<sup>70</sup> The Supreme Court evaluated the legality of open price associations in several instances.<sup>71</sup> Although the Court initially condemned the concept, it became tolerant of open competition during the 1920s.<sup>72</sup>

The first rule of reason era, therefore, illustrates how conflicting visions may coexist in antitrust law and even evolve simultaneously. It also demonstrates that a technocracy may go astray.

### C. *The Fairness Era, 1935-1975*

Antitrust's fairness era emerged from the repudiation of laissez-faire constitutionalism and the collapse of the associative state vision. It took place from the 1935 demise of the NIRA to the 1975 retirement of Justice William Douglas, who was the most dogmatic advocate of the fairness vision on the Supreme Court to date.<sup>73</sup>

*The Sugar Institute* (1936) may be the most important landmark representing the transition from the first rule of reason era to the

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66. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

67. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43 (1930).

68. *Standard Oil Co. v. United States*, 283 U.S. 154-55, 163 (1931).

69. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933).

70. *See, e.g.*, EDDY, *supra* note 51, at 118-45.

71. *See, e.g.*, *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936); *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563 (1925); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920); *E. States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

72. *Am. Linseed Oil*, 262 U.S. 371; *Am. Column & Lumber*, 257 U.S. 377; *E. States*, 234 U.S. 600.

73. *See* C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895 (2008).

fairness era.<sup>74</sup> The case concerned a trade association of sugar refiners that operated an elaborate system for information exchange.<sup>75</sup> The government argued that the information exchange facilitated price fixing and sought to dissolve the trade association.<sup>76</sup> The government filed its complaint in 1931, about two years before Congress enacted the NIRA.<sup>77</sup> The case reached the Supreme Court, which delivered a victory to the government in 1936, almost a year after the Court struck down the NIRA.<sup>78</sup> *The Sugar Institute* was the most complex antitrust case since *Standard Oil* (1911) and the most significant attack on trade associations.

In January 1935, a few months before the Supreme Court struck down the NIRA, the Justice Department filed criminal charges against an alleged conspiracy among film distributors. It described the action, known as the *St. Louis Trust Case*, as the “most far-reaching antitrust action in many years,”<sup>79</sup> and “an ‘anti-monopolistic’ campaign ... to convince all American business that the antitrust laws had not been entirely suspended through the liberties granted by the National Industrial Recovery Act.”<sup>80</sup> The Justice Department also emphasized that President Roosevelt approved the action.<sup>81</sup> The declarations were exaggerated. *The St. Louis Trust Case* was not nearly as complex as *The Sugar Institute* and ended in defeat for the government.<sup>82</sup> Its promotion as a campaign intending to revive confidence in antitrust law, however, marks a transition from the limited enforcement of the first rule of reason era to aggressive antitrust enforcement. Other lawsuits challenging the legality of

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74. *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936).

75. See David Genesove & Wallace P. Mullin, *Rules, Communication, and Collusion: Narrative Evidence from the Sugar Institute Case*, 91 AM. ECON. REV. 379 (2001).

76. *Sugar Inst.*, 297 U.S. at 579-81.

77. *Id.* at 596.

78. *Id.* at 553.

79. *U.S. Government Starts Anti-Trust Suits Against Producers in St. Louis*, *FILM BULL.*, Jan. 8, 1935, at 2.

80. See *St. Louis Grand Jury Quiz Based on “Freezing” Films*, *MOTION PICTURE HERALD*, Jan. 12, 1935, at 11.

81. See, e.g., *St. Louis Probe as Test if Trust Laws Live*, *MOTION PICTURE DAILY*, Jan. 8, 1935, at 1 (“Fortified by President Roosevelt’s support, the Department of Justice is out to show industry and the nation at large that the anti-trust laws have survived the New Deal.”).

82. See *Jury Acquits Defendants in St. Louis Trust Case*, *MOTION PICTURE DAILY*, Nov. 12, 1935, at 1 (“Every resource of the Department of Justice has been brought to bear to prove conspiracy in restraint of trade.”).

arrangements in the spirit of associationalism were more successful.<sup>83</sup>

During the fairness era, antitrust law and policy premised that large businesses and vertical arrangements tend to exclude competition,<sup>84</sup> that horizontal market arrangements tend to be collusive,<sup>85</sup> that intellectual property rights convey monopoly power,<sup>86</sup> and that the corporate form defines the boundaries of economic units.<sup>87</sup> Guided by these premises, antitrust law in the fairness era was hostile toward defendants and enforced aggressively. Significant developments that represent the spirit of the fairness era included the 1936 Robinson-Patman Act, which protected small businesses,<sup>88</sup> the 1950 Celler-Kefauver Act, which was an anti-merger statute,<sup>89</sup> the 1968 merger guidelines, which formulated economic standards for merger review; the adoption of presumptions about competitive harm, such as per se rules that outlawed horizontal and vertical arrangements,<sup>90</sup> the *Philadelphia National Bank (PNB)* presumption, which states that horizontal mergers that increase concentration harm competition,<sup>91</sup> and the presumption

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83. See, e.g., *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941) (complaint filed in April 1936); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (action filed in December 1936); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (action filed in December 1936).

84. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Aluminum Corp. of Am.*, 148 F.2d 416 (2d Cir. 1945).

85. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945).

86. See, e.g., *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

87. See, e.g., *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

88. Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13 (2012)).

89. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950).

90. See, e.g., *Topco*, 405 U.S. 596; *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Sealy*, 388 U.S. 350; *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Int'l Salt*, 332 U.S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

91. *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963).

that intellectual property rights convey market power;<sup>92</sup> the development of conspiracy inference standards, which offered some guidance for proof of conspiracy with circumstantial evidence;<sup>93</sup> doctrinal standards for the relationship between antitrust and regulation;<sup>94</sup> and repudiation of the associative state vision.<sup>95</sup>

Throughout the fairness era, courts praised aggressive antitrust enforcement, likening antitrust law to constitutional law and describing antitrust as the “Magna Carta of free enterprise” and a “charter of economic liberty.”<sup>96</sup> Courts also used similar analogies before and after the fairness era but less forcefully.<sup>97</sup>

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92. See, e.g., *United States v. Loew’s Inc.*, 371 U.S. 38 (1962); *Int’l Salt*, 332 U.S. 392.

93. See, e.g., *Theatre Enters. v. Paramount Distrib. Corp.*, 346 U.S. 537 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

94. See, e.g., *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Phila. Nat’l Bank*, 374 U.S. 321 (expanding the scope of the implied immunity doctrine); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (establishing the antitrust petitioning immunity); *Parker v. Brown*, 317 U.S. 341 (1943) (establishing the state action immunity); *United States v. Borden Co.*, 308 U.S. 188 (1939) (adopting the implied immunity doctrine).

95. See, e.g., *Fasion Originators’ Guild of Am. v. FTC*, 312 U.S. 457 (1941); *Socony-Vacuum*, 310 U.S. 150; *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936); see also *Find Trust Abuses in Sugar Institute*, N.Y. TIMES, Mar. 31, 1936, at 1 (arguing that *The Sugar Institute* decision would “vitally affect the course of 2,000 trade associations”).

96. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 291 (1972); *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (describing antitrust law as “the Magna Carta of free enterprise” and stating that antitrust law is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms”); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (“Every violation of the antitrust laws is a blow to the free-enterprise system.”); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 675 (1965) (Douglas, J., concurring) (stating that the antitrust laws express the “philosophy of the free enterprise”); *Phila. Nat’l Bank*, 374 U.S. at 372 (“[C]ompetition is our fundamental national economic policy.”); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 385 (1956) (“The Sherman Act has received long and careful application ... to achieve for the Nation the freedom of enterprise.”); *Socony-Vacuum*, 310 U.S. at 221 (characterizing the Sherman Act as a “charter of freedom”); *Sugar Inst.*, 297 U.S. at 600 (“[T]he Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”).

97. See, e.g., *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1110 (2015); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 350 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 651 (1985) (Stevens, J., dissenting); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 n.38 (1983); *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 56 (1982); *Cal.*

Antitrust commentators often describe the years of the Warren Court (1953-1969) as a distinctive period in antitrust history.<sup>98</sup> The Warren Court was suspicious of businesses and distrustful of markets. It understood “competition” to mean markets with large numbers of small competitors, and thus, was particularly hostile toward mergers and acquisitions.<sup>99</sup> The fairness vision, however, dominated antitrust policies for two decades before Chief Justice Earl Warren was confirmed and for a few years after Warren’s retirement.

Since the rise of the Chicago School, the fairness vision has been a popular punching bag of antitrust commentators. Critiques of the era emphasize its incoherent goals and enforcement zeal. This zeal, however, rested on then-popular economic theories that tied market structure to competition (the structure-conduct-performance paradigm).<sup>100</sup>

#### *D. The Second Rule of Reason Era, 1975-?*

Antitrust’s second rule of reason era began in the mid-1970s and its spirit still dominates antitrust law. Future studies will identify events that would symbolize the end of the era. Several antitrust landmarks symbolize the beginning of the era. *General Dynamics* (1974) approved a challenged merger, effectively ending the fairness era’s hostility toward mergers.<sup>101</sup> The 1976 Hart-Scott-Rodino Antitrust Improvements Act turned merger review into an

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Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 n.16 (1978); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933); *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 299 (4th Cir. 2007); *United States v. Azzarelli Constr. Co.*, 612 F.2d 292, 294 (7th Cir. 1979); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 271 (2d Cir. 1979).

98. See Thomas E. Kauper, *The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 325 (1968) (“No one could quarrel with the simple assertion that the so-called “Warren Court” has had a significant, if indeed not extraordinary, impact on the development of the antitrust laws.”); Tony A. Freyer, *What Was Warren Court Antitrust?*, 2009 S. CT. REV. 347, 347.

99. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 579-80 (1967); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 547-48 (1966); *United States v. Von’s Grocery Co.*, 384 U.S. 270, 278-79 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-20 (1962).

100. See Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104, 1104 (1979).

101. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974).

administrative process.<sup>102</sup> But more than anything else, three 1977 Supreme Court decisions declared the change in attitude—*GTE Sylvania*, *Brunswick*, and *Illinois Brick*.<sup>103</sup> *GTE Sylvania* held that courts should apply the rule of reason to nonprice vertical restraints and declared that “demonstrable economic effect rather than ... formalistic line drawing” should direct antitrust analysis.<sup>104</sup> *Brunswick* introduced the antitrust injury doctrine,<sup>105</sup> and *Illinois Brick* introduced the direct purchaser doctrine.<sup>106</sup> I call this period the “second rule of reason era” because a defining characteristic of the era is the growing use of reasonableness standards to narrow the scope of antitrust law.

The most persistent characteristic of the second rule of reason era is the Supreme Court’s capture by laissez-faire ideas, which has been growing with the changes in the composition of the Court. Since the mid-1970s, and at a faster pace since the confirmation of Chief Justice Roberts, the Supreme Court has expanded corporate rights at the expense of individual rights.<sup>107</sup> Vast literature examines this drift, mostly with sharp criticism. Legal historians broadly agree that the Supreme Court’s adoption and development of constitutional corporate rights have been neither informed nor thoughtful.<sup>108</sup> Likewise, corporate scholars have been critical of the Court’s interpretation of corporate rights. For example, Leo Strine, the

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102. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383.

103. *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 41-42, 59 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

104. *GTE Sylvania*, 433 U.S. at 59.

105. *Brunswick*, 429 U.S. at 489.

106. *Ill. Brick*, 431 U.S. at 729-36.

107. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (*Amex 2013*); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978). See generally ERIC W. ORTS, *BUSINESS PERSONS* (2013); ADAM WINKLER, *WE THE CORPORATIONS* (2018); JOHN C. COATES IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015); Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

108. See generally JOHN DEWEY, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); HOWARD JAY GRAHAM, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938); HOWARD JAY GRAHAM, *The “Conspiracy Theory” of the Fourteenth Amendment: 2*, 48 YALE L.J. 171 (1938); MORTON J. HORWITZ, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); ANDREW C. McLAUGHLIN, *The Court, The Corporation, and Conkling*, 46 AM. HIST. REV. 45 (1940).

Chief Justice of the Delaware Supreme Court, published a series of articles questioning the soundness of the Supreme Court's claims about corporations and corporate law.<sup>109</sup> The evolution of antitrust law has closely followed this trend.

Since the mid-1970s, the Supreme Court has persistently narrowed the substantive scope of antitrust law, adopting procedural barriers, and dismantling doctrines associated with the fairness vision.<sup>110</sup> Among other things, the Court moved from glorification to skepticism of the effectiveness of antitrust enforcement, emphasizing concerns regarding the costs of false positives;<sup>111</sup> replaced per se rules with the rule of reason;<sup>112</sup> abandoned exaggerated concerns about exclusionary practices in favor of skepticism of the viability of exclusionary conduct;<sup>113</sup> reversed judicial premises regarding the competitive effects of unilateral conduct and vertical restraints;<sup>114</sup> overruled the intraenterprise conspiracy doctrine;<sup>115</sup> withdrew from the premise that intellectual property rights convey market power;<sup>116</sup> reinterpreted the implied immunity doctrine to trim the reach of antitrust law;<sup>117</sup> and piled up procedural standards that are favorable to antitrust defendants.<sup>118</sup>

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109. See generally Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71 (2015); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423 (2016); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877 (2016).

110. See Barak Orbach, *Antitrust Stare Decisis*, ANTITRUST SOURCE, Oct. 2015.

111. See *supra* notes 6-8 and accompanying text.

112. See Orbach, *supra* note 110.

113. See, e.g., *Trinko*, 540 U.S. 398; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

114. See, e.g., *Pac. Bell Telephone Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438 (2009); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Bus. Elect. Corp. v. Sharp Elect. Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

115. *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010); *Copperweld v. Indep. Tube*, 467 U.S. 752 (1984).

116. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

117. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Trinko*, 540 U.S. 398.

118. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Bell Atl. Corp.*

Although the transformation of antitrust law in recent decades has been consistent with changes in the Supreme Court's jurisprudence, antitrust scholars tend to credit the so-called Chicago School with the reorientation of antitrust law.<sup>119</sup> The Chicago School produced an elegant and accessible analytical framework that supports laissez-faire sentiments. It offered economics as the only legitimate methodology for antitrust analysis and promoted a false equivalence between economics and laissez faire. The Chicago School dominated antitrust thinking in the 1970s and 1980s and still guides the antitrust narrative of the Supreme Court. Most antitrust scholars, however, distance themselves from the broad and unqualified claims of the Chicago School of Antitrust Analysis. Herbert Hovenkamp coined the term "post-Chicago economics" to describe the growing differences between the evolving antitrust economics and the rigid Chicago School's framework.<sup>120</sup>

Several decisions of the Supreme Court from the 1990s, chiefly *Kodak* (1992) and *California Dental Association* (1999),<sup>121</sup> inspired beliefs (or hopes) that the Court was moving away from the Chicago School framework toward post-Chicago economics. These beliefs proved mistaken. While the Court's use of a quasi-economics narrative is celebrated in certain political and ideological circles, it has little to do with contemporary antitrust economics.

In sum, the second rule of reason era is typically described as a product of a stunning takeover of antitrust law by laissez-faire ideas that scholars associated with the Chicago School promoted.<sup>122</sup> It is, however, important to recognize that the so-called "Chicago School revolution" mostly offered rationales for ideological preferences that

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v. Twombly, 550 U.S. 544 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

119. See, e.g., ROBERT PITOFSKY ED., *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* (2008); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985) [hereinafter Hovenkamp, *Antitrust Policy After Chicago*]; Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 [hereinafter Hovenkamp, *Post-Chicago Antitrust*].

120. Hovenkamp, *Antitrust Policy After Chicago*, *supra* note 119; Hovenkamp, *Post-Chicago Antitrust*, *supra* note 119.

121. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

122. See, e.g., PITOFSKY, *supra* note 119.

have guided the Supreme Court in recent decades and are likely to continue dominating the Court in the foreseeable future.

## II. THE PRESENT ERA

Dramatic changes in the economy and attitudes toward antitrust law suggest that a new antitrust era is already here. No longer is antitrust law a neglected specialized area. The digital revolution that began in the mid-1970s revived old debates about how society should address disrupting technologies, large corporations, and economic disparities.<sup>123</sup> Renewed fairness sentiments captured the public in the aftermath of the Great Recession, offering political and attention capital for populist voices that demand “fair trade” and action against large corporations. The resurrection of the fairness vision, however, is yet to influence the direction of antitrust policy. There are no signs that the Supreme Court is about to revisit its approach to antitrust. Antitrust enforcement during the Trump Administration lost vigor, with the exception of actions that appear politically motivated.<sup>124</sup> Nonetheless, tensions between influential laissez-faire sentiments and public anxieties have empowered voices demanding reevaluation of antitrust policies.

Long-term trends triggered by the digital revolution parallel trends caused by the Second Industrial Revolution at the turn of the nineteenth century.<sup>125</sup> Both waves of rapid technological change signify a transition from an “old economy” to a “new economy.”<sup>126</sup> The new economy of the Second Industrial Revolution is today’s old economy.<sup>127</sup> In both periods, the organization of production and

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123. See, e.g., *The Next Capitalist Revolution*, *ECONOMIST*, Nov. 17, 2018, at 13; *Trust-busting in the 21st Century*, *ECONOMIST*, Nov. 17, 2018; Ryan Avent, *The Third Great Wave*, *ECONOMIST*, Oct. 4, 2014. See generally ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE* (2014); ALFRED D. CHANDLER JR., *INVENTING THE ELECTRONIC CENTURY* (2001); Alfred D. Chandler, Jr., *Industrial Revolutions and Institutional Arrangements*, 33 *BULL. AM. ACAD. ARTS & SCI.* 33 (1980); Andrew Kupfer, *The Race to Rewire America*, *FORTUNE*, Apr. 19, 1993, at 42; Roy B. Helgott, *America’s Third Industrial Revolution*, 29 *CHALLENGE* 41 (1986); *Machine of the Year: A New World Dawns*, *TIME*, Jan. 3, 1983, at 12; Gene Bylinsky, *A New Industrial Revolution*, *FORTUNE*, Oct. 5, 1981, at 106.

124. See, e.g., *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018).

125. See Barak Orbach, *Antitrust Populism*, 14 *N.Y.U. J.L. & BUS.* 1, 15-17 (2017).

126. See, e.g., *The New Economy: Work in Progress*, *ECONOMIST*, July 24, 1999, at 21; *The New Economy*, *TIME*, May 30, 1983, at 62.

127. See, e.g., Carol A. Corrado & Charles R. Hulten, *How Do You Measure a “Technological*

distribution in the economy radically changed,<sup>128</sup> new forms of businesses appeared,<sup>129</sup> business titans emerged and acquired control over large segments of the economy,<sup>130</sup> concentration in markets soared,<sup>131</sup> income and wealth inequalities grew,<sup>132</sup> automation reshaped labor markets,<sup>133</sup> productivity growth rates were disappointing,<sup>134</sup> social discontent and anxieties dramatically increased,<sup>135</sup>

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*Revolution*?, 100 AM. ECON. REV. 99 (2010); Robert J. Gordon, *Does the "New Economy" Measure Up to the Great Inventions of the Past?*, 14 J. ECON. PERSP. 49 (Fall 2000). See generally Francesco Caselli, *Technological Revolutions*, 89 AM. ECON. REV. 78 (1999).

128. See, e.g., *The World's Most Valuable Resource*, ECONOMIST, May 6, 2017, at 9; *Fuel of the Future*, ECONOMIST, May 6, 2017, at 19; Tom Standage, *Special Report: The Return of the Machinery Question*, ECONOMIST, June 25, 2016.

129. See, e.g., ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 2 (1932); GERALD F. DAVIS, *THE VANISHING AMERICAN CORPORATION* (2016); BBVA, *REINVENTING THE COMPANY IN THE DIGITAL AGE* (2015); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916* (1988); WILLIAM H. WHITE, JR., *THE ORGANIZATION MAN* (1956); Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311 (1957); Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LITERATURE 1537 (1981).

130. See, e.g., Jonathan Taplin, *Can the Tech Giants Be Stopped?*, WALL ST. J., July 15-16, 2017, at C1; Derek Thompson, *America's Monopoly Problem*, ATLANTIC, Oct. 2016, at 26; Adrian Wooldridge, *Special Report: The Rise of the Superstars*, ECONOMIST, Sept. 17, 2016.

131. See, e.g., S. TEMP. NAT'L ECON. COMM., 76TH CONG., *TECHNOLOGY IN OUR ECONOMY* (1941); THURMAN W. ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940); NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904* (1985); *The Problem With Profits*, ECONOMIST, Mar. 26, 2016, at 11; *Too Much of a Good Thing*, ECONOMIST, Mar. 26, 2016, at 23; *Survival of the Biggest*, ECONOMIST, Dec. 1, 2012, at 11.

132. See, e.g., S. TEMP. NAT'L ECON. COMM., 76TH CONG., *CONCENTRATION AND COMPOSITION INDIVIDUAL INCOMES, 1918-1937* (1940); ORG. FOR ECON. CO-OPERATION & DEV., *INEQUALITY: A HIDDEN COST OF MARKET POWER* (2017); David H. Autor, *Skills, Education, and the Rise of Earnings Inequality Among the "Other 99 Percent"*, 344 SCI. 843 (2014); David H. Autor et al., *Computing Inequality: Have Computers Changed the Labor Market?*, 113 Q.J. ECON. 1169 (1998); David H. Autor et al., *Measuring and Interpreting Trends in Economic Inequality: The Polarization of the U.S. Labor Market*, 96 AM. ECON. REV. 189 (2006); *Normal Inequalities of Fortune*, N. REPUBLIC, Feb. 6, 1915, at 5.

133. See, e.g., W. GOODWIN MOODY, *OUR LABOR DIFFICULTIES* (1878); P.M. Baldwin, *Technological Unemployment*, 40 SCI. MONTHLY 44 (1935); T.N. Carver, *Machinery and the Laborers*, 22 Q.J. ECON. 210 (1908); John Bates Clark, *The Moral Outcome of Labor Troubles*, 9 N. ENGLANDER & YALE REV. 553 (1886); Burton J. Hendrick, *Fitting the Man to the Job*, HARPER'S MAG., Dec. 1916, at 64; Wassily Leontief, *Is Technological Unemployment Inevitable?*, 22 CHALLENGE 48 (1979); Michael B. Scheler, *Technological Unemployment*, 154 ANNALS AM. ACAD. POL. & SOC. SCI. 17 (1931); *Better, Stronger, Faster*, ECONOMIST, Mar. 3, 2018, at 66; Ram Charan, *The Algorithmic CEO*, FORTUNE, Feb. 1, 2015, at 45; *The Future of Work*, N.Y. TIMES MAG., Feb. 26, 2017; Derek Thompson, *A World Without Work*, ATLANTIC, July 2015, at 51; *Workers on Tap*, ECONOMIST, Jan. 3, 2015, at 9.

134. See, e.g., MARK P. KEIGHTLEY & JEFFREY M. STUPAK, CONG. RESEARCH SERV., R44543, *SLOW GROWTH IN THE CURRENT U.S. ECONOMIC EXPANSION* (2016); S. TEMP. NAT'L ECON.

populist movements influenced the political process and public policies,<sup>136</sup> and laissez-faire sentiments dominated the jurisprudence of the Supreme Court.

The similarities between present conditions and the conditions at the turn of the nineteenth century offer a glimpse into the likely future of antitrust law. In both periods, the disruption of markets and transformation of the economy resulted in a skewed distribution of gains and losses. A few accumulated vast fortunes and economic power, while many suffered losses and were unable to integrate in the new economy.<sup>137</sup> This pattern of growing economic disparities, in turn, proved conducive to public anxieties, social discontent, radical populism, and ill-conceived public policies.<sup>138</sup> In both periods, the Supreme Court blundered into radical laissez-faire constitutionalism. The Court's jurisprudence at the turn of the nineteenth century, which became known as *Lochnerism*, earned broad condemnation and repudiation.<sup>139</sup> The Court's jurisprudence in recent decades is likely to follow a similar path. The Court is already

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COMM., 76TH CONG., *supra* note 131; ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH* (2016); ORG. FOR ECON. CO-OPERATION & DEV., *THE FUTURE OF PRODUCTIVITY* (2015); Stuart Chase, *The Enemy of Prosperity*, HARPER'S MAG., Nov. 1930, at 641; Jon Hilsenrath & Bob Davis, *Tech Boom Creates Too Few Jobs*, WALL ST. J., Oct. 13, 2016, at A1.

135. See, e.g., Daniel Akst, *Automation Anxiety*, 37 WILSON Q. (2017); Joel Mokyr et al., *The History of Technological Anxiety and the Future of Economic Growth: Is This Time Different?*, J. ECON. PERSP., Summer 2015, at 31; Chase, *supra* note 134; *Victims of the Machine*, N. REPUBLIC, Oct. 26, 1927, at 249; Leontief, *supra* note 133; *Obsolete Man*, FORTUNE, Dec. 1932, at 25; Angela Merkel & Barack Obama, *The Future of Transatlantic Relations*, WIRTSCHAFTSWOCHE, Nov. 11, 2016; Barack Obama, *The Way Ahead*, ECONOMIST, Oct. 8, 2016, at 22; James L. Wright, *Need We Be Afraid of a Job Famine?*, NATION'S BUS., Jan. 1927, at 22.

136. See, e.g., JOHN D. HICKS, *THE POPULIST REVOLT* (1931); RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1962); JOHN B. JUDIS, *THE POPULIST EXPLOSION* (2016); Robert R. Barr, *Populists, Outsiders, and Anti-Establishment Politics*, 15 PARTY POL. 29, 44 (2009); Rogers Brubaker, *Why Populism?*, 46 THEORY & SOC'Y 357 (2017); Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S, Nov. 1964, at 77.

137. In *Trans-Missouri*, Justice Peckham described the "small dealers and worthy men ... who [were] unable to readjust themselves to their altered surroundings." *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323, (1897).

138. Orbach, *supra* note 125, at 6-11.

139. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 623 (2012) (Ginsburg, J. concurring in part, concurring in the judgment in part, and dissenting in part) ("In the early 20th century, this Court regularly struck down economic regulation.... [The opinions and reasoning of the conservative Justices] bear a disquieting resemblance to those long-overruled decisions.").

perceived as ideological, hostile to public restrictions on businesses, and dismissive of concerns regarding restraints of trade.<sup>140</sup>

Thus, while it may take time until antitrust law changes direction again, the present conditions suggest that demands to reorient antitrust law are likely to grow. If history is any guide, we should expect to see at least a partial reversal from the landmark developments of the second rule of reason era. Specifically, doctrines related to unilateral conduct, exclusionary practices, vertical restraints, and conspiracy inference are likely to be modified and become less protective of antitrust defendants.

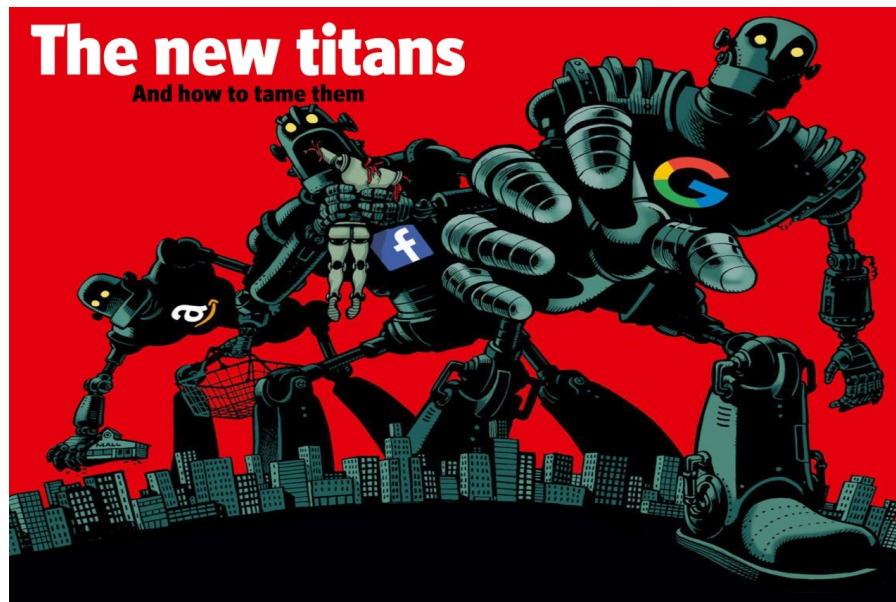
### *The Return of Bigness*



*The Trust Giant's Point of View.* "What a Funny Little Government," VERDICT, Jan. 22, 1900, at 8-9.

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140. See Coates IV, *supra* note 107, at 269-70 (comparing the development of corporate rights in the *Lochner* era and in recent decades, and arguing that the present expansion of corporate rights "undermines the rule of law").



*The New Titans*

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#### CONCLUSION: THE VIRTUES OF MODERATION

Antitrust law's core function is delicate: It imposes restrictions on economic freedom of businesses to reduce unreasonable harm to competition caused by restraints of trade that businesses would otherwise use. The fairness, laissez-faire, and technocracy visions, which have shaped the evolution of antitrust law, present different approaches to this function. The fairness vision emphasizes concerns about restraints of trade, the laissez-faire vision focuses on the costs of antitrust enforcement, and the technocracy vision presumes that enforcement institutions run by experts effectively protect market competition.

Commentators identify cycles of zeal in the evolution of antitrust law and sometimes describe those through pendulum metaphors.<sup>141</sup> In the spirit of these metaphors, it is broadly understood that the

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141. See, e.g., Kovacic, *The Modern Evolution*, *supra* note 17, at 378-82; Louis B. Schwartz, *Cycles of Antitrust Zeal: Predictability?*, 35 ANTITRUST BULL. 771, 771-73 (1990).

second rule of reason era will end sometime. This end, I argue, is already here, though the transition to a new period may linger because of the ideological radicalization of the Supreme Court.