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Neo-Brandeisian Antitrust: Repeating History's Mistakes

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Neo-Brandeisian Antitrust: Repeating History's Mistakes

Timothy J. Muris¹

January 30, 2023

Abstract

President Biden rejects the economics-driven antitrust policies of the past 40 years. Flanked by his White House competition adviser and his new FTC Chair in July 2021, he asserted that the “experiment failed” and promised to return to earlier antitrust traditions. This report shows those traditions were abandoned for good reason: they harmed consumers.

Two such traditions are discussed in particular detail. One involves the Robinson Patman Act of 1936, which the FTC promises to reinvigorate. The second involves what FTC Chair Khan calls the “controlling precedents” of old Supreme Court merger decisions, especially from the Warren Court. Those decisions stand in sharp contrast to the modern economic standards used to evaluate mergers, as exemplified in court decisions and in the Obama administration’s 2010 guidelines

President Biden blamed the alleged failure on Robert Bork and the Chicago school. Blaming, or crediting, Chicago for the 40 years is inaccurate. In fact, modern antitrust analysis was much richer than any school, including Harvard professors and judges, especially Philip Areeda and Stephen Breyer, both of whom have had profound impacts.

The true “failed experiment” was populist antitrust and its policies that the new enforcers praise.

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Overview

In July 2021, with his top White House competition adviser and the new chair of the Federal Trade Commission (FTC) at his side as he introduced a competition executive order, President Joe Biden decried the “experiment failed” in economics-driven antitrust over the past 40 years.¹ The president promised to return to antitrust “traditions” that existed before the “failed” 40 years.

The Biden appointees, who call themselves neo-Brandeisians, have made numerous favorable pronouncements about this history before 1981. Start with the name. Louis Brandeis’s famous 1914 Harper’s Weekly article, “A Curse of Bigness,” inspired the title and some of the content of White House competition adviser Tim Wu’s 2018 book, *The Curse of Bigness*. To the neo-Brandeisians, big is again bad.² Bad, not because it harms consumers—we will see that, to the Biden administration, harm to consumers is not the appropriate test for judging business conduct—but bad in some overarching political sense and for its own sake.

Such attacks on bigness are no strangers to antitrust history. Thus, President Biden praises Franklin Delano Roosevelt’s approach as worthy of emulation, although FDR’s competition policies varied wildly. A year after the Supreme Court in 1935 found unconstitutional the National Industrial Recovery Act of 1933 (NIRA), which eschewed competition in favor of central planning, President Roosevelt joined Brandeis, at least rhetorically. Accepting his party’s renomination for president, he attacked the “economic royalists” who, he charged, subjected American workers to “economic slavery.”³

Four and a half years later, however, the world was very different. Germany and Japan were on the march, with the former in control of most of non-Russian continental Europe. In the immortal words of Winston Churchill, civilization itself was threatened by a new Dark Age.⁴ Ever flexible, FDR changed again, as “economic royalists” became the “arsenal of democracy.”⁵ Had the populists prevailed and the growth of American big business been thwarted, would the Allies have won World War II without the American economic juggernaut?

Notably, Justice Brandeis himself was consistent in his disdain of bigness. Big government, especially at the federal level, concerned Louis Brandeis as much as bigness in commerce. Thus, Justice Brandeis warned in a private communication to the Roosevelt White House that the Supreme Court on which he sat was “not going to let this government centralize everything. It’s coming to an end.”⁶ Not so for the modern neo-Brandeisians. One searches the numerous writings of the new antitrust progressives without success for concern over the power of government. Instead, they plan to use big government to restructure entire industries in their progressive images, a topic on which Howard Beales and I recently reported for AEI.⁷

Justice Brandeis was also an empiricist; one of his first, and perhaps greatest, innovations was the “Brandeis Brief,” marshaling the available facts on an issue before the courts. Such empiricism helps explain why Brandeis admitted that his opposition to bigness could be costly, but for him forgoing some benefits of bigness was worth the price. For example, he dissented from a Supreme Court decision invalidating state laws

that taxed chains disproportionately higher than single stores, but he conceded that such taxes could “compel their [the chain stores] withdrawal from the state.”⁸ The modern-day Brandeisians lack fealty to the empiricism of their namesake as well.⁹

It is not just bigness, sans big government, that the modern progressives deplore. As did the progressives of a century ago or more, the neo-Brandeisians support transportation regulation, which the new competition executive order, among other steps, has begun to reimpose.¹⁰ Of course, many famous liberals supported transportation deregulation, Sen. Edward Kennedy in particular. I first met former Supreme Court Justice Stephen Breyer in 1975 when he was a Harvard professor, on leave, leading Sen. Kennedy and his Judiciary Committee in promoting deregulation.¹¹ Transportation deregulation was one of the highlights of President Carter’s tenure, yet is now castigated by the neo-Brandeisians, perhaps because it suffered from the same focus on consumer welfare as the claimed failed 40-year experiment in antitrust.

The chapters that follow this introduction study in detail two examples of past antitrust policy that the Biden antitrust leaders praise: vigorous enforcement of the Robinson-Patman Act and 1960s-style merger enforcement. Because the courts rejected these policies and the antitrust agencies subsequently abandoned them, most modern antitrust attorneys and scholars understandably no longer study them in depth. When I first started teaching antitrust in 1977, following my first tour at the FTC, both were then prominent in most antitrust courses, including mine. When I returned to the academy near the end of the Reagan administration, they were far less prominent, and by the time I left my last government job, as chairman of the FTC in the “Bush 43” years, the specifics were barely covered except perhaps as footnotes. Recalling the details here will allow us to see just how aberrant the neo-Brandeisian antitrust policy will be if implemented.

Chapter 2: The War on Chain Stores and the Robinson-Patman Act

We begin with the Robinson-Patman Act. This statute, one of the main competition legacies of the second President Roosevelt, was long the bane of antitrust. We will see that the statute arose from the collapse of the NIRA; it was first introduced 15 days after the Supreme Court found that statute unconstitutional. The “bigness” under attack was the emergence of large chain retailers, most notably the Great Atlantic & Pacific Tea Company (A&P). Although it no longer exists today, the A&P was America’s largest retailer for 40 years in the mid-20th century.¹² A&P and its retail imitators used a new business model, with vertical integration, economies of scale, and greater use of data that lowered prices and provided attractive products to consumers, especially the less wealthy. Traditional retailers and the middlemen on which they relied suffered from this new competition. The businesses competing with the chains were the favorites of progressives like Justice Brandeis and were the main supporters for using the NIRA against the chains and for the proposed Robinson-Patman statute.

Robinson-Patman’s sponsors could not get their original draft enacted, inspired by the codes written under the NIRA. Instead, the sponsors of the Robinson-Patman Act resorted to language that is, to say the least, vague, frequently self-contradictory, and subject to varying interpretations.

For decades, the FTC aggressively interpreted the statute, as many in the agency shared antipathy toward chain stores and the growing number of large suppliers (now often called grocery manufacturers) that sell to the chains. The prices those manufacturers charge became a major focus of FTC enforcement over the coming decades, as did other players, such as food brokers, involved in supplying the chains. Through the 1960s, Robinson-Patman was the FTC's major antitrust enforcement tool, producing hundreds of cases and investigations early in that decade alone, with the attack on alleged anti-competitive mergers following 1950 legislation, discussed in Chapter 3, a distant second.

Chapter 2 contains multiple examples of the FTC's costly, occasionally absurd, reading of Robinson-Patman. The reader may be convinced after one or two, but it is useful for those who do not know the history to at least sample them. For those involved in the actual history, the lessons were indeed memorable. Consider a meeting in the White House cabinet room to discuss the budget with President Reagan during his second term. I was an official in Office of Management and Budget (OMB), and the president was doing his best not to show boredom with terrain that he had covered numerous times already in his presidency. When we came to a new proposal, abolishing the Interstate Commerce Commission to further transportation deregulation, he perked up: "Do they still have that backhaul problem?" The president and Jim Miller, director of OMB, an expert in transportation regulation, proceeded to discuss backhauls for the next few minutes!

Because in the Ford administration I had been an informal FTC contact to those working on a 1970s Justice Department (DOJ) study of Robinson-Patman, I understood the arcane nature of the subject the president had raised. While he was governor of California, the FTC's view of the issue had reached the Interstate Commerce Commission, which regulated trucking between states. Backhaul here refers to the return trip once a retailer delivers goods to its stores from its own warehouses. After the delivery, if the retailer's empty truck is near one of its supplier's warehouses, it could be profitable for the truck to visit that supplier, load, and return to the retailer's warehouse from which it started and thereby avoid the supplier's delivery fee.

Sounds sensible? Not to the Federal Trade Commission, ever on the lookout for "advantages" of large manufacturers of consumer goods and their large retail customers. For decades, the agency interpreted this transaction as implicating problematic price discrimination under Robinson-Patman even if the retailer received a "discount" on its bill from the supplier, reflecting no more than the avoided freight cost.¹³

More generally, Robinson-Patman enforcement raised the costs and otherwise impeded the competition of its intended targets, including chain stores, to the detriment of consumers. After decades of withering criticism, first from the academy and the practicing bar, courts rejected some of the FTC's positions, a trend that accelerated as criticism grew, even from within the FTC itself in the 1960s by an influential FTC commissioner, Philip Elman. Following a 1970 blue-ribbon American Bar Association panel excoriating FTC enforcement,¹⁴ the FTC deemphasized the statute in the 1970s and has virtually abandoned it since. The DOJ issued a devastating report in 1977,¹⁵

and court decisions have significantly, albeit not completely, given the statute's text, tried to interpret Robinson-Patman consistent with the rest of antitrust law.

By the mid-1970s, before the “failed” 40 years experiment, prominent antitrust scholars or enforcers who praised the Robinson-Patman Act were becoming scarce. In the 21st century, they had become rare indeed. Yet, even before she finished law school, Biden FTC Chair Lina Khan praised the Robinson-Patman Act as a tool to reign in what she perceived as the excessive power of a modern large retailer, Amazon.¹⁶ She has continued that praise as chair.¹⁷ And the newest FTC commissioner, Alvaro Bedoya, in one of his first pronouncements on competition policy, praised Robinson-Patman as “the Magna Carta of Small Business.”¹⁸

Chapter 3: The Mid-Century Populist War Against Mergers

Our second example, discussed in Chapter 3 and frequently cited by the neo-Brandeisians, involves restricting mergers under the largely noneconomic and much more stringent standards advocated by the antitrust agencies in the 1950s, 1960s, and well into the 1970s. In 1950, Congress revised Section 7 of the Clayton Act, the section prohibiting anti-competitive mergers, in part because of a loophole in the original statute. Moreover, as the Supreme Court read the legislative history, Congress also feared rising concentration, in which mergers allegedly played an important role, as supposedly documented by an FTC study of that era. The neo-Brandeisians similarly fear bigness and cite that old FTC report even today, ignoring the fact, known by 1950 and widely within the academy since, that the FTC study was wrong, as the authors of the FTC study admitted a few years after publication with little fanfare. Because the threat of rising concentration was almost certainly inaccurate, mergers were not a systemic cause for concern on that front.

We will see that the 1960s in particular produced a case law incoherent, illogical, and, most importantly, anti-consumer, condemning bigness for its own sake—indeed, even when the mergers were not particularly large. The first case the Supreme Court decided under the amended Clayton Act was the Justice Department's challenge of a merger between Brown Shoe and Kinney. Brown was the third-largest retailer of shoes nationally, Kinney the eighth largest, and the combined national market share was only 4.5 percent. The business was very un-concentrated, with the 24 largest shoe retailers accounting for only 35 percent of sales. Yet, in 1962, the Supreme Court agreed that a merger between companies with such small shares was illegal. (The Court's horizontal focus was on local competition, finding combined shares of 5 percent enough to trigger illegality.) The Court also found illegal the vertical aspects of the merger, which had a similarly inconsequential economic impact.

Perhaps recognizing that opinion protected small businesses, not consumers, in an infamous passage, the Court tried to rationalize its result:

Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize

Congress' desire to promote competition through the protection of viable small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

No matter how many times one reads this passage, its economic incoherence remains: The Court "protected" competition by protecting inefficient competitors, thereby harming consumers.

As we will see, the incoherence of 1960s merger law was only beginning. Thus, as did *Brown Shoe*, other of the Court's cases suggested that becoming more efficient was a reason to attack mergers, not to bless them! This hostility to the obvious consumer benefit of more competitive businesses continued through the 1970s, when, for example, opposition to consumer benefits was a frequent attribute of FTC administrative litigation. The Supreme Court was so keen to find reasons to support the government's challenges, rejecting lower court decisions and even inventing arguments the government had not used, that Justice Stewart, a frequent dissenter, famously stated that the only consistency in the case law was that "the Government always wins."

It is this aberrant case law, long condemned across all parts of the antitrust community, that President Biden's antitrust leadership used for significant support as they began to rewrite the guidelines for enforcing Section 7. Thus, the FTC-DOJ request for information on merger enforcement, short by legal standards at a little over nine pages, contains 15 references to merger decisions, 12 from before the disfavored last 40 years, five from *Brown Shoe* alone.¹⁹ And two of the three more recent cases cited to support propositions were more consistent with the older era of merger enforcement than modern law. Ten of the 12 older cites are to cases in the 1960s, the height of agency and judicial deviation from applying modern economics to mergers. Although there are noncontroversial aspects of that law, this document's disregard of intervening case law, especially from the disfavored 40 years, appears neither accidental nor promising for the future well-being of American consumers.

Even more recently, FTC Chair Khan criticizes the agencies in the condemned 40 years for ignoring the "controlling precedents" of the merger cases that courts and commentators began abandoning even before 1981. Although the Supreme Court has not spoken substantively about a merger for nearly 50 years, it has issued antitrust decision after decision, making clear that it now rejects the populist focus of 1960s law in favor of an economically based antitrust founded on the welfare of consumers.

This chapter does not attempt to analyze the precise details of Biden administration merger enforcement, which are only now beginning to take form. Instead, Chapter 3 demonstrates that the merger law before 1980, especially that from the Warren Court, to which the neo-Brandeisians claim fidelity, does not provide coherent legal or economic support on which to build future enforcement. That law was abandoned decades ago for excellent reasons, as detailed in Chapter 3.

Chapter 4: Erroneously Blaming Chicago and Abandoning Consumers

Unfortunately, the welfare of consumers is not central to Biden antitrust enforcers, as discussed in this monograph's last chapter. To them, antitrust is not consumer protection, and the president and his appointees dismiss the consumer focus as a mistake of Robert Bork and scholars associated with the University of Chicago.²⁰ This is an assertion that I, with two different coauthors, and others have previously refuted.²¹ Let us count the ways.

Perhaps most important, non-Chicago scholars, including those associated with Harvard, have very much shaped modern antitrust law. Phillip Areeda of Harvard was the principal author of the most influential treatise on antitrust doctrine during the beginning of the 40 years, now written primarily by another non-Chicago scholar, Herbert Hovenkamp.²² Former Justice Breyer was a leader in antitrust, so much so that Ralph Nader, among others on the left of the political spectrum, opposed his elevation to the Supreme Court, largely on antitrust grounds.²³

Second, the Chicago scholars were indeed quite important, primarily in overthrowing the antitrust of the 1960s and '70s, not in writing an agenda for antitrust once the revolution succeeded. That task fell to others, for which the Areeda-Hovenkamp treatise has been the most widely cited and leading legal source. The Chicago scholars, like the revolutionaries of 1776, agreed on what they opposed, but not on what the world post-revolution should look like, as Chapter 4 discusses.

Third, the focus on Bork is particularly odd, almost certainly attributable to the notoriety Judge Bork obtained, not in antitrust, but during his controversial Supreme Court nomination. Bork was indeed influential; I, for one, spent a crucial weekend as a law student reading his seminal articles from the 1960s on antitrust's rule of reason. Yet, his important book, *The Antitrust Paradox*, was developed largely many years before its publication, during some of the worst of the Warren Court's excesses. (Publication was postponed because of his tenure as solicitor general and personal issues.)

The delay made the book less important than it would have been in influencing the decline of the period before the last 40 years of antitrust. Instead, it serves more as a catalog of errors that were generally recognized in how the antitrust laws were enforced through much of the 1970s. As such, its influence on the development of modern law was tempered by its focus on the old regime, the vintage of most of the writing, and the important fact that the book was out of print for many years.²⁴ Thus, at a 2021 Federalist Society event to celebrate the third edition, published 28 years after the second (43 years after the first) and inspired in significant part by the attention to Bork from the neo-Brandeisians, participants discussed the importance of a new edition, given the out-of-print status, and how one could find a previous edition online only for \$800–\$1,000!

The neo-Brandeisians have revived interest in Judge Bork, primarily as a villain. Bork was once pivotal to the education of antitrust students, enforcers, scholars, and practitioners—and I am certainly one who profited immensely from both his writings and many personal conversations. Nevertheless, he ceased to participate regularly in the development of antitrust law during the 40-year “experiment failed,” save for a few judicial opinions, occasional advocacy on individual cases, and the continuing, but

waning, influence of *The Antitrust Paradox* as an introduction to both antitrust and the controversies before the last 40 years.

Finally, the Bork shibboleth allows the Biden leadership to dismiss the economics-driven antitrust of the last 40 years, in favor of a much looser, more ad hoc, less structured, and less principled analysis. Lawrence Summers, secretary of the Treasury under President Clinton, whose warning of impending inflation the Biden administration ignored to consumers' detriment, has issued a similar warning about the new antitrust leadership: "I am very concerned that we may [be] headed into a new era of Brandeisian populist antitrust policy that will make the US economy more inflationary and less resilient."²⁵ He continued, "The statements on policy coming from @FTC & @TheJusticeDept better reflect legal doctrines of the 1960s than economic understandings of the last two decades." He also found the big is bad attitudes "presumptively problematic."

Neo-Brandeisian interest in predatory pricing is a particularly problematic example. Inspired by the 1967 Supreme Court *Utah Pie* decision protecting a dominant, regional frozen pie manufacturer from national competitors that cut their prices selectively to compete with the regionally dominant firm,²⁶ the Federal Trade Commission in the 1970s filed multiple predatory pricing cases to expand the doctrine. Fortunately for consumer interest in low prices, this initiative failed.

More generally, predatory pricing law was reformed, led by the seminal 1975 article in the *Harvard Law Review* by Harvard professors Philip Areeda, discussed above, and his colleague Donald Turner, the original coauthor of what is now the Areeda-Hovenkamp treatise and head of the Antitrust Division under President Johnson.²⁷ Their test required that low prices were legal unless they were below an appropriate level of cost and the alleged predator could successfully raise prices in the future to recoup losses from the predatory campaign. Such a test was adopted in Court first in 1983 by then-Judge Breyer and then twice by the Supreme Court within the next 10 years.²⁸

Inspired by Areeda and Turner, predatory pricing law was reformed to protect one of the main benefits of competition to consumers, low prices—particularly important in this time of high inflation. Yet this success, implemented during the so-called "experiment failed," is one of the main targets of the neo-Brandeisians. Professor Hovenkamp ably explains the implications of this plank of neo-Brandeisian antitrust:

The neo Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most..... As a result, to the extent that it is communicated in advance, it could spell political suicide. Setting aside economic markets, a neo Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.²⁹

Today's populists do make some economic-like assertions, and this chapter discusses one of the most prominent—namely that economic performance has decreased, especially in this century, with a particular criticism of so-called "Big Tech." Although

these companies have brought undoubted benefits to billions of consumers, with the rise of the internet, the smartphone, cloud computing, social networking, the online retail revolution, and others, the neo-Brandeisians assail them like the robber barons of old. Chapter 4 analyzes the assertion that concentration has increased, again noting that concentration itself addresses the wrong issue, but also reprising the growing literature that the claim itself appears inaccurate, as do the claims about increased market power.

The mistakes summarized in this introductory chapter, from Robinson-Patman to merger law based on populist norms long abandoned, renewed attacks on low prices, and hostility to bigness for its own sake, result from animus to applying economics to determine the impact of business practices on consumers. As this monograph shows in detail, we have tried the progressive philosophy before, now proposed again as a revolution. To respond to President Biden, *that* was the experiment that failed.

Notes

¹ Joe Biden, President, U.S., Remarks by President Biden at Signing of An Executive Order Promoting Competition in the American Economy (Jul. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>. This introductory chapter does not cite materials that summarize directly analysis in subsequent chapters.

² Louis D. Brandeis, *A Curse of Bigness*, Harper's Wkly. (Jan. 10, 1914); TIM WU, *THE CURSE OF BIGNESS ANTITRUST IN THE NEW GILDED AGE* (2018).

³ Franklin D. Roosevelt, President, U.S., Acceptance Speech for the Renomination for the Presidency, Philadelphia, Pa. (Jun. 27, 1936), available at <https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa>.

⁴ Winston Churchill, Prime Minister, U.K., *Their Finest Hour* (Jun. 18, 1940), available at <https://winstonchurchill.org/resources/speeches/1940-the-finest-hour/their-finest-hour/>.

⁵ Franklin D. Roosevelt, President, U.S., Fireside Chat 16: On the "Arsenal of Democracy", Dec. 29, 1940), available at <https://www.presidency.ucsb.edu/documents/fireside-chat-9>. In late 1940, of course, the American economy was only beginning to switch to war time production.

⁶ Daniel A. Crane, How Much Brandeis Do the Neo-Brandeisians Want?, 64(4) *The Antitrust Bulletin* 533 (2019) (citing PETER H. IRONS, *THE NEW DEAL LAWYERS* 104 (1982)).

⁷ J. Howard Beales III & Timothy J. Muris, Back to the Future: How Not to Write a Regulation (May. 26, 2022); see also Maureen K. Ohlhausen & James Rill, *Pushing the Limits?: A Primer on FTC Competition Rulemaking*, Before the U.S. Chamber of Commerce (Aug. 12, 2021), available at https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.

⁸ *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933) (Brandeis, J. dissenting). Laura Phillips Sawyer's recent book on the fair trade movement documents Brandeis' long support for even cartel-like activities trying to protect small business at the expense of more efficient, bigger firms and of consumers. Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the 'New Competition,' 1890–1940*, 121-122, 136 (2018).

⁹ Crane, *supra* note 6.

¹⁰ Joe Biden, President, U.S., Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (Jul. 9, 2021); STAFF OF S. COMM. ON THE JUDICIARY, 116TH CONG., *INVESTIGATION OF COMPETITION IN DIGITAL MARKETS* (2020), available at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=5025>; see Christine S. Wilson, Commissioner, Fed. Trade Comm'n, *Remembering Regulatory Misadventures: Taking a Page from*

Edmund Burke to Inform Our Approach to Big Tech (Jun. 28, 2019). The executive order itself does not impose regulation; it tells agencies to use their authority to accomplish the stated goals.

¹¹ *About the Court*, <https://www.supremecourt.gov/about/biographies.aspx> (last visited on Dec. 29, 2022).

¹² See Timothy J. Muris & Jonathan E. Nuechterlein, Chicago and Its Discontents, 87 UNIV. OF CHI. L. REV. 506-10 (2020).

¹³ To perhaps oversimplify, if the retailer's overall bill from the supplier did not reflect a charge for the backhaul, to the FTC, that in itself could show the discrimination.

¹⁴ American Bar Association, Commission to Study the FTC, Report of the Commission to Study the Federal Trade Commission (Sept. 1969).

¹⁵ Dept. of Justice, Report on the Robinson-Patman Act (1977).

¹⁶ Lina Khan, A remedy for Amazon-Hachette fight? CNN Opinion (May 30, 2014). Amazon is not the largest American retailer, WalMart has that honor, but Amazon was the target of her 2017 Yale Law Review student note that launched her fame. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

¹⁷ See Lina M. Khan, Introduction and Keynote Address - Lee E. Teitelbaum Utah Law Review 2022 Symposium, available at <https://www.youtube.com/watch?v=UpDDSOi7dtg>.

¹⁸ STATEMENT OF COMMISSIONER ALVARO M. BEDOYA Regarding Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products 2 (Jun. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214501BedoyaStatementRebatePolicy.pdf.

¹⁹ See D.O.J. & F.T.C., Request for Information on Merger Enforcement (Jan 18, 2022).

²⁰ See Biden, *supra* note 1.

²¹ See Muris & Nuechterlein, *supra* note 12; Bruce H. Kobayashi & Timothy J. Muris, *CHICAGO, POST-CHICAGO, AND BEYOND: TIME TO LET GO OF THE 20TH CENTURY*, 78 Antitrust L.J. 147 (2012). One of these articles, published in 2012, begins "We come both to praise and bury the Chicago School of Antitrust." See Chapter 4.

²² Phillip Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2013).

²³ Statement of Ralph Nader on the nomination of Stephen G. Breyer by President Clinton to be Associate Justice of the Supreme Court of the United States (Jul. 15, 1994).

²⁴ See Robert Bork, Jr., & Mike Lee, The Antitrust Paradox: A Conversation with Sen. Mike Lee and Robert Bork, Jr. (Apr. 27, 2021), available at <https://fedsoc.org/events/the-antitrust-paradox-a-conversation-with-sen-mike-lee-and-robert-bork-jr>.

²⁵ Lawrence H. Summers (@LHSummers), Twitter (May 22, 2022), <https://twitter.com/LHSummers/status/1528568277378662403>.

²⁶ See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

²⁷ Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

²⁸ *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

²⁹ Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 130 (2019).

The Populist Revolt Against Chain Stores and the Rise of Robinson-Patman

“It didn’t matter if retailers passed on these savings to consumers or not. It was fair competition that mattered.”

—Lina Khan¹

So wrote the Biden administration’s Federal Trade Commission (FTC) chair, before her appointment, in praise of the most widely condemned statute in antitrust legislation’s long history: the Robinson-Patman Act of 1936. Virtually all antitrust enforcers, commentators, and practitioners have condemned this statute for over 50 years. As discussed in Chapter 1, since becoming chair, Lina Khan has repeated her affinity for the statute, as has the newest commissioner, Alvaro Bedoya. This chapter discusses that statute and its origins, meaning, application, impact, and eventual demise as a central tool of antitrust enforcement, and it shows why those who care for the welfare of consumers reject the FTC’s new affection for this antitrust anachronism.

This chapter’s first section covers the origins of the Robinson-Patman Act, which lay in populist resistance to chain stores, especially America’s leading retailer the Great Atlantic & Pacific Tea Company (A&P). This resistance led ultimately to the passage of Robinson-Patman, described in the second section, following the Supreme Court finding the National Recovery Administration (NRA) unconstitutional. This prevented enforcement of regulatory codes, including those designed to curtail A&P and other chains. The third section continues the A&P story with the Department of Justice’s (DOJ) successful effort to use Robinson-Patman principles to prosecute the company under the Sherman Act. The fourth section analyzes how constraining A&P and other chains was part of the FTC’s aggressive enforcement of Robinson-Patman, leading to the act’s many adverse effects.² Robinson-Patman’s continued presence caused decades of inefficiencies and costly work-arounds as modern retailers and their suppliers tried to adjust to a statute that was not only arbitrary but also directly at odds with the consumer focus of modern antitrust. The fifth section discusses the FTC and judiciary changes that reduced Robinson-Patman enforcement and those adverse effects, while the sixth section offers concluding remarks.

The Rise of Chain Stores and the A&P

At the turn of the 20th century, distribution of goods to American consumers occurred mostly through contracts, from manufacturers to wholesalers to retailers.³ The manufacturer made the goods, the wholesaler was the middleman, and the retailer sold the goods to the public. While each performed distinct functions, the wholesaler was preeminent, buying “goods from the manufacturer for resale to retailers who in turn served the consuming public.”⁴ The wholesaler “typically assumed the task of bulk storage, warehousing, and delivery of the goods to the retail market” and “accepted the responsibilities and credit risks in dealing with numerous scattered retail accounts.”⁵ The manufacturer’s pricing and discounts compensated the wholesaler with a reasonable margin. Each level typically kept in its lane, with manufacturers mostly

refraining from selling to retailers and wholesalers mostly declining to sell directly to the public.⁶

Modern mass retailing firms shattered this world.⁷ As efficient as the wholesalers had been in the 19th century, they could not withstand this new competition. The department store and the mail-order house began in the late 19th century, and the chain store followed early in the 20th century.⁸ These new mass-marketing firms each had their own particulars, but they operated with the same conceptual model:

All these mass marketing enterprises had the same internal administrative structure. Their buying and selling representatives, by using the railroads, the telegraph, the steamship, and improved postal services, coordinated the flow of agricultural crops and finished goods from a great number of individual producers to an even larger number of individual consumers. By means of such administrative coordination, the new mass marketers reduced the number of transactions involved in the flow of goods, increased the speed and regularity of that flow, and so lowered costs and improved the productivity of the American distribution system.⁹

The enhanced efficiency of the mass-market retailers could be achieved once the new retailers reached a sufficient scale:

Mass retailers began to replace wholesalers as soon as they were able to exploit a market as large as that covered by the wholesalers. By building comparable purchasing organizations they could buy directly from the manufacturers and develop as high a volume of sales and an even higher stock-turn than had the jobbers. Their administrative networks were more effective because they were in direct contact with the customers and because they reduced market transactions by eliminating one major set of middlemen.¹⁰

With these advantages, the mass retailers developed low margin, high turnover businesses, superior to the wholesale model: "Such velocity of stock-turn permitted mass retailers to take lower margins and to sell at lower prices and still make higher profits than small specialized urban retailers and the wholesalers that supplied them."¹¹

This revolution in marketing and distribution accelerated after World War I:

Comparable to the discount house and supermarket which symbolized the mass marketing innovations following World War II, the post-World War I era featured the rapid growth of grocery chains and mail order merchandisers. Then, as now, the mass marketer was dedicated to a high-volume, low-margin operation, whose prime appeal to the buying public centered on price. Structurally, the mass distributor of the twenties was not content to operate in a single stage of the distribution process, either as a "wholesaler" or "retailer." Instead, he invested capital in facilities for performing bulk storage, redelivery, and financing, so as to "integrate" the retailing and wholesaling functions within his own

organization and to eliminate middleman profits by dealing with the manufacturer directly.¹²

Multiple elements lowered costs for this new business model. As just noted and perhaps most important, the large mass-marketing firms, such as chain stores, bought directly from manufacturers, allowing them to eliminate the wholesaler profit margins and other costs of the traditional distribution model. The large retail firm could seek the same prices as the wholesaler and then compete at retail without paying the wholesaler's profit margin.¹³ By building larger-scale operations and emphasizing fast turnover of inventory, the large retailer also spread the enterprise's cost of capital and fixed labor resources across a larger volume of business; profits were made on volume, not high margins, lowering costs per unit of sale.¹⁴ Moreover, by achieving scale, the large retail firms could use their greater bargaining position to negotiate for lower prices from manufacturers.¹⁵

In the political resistance to chain stores, the mythology developed that large retail firms achieved lower pricing simply through muscling manufacturers to provide them lower pricing, because a larger firm's size provided buyer power. While that was no doubt a factor (and a pro-consumer one), it was not the predominant, or even a significant, reason that large retailers lowered costs and prices. In 1934, the FTC completed a six-year study of chain stores,¹⁶ concluding that the "chains' lower cost of goods sold was but a minor factor in the chains' ability to sell at a lower price."¹⁷ This ability to use larger size to negotiate for lower manufacturing pricing accounted for 10–20 percent of the price difference between the large chains and the smaller, independent retailers.¹⁸ Thus, even if the Robinson-Patman Act totally eliminated this cost advantage, it would not have eliminated the vast majority of the cost advantages chain stores had over these traditional distributors.¹⁹

With the advent of big-box stores, giant supermarkets, super drug stores, online shopping, and large home stores, 21st-century Americans may see innovation in retailing and distribution as normal, but it was not always so. The importance of such innovation in the 20th century was often underappreciated. In discussing the debate over Robinson-Patman, the DOJ in 1977 noted the too-often ignored gains from innovation in distribution:

Yet, for all its size, surprisingly little attention has been paid in the debate on Robinson-Patman to the fact that distribution is indeed an "industry" and that "innovation" and technological change in the distribution industry were significant parts of the maturation of the American economy over the last century. These changes were as significant as the replacement of the handcrafted product by the assembly line or the replacement of the multi-story urban factory by the single story suburban plantBecause of this failure to perceive change in the distribution sector as innovation, and hence valuable, the Robinson-Patman debate centers exclusively on the issue of whether it is appropriate to protect small businessmen from "large corporation" organizations; no consideration is given to whether such protection would, if successful, serve to inhibit innovation in distribution, or to impede development of more efficient forms of business organization,

or to forestall the establishment of new types of retail outlets. Nor is consideration given to the consumers who might benefit from and desire such changes.²⁰

At the vanguard of this innovation was the A&P. Like today's leading retailers, A&P was exceptionally popular with consumers, which made it harder for smaller rivals to maintain their margins. Indeed, it is hard to think of a company—past or present—that so used scale, vertical integration, superior data, and innovation to remake retailing. A&P became America's largest retailer by giving consumers a wider range of products than did the competition and at lower prices. In today's economy, Amazon also fits this description, except in one crucial respect: Unlike A&P, Amazon is not the leading US retailer; Walmart, also a disruptive force, is.²¹

A&P was the largest American retailer for more than 40 years, pioneering the large retail supermarket chain. A&P brought enormous benefits to consumers—especially the less affluent—through lower prices, greater variety, and opportunities for improved nutrition. A&P, now gone, has faded from public memory, but it was once the disruptive juggernaut of American retailing. A&P was so central to mid-century American life that John Updike made it both the setting and the title of his best-known short story.²²

From humble beginnings in the mid-19th century, by the 1920s it was by far the largest American retail chain, vertically integrating into multiple stages of food production, distribution, and retail sales. As Marc Levinson, A&P's leading biographer, summarized:

By 1929, when it became the first retailer ever to sell \$1 billion of merchandise in a single year, A&P owned nearly 16,000 grocery stores, 70 factories, and more than 100 warehouses. It was the country's largest coffee importer, the largest butter buyer, and the second-largest baker. Its sales were more than twice those of any other retailer.²³

Levinson attributes A&P's success to the farsightedness of its longtime owners, the Hartford brothers:

At a time when most retailers worried about the profit margin on each item they sold, the Hartfords focused on their long-term return on investment. They understood that if their company kept its costs down and its prices low, more shoppers would come through its doors, producing more profit than if it kept prices high.²⁴

This strategy rested on low costs. A&P built its own distribution network to bypass jobbers and other profit-taking middlemen that the mom-and-pop competitors used for delivery. Eliminating these middlemen was highly efficient because, as the FTC observed in 1919, "the cost of these individual delivery systems . . . [wa]s a large item to be figured into the wholesale prices."²⁵ For example, "most produce . . . was sold by individual farmers to small-town dealers who in turn sold to bigger dealers in nearby cities, creating a lengthy and circuitous route before perishable merchandise finally reached the retail store."²⁶

A&P instead went directly to farmers and passed the savings to consumers through lower retail prices. The main “victims” of this practice were the bypassed middlemen and smaller grocers that continued to use the middlemen’s expensive services, thus charging more to consumers. As discussed below, both victims would be main advocates for legislation against the A&P.

Having eliminated these middlemen, A&P persuaded food producers to sell on highly advantageous terms. A&P won deeper discounts than other purchasers in part because, given its scale, it bought in such large and predictable volumes that it offered the producers major cost savings. No doubt some of those discounts also resulted from A&P’s bargaining strength, but there is nothing problematic or anticompetitive about a retailer using such strength to lower prices. Any contractual transaction produces a “surplus” (i.e., value that the two sides agree to divide). The greater one side’s leverage is, the greater its portion of the surplus, but so long as a bargain is struck, both sides are better off with a deal than without.²⁷

In this case, A&P’s purchasing clout probably enabled it to win a larger share of the surplus through unusually deep discounts, of which consumers received a significant share. Here, too, consumers won, especially those for whom groceries were a large portion of their budgets, in a time when such purchases were a larger part of consumers’ budgets, freeing precious funds to be spent elsewhere. The main losers were the smaller grocers who would not obtain similar discounts, thus finding it difficult to match A&P’s low retail prices.²⁸

A&P also kept costs low by vertically integrating—into not only distribution but food production as well. Like many forms of vertical integration today, A&P’s integration produced major efficiencies, and again consumers gained. For example, its baked goods were “delivered to stores in the same trucks that delivered other foods rather than by commissioned salesmen, a system that saved a penny per one-pound loaf at a time when the average loaf sold for a nickel.”²⁹ More broadly:

A&P’s manufacturing plants earned money because the company learned to use the flow of orders from its [retail] stores to run the plants steadily at full capacity, reducing the waste that comes from expensive factory equipment that is not fully utilized.³⁰

Moreover, A&P succeeded for the same reason as many of today’s technology companies, albeit amid much controversy: data use that benefits consumers. For example, A&P met previously unrecognized regional preferences: “Philadelphians, it found, liked their butter lightly salted, with a light straw color, whereas New Englanders preferred more salt and a deeper yellow coloration.”³¹ And the company’s “mass of sales data allowed A&P’s bakeries to forecast demand with a high degree of accuracy, minimizing returns of stale bread and doughnuts,” reducing costs and ultimately retail prices.³²

Through these innovations, A&P sold top-quality groceries at unusually low prices, winning both the loyalty of consumers and the hostility of undersold competitors and

displaced wholesalers, who turned to government for protection. As the leading antitrust treatise comments:

The class targeted for protection was not consumers, who benefitted from the chains' success; rather, the class comprised the various small businesses and intermediaries who lost market share, profits, or in some cases their entire businesses as a result of more efficient distribution methods.³³

Ultimately these disgruntled rivals prevailed on the government to give them what they could not win in the market: tools to blunt A&P's popularity with consumers.

Activism against mass retailers started with the rise of chain stores in the 1920s, and it increased when the Great Depression led to even more significant losses in market share by the smaller retailers and their wholesalers.³⁴ The growth of modern chain stores displaced thousands of small, single-store businesses; between 1926 and 1937, chain stores nearly tripled their share of retail sales from 9 to 25 percent, and the failure rate of the independent retailer averaged about 10 percent per year during the 1920s and 1930s.³⁵ This displacement of single-store businesses led to a vicious political reaction. The Phillip Areeda–Herbert Hovenkamp treatise observed that “it is difficult for us today to appreciate the extent to which Congress and some of its most powerful constituencies in the Depression regarded the American chain store as a ‘public enemy’!”³⁶ The hostility of the political and cultural atmosphere at the time was well described by Fred Rowe:

Amid the general distress of the Great Depression, Big Business and Wall Street were popular scapegoats for the misfortunes suffered by the “little man.” The mood was fed with propaganda campaigns by press, radio, mail, and personal contacts, and turned against the “chain store menace,” which by 1929 was under attack by organized groups in more than 400 cities and towns. The psychological warfare included the nationwide exhibition of a motion picture, “Forward America,” which linked the notorious extravagance of Babe Hutton, the Woolworth heiress, to the vice of chain store profits. In the provinces and on Main Street, the A&P store soon symbolized the evils of absentee control by distant “lords of privilege.” Huey Long proclaimed he “would rather have thieves and gangsters than chain stores in Louisiana.”³⁷

This populist attitude toward chain stores existed worldwide, and “hostility to chain stores was a tenet of Nazi economic policy in this period.”³⁸

Attacks on Chain Stores and Passage of Robinson-Patman

Commentators on Robinson-Patman all note the significance of the Great Depression. As the DOJ's 1977 report concluded, “Occurring simultaneously was a revolution in distribution and a Great Depression.”³⁹ While the innovation in distribution was a “positive force” and the Depression a “negative one,” they “joined in the creation of a common effect: the destruction of the small businessman's sense of present and long-term security and the universal perception of the loss of fundamental American

values.”⁴⁰ The resulting anti-chain store sentiment was so virulent that many supported legislation to prohibit chain stores.⁴¹

Advocates for anti-chain store legislation confusingly used antitrust rhetoric to describe their protectionist goals:

When the small merchant denounced “monopoly” in the nineteen thirties, he meant big business curbing little business, not the use of artificial controls to exploit consumers or discourage innovation. To him the monopolist was a chain store, mail order house, supermarket, or some other large-scale rival. Paradoxically, though, he used the vocabulary of the antitrusteer to advocate a program of market controls, a system under which government power would be used to foster cartels, freeze distribution channels, and preserve profit margins.⁴²

Initial efforts by wholesalers and small retailers to stave off the new competition occurred through trade associations formed to pressure manufacturers to stop supplying the new chains. The traditional manufacturer-wholesaler-retailer model was deemed “legitimate,” and the new innovative stores were labeled “illegitimate” and accused of “chiseling” (i.e., a manufacturer offering a lower price selectively, usually only to a few buyers).⁴³ Non-cooperating manufacturers faced blacklists, boycotts, and other punitive tactics. Because such joint activity is illegal under antitrust law, the trade associations were themselves law violators, and the FTC and DOJ sued them during the 1920s for their conspiratorial boycotts.⁴⁴

Unlike privately organized collective boycotts, collective efforts to achieve the same results through legislation are legal under federal antitrust law, and that is where the wholesalers and small retailers turned. Initially, well-organized lobbying organizations of small retailers convinced some states to prohibit chains from opening additional stores,⁴⁵ only to see state courts invalidate these statutes.⁴⁶

Other states taxed chains like A&P, with the tax rate rising as the number of the chain’s stores in the state increased.⁴⁷ Chain-store taxes arose during 1927–33, subsided during the NRA era at the start of the Franklin D. Roosevelt administration and emerged again after the NRA was found unconstitutional.⁴⁸ This was a transparent effort to favor smaller and less efficient stores, and “by the mid-1930s, 29 of the 48 states had taxes on chain stores, some of them so high as to capture half of the profits of an average chain grocery store.”⁴⁹

As the DOJ noted in 1977, chain-store taxes were clearly attempts to “protect the independent small businesses and [their] way of doing business from the economic power of the larger enterprise—and its efficiencies, new ways of distributing products, and better entrepreneurial skills.”⁵⁰ The FTC observed in 1934 that the taxes were anti-consumer, because to

tax out of existence the advantages of chain services over competitors is to tax out of existence the advantages which the consuming public have found in

patronizing them, with a consequent addition to the cost of living for that section of the public.⁵¹

In 1938, Rep. John William Wright Patman cosponsored with 74 others a federal bill to apply a discriminatory tax on chain stores.⁵² The bill, however, never came close to passage.⁵³

Into this political turmoil stepped the Roosevelt administration. As described more fully in Chapter 3, Roosevelt focused initially on raising prices in an era of deflation and sponsoring business cartels to achieve that aim. Attacks on low prices from the retail chains fit these aims, and the NRA was used to attempt to limit these stores.⁵⁴ The NRA codes were “particularly hostile toward vertical integration into retailing” and “attempted to preserve traditional schemes of manufacturer-intermediary-retailer sale and resale distribution as it had existed for centuries.”⁵⁵

Some of the NRA codes prohibited manufacturers from selling outside the wholesaler-retailer chain; other codes prohibited integrated operators, such as chain-store distributors and mail-order houses, from obtaining discounts that compete with wholesalers.⁵⁶ If any manufacturer attempted to bypass wholesalers by quoting prices directly to retailers, a code required all code members to boycott the manufacturer.⁵⁷ The NRA codes also specifically sought to limit quantity discounts, discounts to buyers for performing promotional functions, and discounts to buyers to compensate for eliminating brokerage⁵⁸—provisions that would eventually find parallels in the Robinson-Patman Act.

The Supreme Court found the NRA unconstitutional in the famous *Schechter Poultry Corporation v. United States* case.⁵⁹ Given political resistance to NRA enforcement, it had not achieved the “rigid regulation of distribution that wholesalers and retailers desired.”⁶⁰ Yet while the NRA codes “often worked badly” and were “irritating, inconsistent, and hard to enforce,” code advocates desired to “strengthen the code controls, not junk them”⁶¹ following *Schechter*. The NRA thus served as a learning experience and template for the future.⁶²

With the NRA’s demise, advocates of the populist attack on chain stores sought a replacement; days after the Supreme Court decision, Rep. Patman introduced a bill that, with major changes, would become the Robinson-Patman Act of 1936.⁶³ The proposal was originally—and more descriptively—titled the Wholesale Grocer’s Protection Act⁶⁴ and drafted by the counsel for the Wholesale Grocers Association, a trade group⁶⁵ that took the lead in the political alliance between wholesalers and aggrieved retailers.⁶⁶ From the beginning, there was controversy: “The Robinson-Patman Act early was recognized as an anti-chain store measure and severely criticized on that premise.”⁶⁷

This history of the Robinson-Patman Act’s drafting reveals why it was never a traditional antitrust law. When passed, “chain stores were the legislative target,”⁶⁸ and “the Act . . . was the product of organized efforts to preserve traditional marketing channels against the encroachment of mass distribution and chains whose low-priced appeal to consumers was enhanced during the general business recession of the 1930s.”⁶⁹ In

short, Robinson-Patman was a political reaction by small, independent merchants and independent wholesalers to the growth of and competition from chain stores.⁷⁰

Reflecting the effect of the NRA, the original draft

contemplated a pricing system under which discounts would be available solely on the basis of a buyer's function in the chain of distribution, that function being defined by reference to the class of customers to whom the purchaser sold goods.⁷¹

Effectively, the original bill sought to prevent mass-market retailers from bypassing wholesalers to seek discounts directly from manufacturers.⁷² Hence, the original bill had a section classifying customers (later dropped) and a prohibition on payments in lieu of brokerage, both used in the NRA codes, designed to inhibit retailers integrating into wholesaling and thereby preserving the existing middlemen. The general prohibition on *any* price discrimination was designed to forbid larger buyers from using superior bargaining power to reduce manufacturers' prices.⁷³

The virulence against chains permeated the congressional debate. The DOJ's 1977 report describes the atmosphere of conspiracy and anti-New York and anti-Wall Street sentiment, quoting Rep. Patman:

I am convinced that there is a conspiracy existing between a few Wall Street bankers and some of the heads of the biggest financial institutions in this Nation to absolutely get control of retail distribution. They expect to do that through the chain-store system.⁷⁴

He also stated, "Chain stores are out. There is no place for chain stores in the American economic picture."⁷⁵

During the hearings, wholesale groups opposed innovation in distribution that bypassed wholesalers precisely because the reduction in wholesaler profits would lower prices to consumers. One wholesaler testified about the effects of the changes in distribution and a reduced wholesaler role: "A gentleman of the committee asked me yesterday whether or not the consumer got the benefit. *Yes, the consumer gets the benefit, but it is generosity with the producer and shipper's money. You are taking it right out his pocket and giving it to the consumer.*"⁷⁶ (Emphasis added.)

After the Patman bill was initially introduced in the House on June 11, 1935, rumors circulated that passage was a "sure bet," and the initial bill was introduced in the Senate 15 days later.⁷⁷ But the Roosevelt administration opposed the initial bill, and a substantial lobbying campaign commenced in the following months, with the legislation lying dormant.⁷⁸ The anti-chain store populists were forced into concessions, including eliminating the customer classification clause that would have attempted to prevent mass retailers from negotiating discounts separate from the wholesale process and no longer forcing mass retailers to pay for items they did not use.⁷⁹ At the same time, provisions creating buyer liability and adding criminal sanctions were added.⁸⁰

The legislative process produced only a “vague law,” the “actual effects of which would depend on its administration and interpretation.”⁸¹ The act imposes a general prohibition on sales of “commodities of like grade and quality” at different prices to different buyers,⁸² subject to various exceptions; for example, a seller may defend differential pricing to buyers if it makes “due allowance for differences in the cost of manufacture, sale, or delivery” (known as the “cost justification defense”) or is needed to “meet” competition (known as the “meeting competition defense”).⁸³

Other provisions outlawed manufacturers making payments in lieu of brokerage and prohibited them from cutting prices if the purchaser provided promotional or other services, unless such price reductions were provided “to all purchasers on proportionally equal terms.”⁸⁴ A liaison agreement with the DOJ gave the FTC primary responsibility for enforcement. The act’s provisions, which its authors hoped would be read to oversee a manufacturer’s retail distribution closely, would be subject to decades of FTC case law and litigation, with enforcement and interpretation depending on the FTC’s enthusiasm for Robinson-Patman at the time.

Injury to competition under the statute involved two types of injury to rivals: primary-line and secondary-line injury. “Primary-line” refers to a manufacturer’s selective price reductions injuring its direct rivals. Typically, a manufacturer lowers a price selectively only in one of its markets and undercuts the price of local competitors. The notion of primary-line injury effectively differs little from the Sherman Act’s prohibition on predatory pricing, and the law governing primary-line injury is largely coextensive with the Sherman Act.⁸⁵

The chief concern of Robinson-Patman enforcement has always been secondary-line injury (i.e., a manufacturer’s price differential that affects competition between retail buyers receiving different prices). That is where the statute tried to protect smaller retailers from chain-store competition, because such price differentials were “perceived as the tool by which the emerging chain stores, principally the Great Atlantic & Pacific Tea Company, were driving small retailers out of business.”⁸⁶

In regulating manufacturer prices, secondary-line injury cases attempt to regulate intra-brand distribution—that is, how a manufacturer decides to distribute and price its own products most efficiently.⁸⁷ The statute ignores how “wholesale pricing is an efficient and natural way for a manufacturer to control its distribution system,” allowing a manufacturer to optimize distribution and sales through pricing its products differently to different customers.⁸⁸ Professor Hovenkamp explains that if the manufacturer simply vertically integrated into its own retail distribution, using its own personnel (rather than independent retailers) to market its product, it would “price discriminate” as an inherent part of its own optimal distribution:

If a manufacturer owned its own distribution network in which all of its sales agents were employees, it would very likely establish various incentive programs to encourage sales personnel to push the manufacturer’s product aggressively. These incentives might include higher wages for good performance or other kinds of rewards ranging from stock options, annual vacation trips, or other perks, or advancement in

rank. The manufacturer would also very likely invest more promotional funds in the more successful distributorships or stores while reducing its own investment in those whose growth is stagnant.

The manufacturer selling its products through independent dealers is in much the same position. The best way to encourage dealers to sell more is to give them financial rewards. But since in these cases dealers buy and resell the product, financial rewards often take the form of a price reduction, whether in the form of a discount, rebate, or similar form of favorable treatment. But this is precisely the type of conduct that the Robinson-Patman Act condemns when the favored and disfavored dealers are in competition with each other.⁸⁹

There has never been any evidence that prohibiting such distribution efficiencies and stifling innovation is necessary to preserve competition for the benefit of consumers. Indeed, just before Robinson-Patman was enacted, the FTC completed a six-year investigation of chain stores, rejecting that chain stores lead to monopoly or less competition.⁹⁰ After the FTC released its report, the *New York Times* front-page headline read, “Monopoly Denied in Chain Stores; Trade Board Report on 6-Year Inquiry Holds Competition Upsets Contention.”⁹¹

Instead of protecting competition and consumer welfare, the Robinson-Patman Act “reincarnated the spirit of the deceased NRA in the corpus of antitrust.”⁹² The statute sought to preserve the traditional method of distribution and “gr[ew] out of a period in which hostility toward vertical integration in American industry was at an all-time high.”⁹³

This history reveals that the Robinson-Patman Act was never envisioned as antitrust legislation to protect consumers, but instead it was contrary to antitrust law’s goals. Accordingly, Philip Areeda and Donald Turner stated in the first edition of what became the leading antitrust treatise that they would not even address Robinson-Patman because it “operates in ways that are inimical to the goals of the antitrust laws generally.”⁹⁴ Rowe also notes the irony that, in Robinson-Patman, the authors were pursuing pricing restrictions virtually identical with the sugar industry’s Code of Ethics that the Supreme Court in the same year condemned as an illegal restraint of trade under the Sherman Act.⁹⁵

Writing Robinson-Patman into the Sherman Act: The A&P Litigation

Already burdened by the Robinson-Patman Act and anti-chain taxation laws, A&P faced an even more direct challenge in 1944 when the federal government indicted the company and its key executives for criminal violations of the Sherman Act.⁹⁶ After a lengthy bench trial, a federal district court convicted all defendants, and the court of appeals affirmed.⁹⁷ Viewed under contemporary antitrust theory, these opinions are loaded with economic errors, illustrating just how unpredictable and arbitrary antitrust is when unmoored from its current foundation in consumer welfare.

The district court’s 54 double-columned pages in the *Federal Supplement* do not reveal any business practice that plausibly harms consumers. Vague assertions that A&P had

priced below cost in some products and places and thereby priced predatorily (i.e., had a plan to drive competitors from the market and thereafter raise retail prices to monopoly levels) are just that: both vague and assertive.⁹⁸ In fact, the government's claims of below-cost pricing rested on accounting tricks, not economic realities.⁹⁹

More fundamentally, the government identified no scenario in which the A&P could hope to recover short-term losses through future higher prices. Anticipating the Supreme Court's recoupment test by decades, Massachusetts Institute of Technology Professor Morris Adelman explained in his seminal book that "no reasonable and prudent A&P management would have incurred losses to drive out competition because it would have been impossible to claim the pay-off," given that "entry into the food trade was so cheap and easy that any attempt to raise prices would immediately have resurrected competition."¹⁰⁰ Despite this fatal flaw in the case against A&P, FTC Chair Khan persists in calling A&P guilty of predatory pricing.¹⁰¹

The government was equally lost in arguing that A&P's buying power harmed consumers. It argued that A&P forced suppliers to provide such deep discounts that those suppliers raised prices to other grocery stores so that, according to the prosecution, "the consumers who buy food in stores competing with A&P pay part of the low cost of A&P's operations."¹⁰² As Levinson notes, this theory of consumer harm nonsensically "implies that manufacturers met their profit targets by raising prices to other stores to compensate for their price breaks to A&P. But why would manufacturers have charged other retailers less if only A&P had paid more?"¹⁰³ As Adelman suggests, "The government lawyers, although competent in their profession, were so sadly illiterate in economic facts and economic analysis that they simply did not realize what they were saying."¹⁰⁴

Although the prosecution and the district court impugned A&P for vertically integrating into food production and distribution, it is difficult to find any connection between the practices described and consumer harm. The district court was particularly troubled that one A&P affiliate—the Atlantic Commission Company (Acco)—operated as A&P's purchasing agent for fresh produce and sold to third-party grocery stores what A&P's retail stores did not need, typically at higher (i.e., market) prices. The court condemned this practice because

Acco's policy of charging A&P one price and its other customers another, all worked to create restrictions upon competition and to handicap the competitors of A&P in view of the fact that competitors paid Acco earnings which went to A&P who did the competitive retailing.¹⁰⁵

It characterized the payments that third-party retailers made to Acco as "unearned tribute" for its leftover produce and noted that such payments found their way into "the treasury of A&P" and "could be used as defendants wished in competing with others." It then concluded that these "odorous unjustified transactions" and "the multiple roles of Acco taint[ed] the whole fabric of defendants' operations."¹⁰⁶

The court repeated such rhetoric over several pages, but it did not explain why Acco's multiple roles were unlawful or even problematic. Third-party grocery stores did not

have to pay this supposed unearned tribute. Instead, they presumably bought from Acco because its prices were competitive, and in fact many alternative suppliers existed. Indeed, Levinson observes, Acco's "sales to buyers other than A&P came to a mere 3 percent of U.S. grower's total produce sales."¹⁰⁷

In fact, had Acco thrown the produce in the garbage rather than offer it to them, these third-party grocery stores would have not been helped and perhaps been harmed. At bottom, the government's complaint was not that Acco charged third-party grocers too much but that vertical integrating with Acco allowed A&P to obtain produce too cheaply (including through the elimination of two mark-ups in a vertical chain), thereby dropping prices to consumers.

Ultimately, the government's case was not about *consumer* harm but instead about protecting *competitors* at all levels of the grocery business from A&P's disruptive business model—no matter the cost to consumers.¹⁰⁸ One prosecutor claimed that "A&P sells food cheaply [to consumers] in its own stores because it is a gigantic blood sucker, taking its toll from all levels of the food industry."¹⁰⁹

That logic bears a striking resemblance to a wholesaler association's argument for the Robinson-Patman Act: rapid expansion of efficient chain stores was taking money "right out of [the] pocket" of "the producer and ship[er]" and "giving it to the consumer."¹¹⁰ The similarity between these arguments was no coincidence. Adelman explains:

The A & P case is best understood as an attempt . . . to infuse the Robinson-Patman Act into the Sherman Act The hostility to price competition, the yearning for secure entrepreneurial status, the envy and hate of the small businessman for big business were long ago embodied in a set of standard myths. Great gobs of misunderstood evidence were forced into these molds to produce the case for the prosecution.¹¹¹

Yet the district court claimed that neither bigness nor vertical integration were per se unlawful¹¹² and that firms "have the right to set prices at such figures as to meet competition."¹¹³ How, then, will executives in innovative, more efficient companies know when they have crossed the line? What limiting principles keep the law from condemning any aggressive, price-reducing competition?

Instead of analysis, the opinion offered rhetoric without standards. Vertical integration? Permissible—unless it confers "*unreasonable* advantages over competitors not similarly integrated."¹¹⁴ (Emphasis added.) Retail price-cutting? Permissible—unless it amounts to an "*unreasonable* restraint of competition."¹¹⁵ (Emphasis added.) A large buyer, the court continued, may drive a hard bargain with suppliers—unless it "*manipulate[s]* its power in order to realize an *unwarranted* discrimination or preference."¹¹⁶ (Emphasis added.)

Unfortunately, the court offered no criteria to distinguish conduct that is reasonable (or warranted) from that which is unreasonable (or unwarranted). The court's opinion instead relied on "I know it when I see it" logic, often expressed with an olfactory or visual metaphor. Thus, the court found that various A&P "practices over the years leave

a bad odor”¹¹⁷ and that Acco’s sales to unaffiliated grocers at market rates were not only “unjustified” but “odorous.”¹¹⁸ And various actions may, “standing alone, [have been] devoid of wrongful character, but when the fabric woven from them is considered as a whole,” they “t[ook] on a polluted colored light.”¹¹⁹ These quotes showed the judge’s intense dislike of these defendants, not a coherent rule of law, let alone one designed for the Sherman Act’s intended beneficiaries: consumers.

The Seventh Circuit upheld the convictions, in a shorter 1949 opinion similarly lacking analysis.¹²⁰ Not satisfied, the government quickly sought the economic death penalty: breakup. A&P began an aggressive legal and public relations response, including one ad with the Empire State Building and the caption: “It’s Far Too Big. It Ought to be Seven Buildings.”¹²¹ A&P also orchestrated a write-in campaign from ordinary consumers, the beneficiaries of A&P’s supposed law violations. One example: “I am dropping you a line to see if you will try and help us housewives save our A&P stores. We surely could not make our money go so far in small stores.”¹²²

The government’s civil case stalled with changes in DOJ’s leadership as the Truman administration ended. The parties then settled early in the first Eisenhower term, when A&P agreed to close Acco. The lawsuits were over.¹²³

A&P’s long decline started almost immediately thereafter. Problems began with the sudden death of Chief Executive John Hartford in 1951, accelerated with multiple managerial missteps over the ensuing decades, and ended in 2016 with the closure of the company’s few remaining stores. No one reason explains a great company’s demise, and A&P was no exception. The Hartford brothers’ plans for succession to run the company proved faulty, and A&P did not match its rivals in serving America’s post–World War II economy. Nevertheless, this leading retailer faced an enormous distraction that its rivals did not: a decades-long struggle with the government, including state and federal laws, criminal cases against A&P and its senior executives, and an attempt to dismantle the company. Those existential threats occupied a considerable amount of perhaps the most precious resource of any company—the time and energy of its leaders.

In 1949—the same year that the Seventh Circuit upheld the A&P convictions—two economic articles appeared that were sharply critical of the government’s attack on the A&P. The first was Adelman’s initial analysis,¹²⁴ later expanded into his full-length book.¹²⁵ The second was a student note published in the *Yale Law Journal*. Although student notes then appeared without bylines, the author was Turner, who had a recent economics doctorate from Harvard and was teaching economics at Yale while earning his law degree there.¹²⁶ In 1954, Turner joined the Harvard Law faculty, later to coauthor the definitive antitrust treatise with his colleague Philip Areeda after leading the Antitrust Division under President Lyndon Johnson.

Turner demolished the first A&P case. Neither the government nor the courts had made any serious effort to “draw the line between ‘predatory’ and ‘competitive’ price cutting,” and thus their

general broadside against A&P's reduction of gross profit rates [wa]s a direct attack on the competitive processD[id] the Government or the court feel that business should never risk a loss for the sake of ultimate gain? If so, a good share of competition must be consigned to limbo.¹²⁷

Turner also concluded that the court's attacks on Acco's role in effect found "vertical integration is illegal *per se*," despite the court's rejection of that position.¹²⁸ (Emphasis in original.)

More broadly, Turner found a "serious contradiction" in what he called the "new" Sherman Act: a misguided effort to apply the act to attack the competitive forces it was meant to promote.¹²⁹ For example, to "protect" competition, the government prosecuted A&P for *competing too hard* with smaller and less efficient grocers. Yet

vigorous competition is not a friendly pastime. New methods of production and distribution not only disturb existing firms; they frequently demolish them. It then becomes much too easy to identify the demise of these beleaguered competitors with a decline in competition itself.¹³⁰

That conceptual error not only causes unjust prosecutions but also subverts antitrust legislation's very purpose:

The lure of temporary monopoly profits is an important impetus to the introduction of new products and new techniques, which rudely upset the peaceful, profitable existence of long-entrenched business firms. This constant change to the new, the more efficient, is the very heart of the process of effective competition.But in [the A&P case,] the defendant corporation represented the forces of competition, efficiency and change. The potential contradiction in the New Sherman Act is sharply exposed.¹³¹

In short, Turner argued, the antitrust philosophy of the A&P case was a paradox: a policy at war with itself.

That thesis should sound familiar; it is the title of Robert Bork's book-length critique of antitrust policy three decades later.¹³² Although then-Professor Bork is viewed as a key scholar of the antitrust movement's "Chicago School," no one would call Turner a Chicago acolyte. To the contrary, Turner helped found the "Harvard School," often considered a counterweight to the Chicago School in American antitrust theory.¹³³ And Turner led antitrust enforcement in the Johnson administration; he was hardly conservative in economic policy.

Turner reveals an important point, discussed in Chapters 1 and 4 of this report: One need not adhere to the Chicago School to reject the analytical sloppiness of the A&P prosecutions, nor of the Robinson-Patman Act that inspired them. One does not have to follow Bork to agree with Turner that courts and enforcement agencies promote the competitive goals of the antitrust laws only by allowing disruptive companies to reach efficient scale, lower costs through vertical integration, and undersell smaller and less efficient competitors through relentless price-cutting. Those positions reflect basic

economics and view the welfare of consumers as the central objective of sound antitrust policy.

Enforcement and Adverse Consequences of the Robinson-Patman Act

As DOJ was applying Robinson-Patman principles against A&P under the Sherman Act, the FTC was enforcing the actual statute aggressively. From the beginning of such enforcement, the Robinson-Patman Act became an outcast in the antitrust movement, heavily criticized as inconsistent with the rest of the law. The Seventh Circuit recently remarked, with notable understatement, that the act's "fit with [contemporary] antitrust policy is awkward, as it was principally designed to protect small businesses" at the expense of consumers.¹³⁴ Hovenkamp comments that "very few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act."¹³⁵

This section discusses aggressive Robinson-Patman enforcement and its substantial detriments, from higher retail prices to unnecessary costs. When enforced rigorously, the goal was to protect inefficient firms from greater competition, rather than consumers from higher prices. One appeals court found that the FTC, in administering the Robinson-Patman Act, appeared to believe that Robinson-Patman "was intended to freeze prices at the level which would return a profit to a competitor in a market with the highest costs."¹³⁶ The act spawned decades of case law so arcane in its distinctions and so baroque in its complexity that it would have befuddled even medieval scholastics. In Bork's words, the act and its subsequent application were "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory."¹³⁷

To begin, Robinson-Patman's sponsors always hoped it would hinder chain stores, a goal obviously harmful to consumers. Attacking price differences themselves harms consumers, as "most price discrimination is socially beneficial in that it produces higher output and thus yields greater consumer benefits than forced nondiscriminatory pricing."¹³⁸ The price discrimination the act seeks to prohibit did in fact harm smaller rivals of the chains to "the extent that it increased output," as output expansion itself is inherently pro-competitive and pro-consumer.¹³⁹

Thus, Robinson-Patman is protectionist, long enforced to sacrifice consumers to shield inefficient firms from competition. Robinson-Patman's adverse effect on competition and consumer welfare occurred on multiple levels, discussed in this section. First, this section discusses how compliance with the act "may actually seem to require firms to violate one of the other antitrust laws, most notably § 1 of the Sherman Act."¹⁴⁰ Then it shows how compliance with Robinson-Patman "may force firms to develop practices than can facilitate collusion or oligopoly" by proscribing the very low prices that would otherwise disrupt noncompetitive pricing. Finally, it discusses the inefficiencies from prohibiting lower cost distribution methods and other costs of Robinson-Patman compliance.

Robinson-Patman Act Enforcement Encouraged Sherman Act Violations. One striking effect of Robinson-Patman was how aggressive enforcement encouraged and

promoted price coordination or price exchanges among competitors in tension with—or even in violation of—Sherman Act Section 1. This should be unsurprising, as important antecedents of Robinson-Patman were the NRA codes used during the Roosevelt administration that were effectively government-sponsored cartels. Many of the populists behind Robinson-Patman also supported fair trade laws, in which particular industries could protect minimum prices for goods sold in a state legally.¹⁴¹ Like the NRA codes and fair trade laws, supporters of Robinson-Patman hoped to prevent chiseling by large retail chains that lowered retail prices below what those smaller firms charged.

Robinson-Patman's "meeting competition" defense governs the extent of permissible chiseling.¹⁴² The act permits a supplier in "good faith" to offer such a lower price to any buyer when it is meeting competition,¹⁴³ meaning another supplier had offered that buyer a lower price that it sought simply to match. But how would the supplier know its competitors' offers? It could rely on its customer's good word, but customers in such negotiations often mislead and distort what other offers they receive.¹⁴⁴ Or it could ask its competitor whether indeed it made such an offer to a particular buyer, but this way of learning about the competitor's offer risked the Sherman Act's prohibitions on price agreements with competitors.¹⁴⁵

This problem created conundrums for decades, amplified by the FTC's desire to win cases and therefore limit the meeting competition defense.¹⁴⁶ The FTC even considered arguing that a company lacked the defense unless it confirmed sufficiently whether a competitor had offered a low price. The Supreme Court's initial foray into the issue in 1945 applied a high standard for proving good faith, suggesting a seller must "investigate or verify" a buyer's claims.¹⁴⁷ With this encouragement and its litigation zeal, the FTC ruled and argued that a supplier that simply relied on the customer's word could not claim the meeting competition defense:

Not until 1963 did the FTC rule that a price cut was justified under Section 2(b). Thereafter, the Commission's interpretation of the defense has tended to restrict its application. Indeed, it took an appeal to the First Circuit, *Forster Mfg. Co. v. FTC*, to overturn the Commission's rule that a seller seeking to rely on the meeting competition defense must have "proof positive" of the exact competitor and price whose competition the respondent was seeking to meet. Even after the First Circuit's ruling in *Forster Mfg. Co.*, the seller may not safely rely upon oral representations by purchasers that a competing seller is offering a lower price. The Act requires that a seller be a judge of his customer's credibility, and that the seller "investigate or verify" the lower offer which it is seeking to meet.¹⁴⁸

Because the FTC required more extensive proof that a competitor offer existed than just the customer's word, some sellers checked prices with competitors. (That is, the FTC interpretation and therefore enforcement of the law implied that Robinson-Patman compliance justified frequent communications with competitors.)¹⁴⁹ One court even ruled that defendants were not liable under the Sherman Act because their communications were made to verify pricing under the Robinson-Patman's meeting competition defense.¹⁵⁰ Only later, beginning in 1978, did the Supreme Court retreat

from suggestions in its earlier precedent that competitor verification might be necessary, as the Court had come to understand that encouraging such price checking could facilitate a firm making the inquiries in coordinating a price-fixing conspiracy.¹⁵¹ Meanwhile, to say the least, counseling clients on how to apply the meeting competition defense with this changing mélange of precedent was difficult.¹⁵²

In its 1977 analysis, the DOJ described how the information exchanges that had been encouraged by Robinson-Patman precedent were contrary to the goals of Sherman Act restrictions on price-fixing and exchanges:

The former chief prosecutor for the Antitrust Division testified . . . how the exchange of data tends to keep prices at a stabilized level even without an express price fixing conspiracy. When a customer claims he has received a lower price, the supplier may call his competitor to learn whether that price quote was actually given. If it is believed that the claimed discount had not been given then the original seller will, of course, not lower his price. Where, on the other hand, the competitor confirms the offer of a lower price, the seller need only meet that price. Without such confirmation, the seller would be forced to rely on his buyer or to guess at the actual price offered by the competitor. Under these circumstances, the seller might, in the short run, offer lower prices than necessary to meet the competition. Thus, lack of communication would create uncertainty on the part of a seller when faced with the claim that a competitor is charging a lower price; this uncertainty would very likely lead to the outbreak of true price competition and a lower price to the consumer.¹⁵³

One final case captures the tensions between the zeal of FTC Robinson-Patman enforcement and compliance with the Sherman Act.¹⁵⁴ Standard Oil refined and sold gasoline at wholesale to both its own branded retail outlets (independently owned operators that leased the brand) and independent wholesale distributors. After it sold to independent distributors for 1.5 cents cheaper than its posted wholesale price to its own outlets, one of these independents resold the gasoline to independent gas stations at a price cheaper than Standard's posted wholesale price to its own retail outlets.

The FTC found the price differential and resulting competition a Robinson-Patman violation because it diverted business and injured rivals. The FTC ordered Standard Oil to no longer to sell to independent distributors that did not maintain minimum resale pricing to retail outlets equal to Standard Oil's own posted price. The problem was that the remedial order effectively required minimum resale price maintenance, which was then per se illegal under the Sherman Act. When Standard Oil argued that no seller "in his right mind" would establish a per se illegal resale price maintenance system, the FTC disagreed, arguing that it would not be resale price maintenance if Standard monitored resale pricing of its distributors and just refused to deal with distributors that did not comply.¹⁵⁵ The Supreme Court was not amused, demanding to know whether the FTC was "trying to enforce two conflicting legislative policies."¹⁵⁶

Such tension is inherent between the Robinson-Patman Act and antitrust law. Justice Jackson in the Standard Oil case observed that "we have vacillated and oscillated

between the N.R.A. theory, roughly, and the Sherman Anti-Trust theory ever since I can remember, and we are still wobbling.”¹⁵⁷ Justice Jackson understood that aggressive Robinson-Patman enforcement attempted to suppress competition as under the NRA codes. He also understood that the Roosevelt administration had, as discussed further in the next chapter, witnessed fights between those that wanted to use the NRA to sponsor cartels to protect small businesses and maintain higher pricing and those that favored consumer welfare and antitrust law. The enactment of the Robinson-Patman Act ensured the survival of these internal tensions for decades.

Robinson-Patman Facilitated Higher Prices. While encouraging illegal behavior was the most striking effect of aggressive Robinson-Patman enforcement, a probably more significant impact was how the law hindered price-cutting, the lifeblood of competition in so many markets. The FTC successfully established a prima facie Robinson-Patman case by little more than showing that a seller selectively lowered prices to a buyer or subset of buyers.¹⁵⁸ As the DOJ argued,

To the extent that the businessman sees extensive exposure to liability under the statute as a result of any pricing strategy that might involve lowering pricing selectively, it is reasonable to conclude that his inclination to adjust prices downward on a selective basis will be reduced.¹⁵⁹

With such risks, the Robinson-Patman Act created “an overwhelming legal barrier for those firms contemplating price adjustment in response to specific demands by less than all customers,” because the “charging of prices sufficiently different in amount to affect resale prices creates a virtual presumption of illegality and rebuttal of that presumption is difficult if not impossible.”¹⁶⁰

Yet the use of price discounts to a subset of buyers, particularly to large buyers with the size and business importance to justify a price decrease, is a key mechanism of competitive pricing, especially in markets with relatively few firms. In such industries, firms are more likely to recognize that reduced competition is to their mutual advantage while deviating from uniformity to obtain or retain particularly valuable customers through selective discounts. Once a price concession occurs, it can become known in the industry, leading others to demand the same concession or, if a price cut is not forthcoming, turn to other suppliers. Through such a process, high list prices can deteriorate.¹⁶¹ By contrast, the “empirical evidence suggests that when sellers are forbidden from making selective price cuts, they generally respond by making none at all, for giving an across-the-board discount to all buyers is too expensive.”¹⁶²

In its 1977 report, the DOJ analyzed this adverse effect of Robinson-Patman in detail, noting how the authors of Robinson-Patman “did not take into account [the] fundamental importance of the selective discount as a means to bring down oligopoly prices”¹⁶³ and that “both economic theory and observations by attorneys and others indicate that it is the granting of discounts to particular customers with some bargaining power which brings down the high, ‘sticky’ list prices of oligopolistic industries.”¹⁶⁴ Professor Hovenkamp similarly observes that “if a rule forbidding selective price cuts were repealed, all parties except the seller would be better off” and that the biggest gains “would accrue to consumers.”¹⁶⁵

Limiting a firm's ability to cut prices selectively can also keep prices higher by inhibiting firms that sell in one part of the country from expanding into new regions or product lines. When one or a few firms dominate an area, new competition via entry benefits local and regional consumers. Typically, entry into a new geographic market requires promotions, including low prices, to gain an initial foothold.¹⁶⁶ The new entrant might desire to cut prices selectively when entering this new market, leaving prices higher in its established markets.

But such a strategy of selectively lowering prices can violate Robinson-Patman if considered to create primary-line injury—also called predatory pricing.¹⁶⁷ In *Utah Pie Company v. Continental Baking Company*,¹⁶⁸ the Supreme Court ruled that lowering prices selectively when entering to compete with a dominant firm in the Salt Lake City area violated Robinson-Patman. Consequently, “the great likelihood is that a businessman considering geographic price discrimination to enter new markets will be given legal advice which has the necessary effect of instilling caution in pricing.”¹⁶⁹

Selective price cuts can also be considered a secondary-line violation when a company seeks to compete selectively in different businesses in the same market. In *Texaco v. Hasbrouck*,¹⁷⁰ the Court found a secondary-line violation when Texaco lowered pricing to distributors competing with unbranded gasoline without lowering prices for its full-service stations. The case “serves as a warning that firms may not sell into the rapidly expanding portions of a market at a lower price than they sell into the stagnant or languishing parts.”¹⁷¹

Related issues involved Section 2(f) of the Robinson-Patman Act, which imposes liability on a buyer that knowingly induces or receives an illegal price discrimination. The buyer liability provision “strikes at a process which is fundamental to a competitive market: the process by which each buyer negotiates for itself the best possible price.”¹⁷² By making buyers potentially liable for seeking price reductions, Section 2(f) “instills extreme caution in buyers negotiating for price breaks which, if obtained, might arguably subject them to liability.”¹⁷³

Because, to the populists who wrote Robinson-Patman, the “real villain was thought to be chain stores such as A&P,” one might have thought that making large buyers liable was the ideological heart of Robinson-Patman.¹⁷⁴ Ironically, Section 2(f) was an afterthought,¹⁷⁵ and, because the law applies to all buyers large and small, the application of Section 2(f) hinders small buyers from negotiating price discounts from sellers.¹⁷⁶

The buyer liability provision intersected with the meeting competition defense in strange ways. In bargaining, buyers often tell sellers that they have better offers elsewhere. That not only is normal and pro-competitive but also creates a basis for sellers to justify providing selective discounts to particular buyers under the meeting competition defense without running afoul of Robinson-Patman. In short, such back and forth can lower prices—surely a good thing even if the buyer uses gamesmanship, obfuscation, and exaggeration about competitive offers to induce a lower price. To impose an affirmative buyer duty to disclose and compete “honestly,” whatever that might mean, would be counterproductive.

Yet that is precisely what the FTC suggested. Indeed, the FTC found buyer liability for inducing a discount by misrepresenting competitive offers, even though the seller was not liable because it offered the discount in good faith.¹⁷⁷ Rowe wryly observed that this court precedent

for the first time, establishes a Robinson-Patman principle that the very same price transaction which is lawful from the standpoint of a seller, by his successful resort to the meeting competition proviso, can at the same time create illegality on the part of the buyer.¹⁷⁸

Subsequently, in a case involving A&P, the Supreme Court alleviated this harm and held that a buyer cannot violate Robinson-Patman Section 2(f) for receiving a discount if the seller was not liable for providing the discount.¹⁷⁹

In short, this sorry history shows that aggressive Robinson-Patman enforcement discouraged the selective price discounting that tends to lower prices.

The Indirect Costs and Inefficiencies That Robinson-Patman Caused. The previous two subsections described how aggressive interpretations of Robinson-Patman directly inhibited price competition. Robinson-Patman also caused inefficient retail distribution, raising costs and thus prices consumers paid. The law hindered chain stores from routinely obtaining goods at lower prices than did their smaller competitors, thereby hindering their effort to reduce costs, a benefit at least part of which consumers would have received.¹⁸⁰ Consequently, consumers paid more for their necessities and other purchases.

Beyond this primary effect, Robinson-Patman caused numerous other inefficiencies and perhaps unintended consequences. The Hovenkamp treatise observes that the “ways in which the mere presence of the Robinson-Patman Act has encouraged firms to undertake evasive but costly distribution strategies are legion.”¹⁸¹ Yale Brozen similarly stated in his foreword to Richard Posner’s book on Robinson-Patman that the “overwhelming number of absurdities resulting from the application of the Robinson-Patman Act by the Federal Trade Commission and the courts makes it difficult to pick any one to illustrate undesirable features of the act.”¹⁸²

The FTC’s treatment of backhauls provides a prominent example of such an absurdity. Backhauling involves a retailer delivering goods to its stores from its warehouses. After the delivery run, if the retailer’s empty truck is near a warehouse from one of its suppliers, it could be profitable to have the truck swing by that supplier, load up, and return to the retailer’s warehouse rather than pay a fee for the supplier for delivery. This strategy, however, would be frustrated unless the retailer could avoid the supplier’s delivery charge through an allowance or discount for having picked up the goods itself. Unfortunately, the FTC interpreted such discounts or allowances as price discrimination violating Robinson-Patman.¹⁸³ Its interpretation of allowable backhauls softened in the 1970s, after initial restrictive rulings in the 1950s. Backhaul restrictions were estimated to have wasted 100 million gallons of truck fuel and \$300 million annually.¹⁸⁴

Another egregious Robinson-Patman Act enforcement involved price variances where costs of serving buyers differ.¹⁸⁵ In theory, a seller could use the cost justification defense to charge a different price to such buyers. Because the FTC successfully interpreted the defense narrowly, it became difficult to establish,¹⁸⁶ and the statute reduced buyer and seller incentives to seek cost savings that lowered prices.

Warehousing illustrates the problem. Because a manufacturer must pay to warehouse its goods, when buyers would provide warehousing, the manufacturer would offer the buyers a lower price because it avoided those costs. Available lower pricing should lead to more optimal decisions based on which party can warehouse more efficiently. Because different buyers have different warehousing abilities, sellers would desire to charge different prices to different buyers. Yet because the “cost savings to the manufacturer could not be demonstrated with the precision required by the [FTC],”¹⁸⁷ the cost defense was unavailable, frustrating buyers from providing their own warehousing.

Warehousing was just one example of the more general problem: following the goals of those who drafted the original, never-enacted version of the statute that tried to cement distribution practices into the hierarchy of functions that existed at the turn of the 20th century.¹⁸⁸ Whenever a wholesaler or retailer wanted to relieve a manufacturer of costs borne under the old manufacturer-wholesaler-retailer model, it too often could not obtain a discount for avoided costs. Incentives to innovate and reduce distribution costs were accordingly attenuated. FTC enforcement tended to be particularly harsh on retailers that integrated into wholesale distribution—often smaller retailers that formed cooperatives to do so. Robinson-Patman considered these integrated companies to be retailers and demanded that manufacturers sell to them at prices no lower than to nonintegrated retailers, who were not saving costs for upstream suppliers.¹⁸⁹

Even had the FTC and the courts accepted cost justification defenses, the statutory logic was still deeply flawed: permitting price discrimination based on only cost differences made no economic sense. Actual prices are not based on differences in costs alone; they reflect multiple supply and demand factors.¹⁹⁰ When costs are relevant, they are opportunity costs, as measured by the costs of alternative choices. This measurement is common in both economics and some sophisticated forms of business accounting, but it is not commonly used in past FTC calculations, which too often leads to arbitrary cost determinations. For example, the meaning of a seller’s “due allowance for differences in . . . cost” when charging different amounts to different buyers embroiled courts in intractable disputes about how to allocate savings in joint-and-common costs across product lines—a conceptual problem without an economically meaningful solution.¹⁹¹ In the words of a Yale Law professor writing in 1937, the year after Robinson-Patman was enacted, “No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork,” and any “trial is to proceed by the ordeal of cost accountancy.”¹⁹² The author concluded, presciently, that the act “seems destined to raise more questions than it settles” and “presently will reveal its own defects and invite abandonment or amendment.”¹⁹³

Other aspects of Robinson-Patman similarly led to senseless distinctions. Under Section 2(c), a seller could not pay brokerage to a buyer (or provide a discount) “except for services rendered.”¹⁹⁴ The intent was to prevent what were viewed as disguised “phony” brokerage payments or discounts that many believed large grocery chains like A&P used to obtain discounts when no brokerage services were provided.¹⁹⁵ Because A&P dealt directly with buyers, there was no need for sellers to incur the costs of using a broker to arrange a sale, and A&P accordingly would seek lower pricing because its seller need not pay commissions to brokers.

To the FTC, the ability of a large buyer like A&P to save the seller brokerage costs and thereby negotiate lower prices was improper competition regardless of cost savings.¹⁹⁶ As a result, transactions that were indistinguishable economically were treated differently. For example, if a seller sold a product for \$10 and paid a broker \$1 (for a net of \$9 to the seller) and then separately sold to an intermediary without a broker for \$9 (for a net of \$9 to the seller), the second sale violates 2(c) as long as the latter \$9 price was viewed as a discount in lieu of brokerage; in fact, courts did find these facts a violation.¹⁹⁷

The FTC’s initial enforcement of Section 2(c) led to other results that were equally senseless. In the 1940s and 1950s, the FTC held that a seller’s payment of brokerage was not allowed even when brokerage services were actually rendered.¹⁹⁸ Although directly contrary to the statutory language, “unfortunately, the tribunals have gone to great lengths to give a statute that was socially harmful enough to begin with an even more socially harmful meaning.”¹⁹⁹ Even worse, a significant number of FTC cases in these decades involved Section 2(c), which used this erroneous interpretation.²⁰⁰ Effectively, this interpretation precluded retailers from providing their own brokerage-type services to receive a discount. The FTC approach thus “became a charter protecting food brokers from the competition of alternative forms of distribution.”²⁰¹ This absolutist interpretation finally changed in the 1960s, but even then, the FTC imposed unnecessary and anticompetitive restraints on independent brokers, to the point where a broker could not reduce a commission to obtain a large sale.²⁰²

Other inefficiencies involved Sections 2(d) and 2(e), which prohibit suppliers from discriminating in services or promotional assistance among buyers.²⁰³ A seller providing such assistance must do so on “proportionally equivalent terms”; interpreting this phrase led to endless litigation as the FTC’s view of the statute placed “extremely complex and burdensome requirements on promotional or other allowances.”²⁰⁴ In *Federal Trade Commission v. Fred Meyer*,²⁰⁵ the Supreme Court ruled that a supplier providing such services or promotions directly to some buyers must also ensure that retailers obtaining the goods indirectly through wholesalers receive the same services or promotions on proportionally equivalent terms. This result was so impractical that the FTC issued regulations (the “Fred Meyer Guides”) to try to provide some guidance to businesses, but the DOJ found those “guides so complex as to be unworkable.”²⁰⁶ The net effect compelled sellers to provide “useless or unwanted service” to some retailers to try to comply or simply not provide promotional support even when it was “both useful and desired.”²⁰⁷ If promotional programs would only be beneficial when limited to buyers that could fully use them, the statute too often effectively forbade them.²⁰⁸

Ironically, although created to protect small retailers from competition, enforcement actually has often harmed smaller businesses. Smaller firms are subject to the law just like larger ones; while enforcing and administering the act created abundant work for lawyers, such costs are disproportionately harder for smaller firms to bear. Robinson-Patman enforcement also often focused disproportionately on smaller firms. Professor Frederick Scherer testified after serving as the FTC's director of the bureau of economics that smaller firms are "more likely to get into trouble" because they are less able to afford counseling on compliance and because FTC staff attorneys preferred to bring cases against smaller firms, as these cases were less likely to result in complex litigation than were those against well-represented firms.²⁰⁹ Professor Scherer thus concluded that the "brunt of the Commission's [enforcement] effort fell upon the small businesses Congress sought to protect."²¹⁰

Beyond these practical problems of dealing with a vague, complex, and burdensome law, the law's substantive provisions also hurt the ability of many small businesses to compete. Smaller retailers formed cooperatives to obtain better pricing, but they were limited in their ability to do so because they might violate Robinson-Patman.²¹¹ By attempting to maintain a rigid distribution system designed to protect the wholesaler's role, the law denied smaller buyers the ability to bypass wholesale intermediaries and their profit markup.²¹² Perhaps this was an unintended consequence of smaller retailers aligning with wholesalers during the act's legislative negotiations, allowing wholesalers to prevail on many issues. The Robinson-Patman Act also inhibited manufacturers from helping smaller retailers with their own brand that faced localized competition from other brands.²¹³

One last, notable, and unintended consequence of Robinson-Patman was to encourage private-label brands and product differentiation.²¹⁴ Lowering prices through private label or differentiating a product slightly to create a lower-priced version allowed manufacturers to lower prices selectively for some buyers while circumventing Robinson-Patman's desire for uniform pricing. Again, encouraged by Robinson-Patman, such strategies raised costs unnecessarily.²¹⁵

The Evolution of Robinson-Patman Enforcement and Case Law

Since enactment in 1936, enforcement of Robinson-Patman has ebbed and flowed, reflecting its protectionist origins that conflict with antitrust law's focus on competition and consumers. Just 20 years after passage, Rowe noted the statute's "legal split personality":²¹⁶

The statute originated in the class struggle between conventional merchants and mass marketers for supremacy in the channels of distribution. While conceived in the soft protectionist concepts of the NRA, the act emerged as an amendment to the antitrust laws which ordain hard competition for all commerce. Because the text of the act also is artless and imprecise, its interpretation and enforcement over the years have wavered between these polar antecedents of public policy.

The Robinson-Patman Act had its intended populist effect on chain stores, at least in the initial years after enactment. As Levinson recounts, “The average publicly traded grocery company lost 58 percent of its stock market value” over a two-and-a-half year period after the legislation was introduced, even while the broader stock market increased, “suggest[ing] that investors expected the law to have a severe impact on profitability. That expectation proved correct.”²¹⁷ The act’s main effect on A&P and other chains was to hinder them from obtaining goods at lower wholesale prices than their smaller competitors were paying and thus from passing the savings to consumers. A&P and other supermarket chains lost sales and profits as they raised retail prices to cover the higher cost of wholesale goods.²¹⁸ The act’s ultimate victims were the millions of ordinary consumers forced to pay higher prices for food and other necessities.

After an initial phase of moderate enforcement, the FTC became aggressive during the 1940s, continuing through the 1960s, with support from multiple court decisions, including from the Supreme Court.²¹⁹ As detailed in the previous section, the statute was enforced and interpreted to view price discrimination as per se illegal, while the scope of the statutory defenses to differential pricing were narrowed and minimized.²²⁰ Moreover, these years of FTC enforcement focused on “minimizing the scope of the evidentiary inquiry in Robinson-Patman litigation.”²²¹

This was the era of widening the scope of per se rules elsewhere in antitrust law, a philosophy that influenced enforcing and interpreting Robinson-Patman.²²² Since 1977, the Supreme Court has reduced the scope of per se rules; whatever the merit (or lack thereof) for per se rules more generally in antitrust, such an approach had no merit for a protectionist statute like Robinson-Patman that was read to micromanage distribution in a complex economy.²²³ The collective effect of these events was “legal chaos,” with the implication that “any departure from a nationwide uniform pricing policy” would subject a company to legal jeopardy.²²⁴

FTC enforcement of Robinson-Patman peaked in the early 1960s, with hundreds of complaints issued—215 in 1963 alone.²²⁵ While from 1958 to 1963 the FTC issued 655 Robinson-Patman complaints, in the following six years the number fell to 77.²²⁶ During the 1970s, the number of complaints issued fell to single digits annually.²²⁷ Moreover, Robinson-Patman cases dominated the antitrust workload of the FTC during these early decades. Of the 941 FTC orders issued from 1945 to 1965, 72 percent were for violations of the Robinson-Patman Act.²²⁸ The shift in the FTC’s workload since has been substantial. During the Kennedy and Johnson administrations, Robinson-Patman cases accounted for 65 percent of the FTC’s non-merger cases, a number that fell to 5 percent during the Nixon and Ford administrations, 2 percent during the Carter administration, less than 1 percent during the Reagan administration, and basically zero (or barely above zero) since.²²⁹

This early 1960s peak and subsequent decline reflected a shift from “mechanical simplification and extension” of the statute that started in that decade,²³⁰ partly because of the opinions from one FTC commissioner (Philip Elman), and it was “reinforced by an increasing judicial hostility to Commission enforcement.”²³¹ The result was a shift from the use of per se to more nuanced interpretation of the statute, “increasing the scope of the required or permitted factual inquiry in Robinson-Patman cases.”²³² This shift in

evidentiary requirements led to a “substantial increase to the [FTC] and its staff in cost and difficulty of trying and winning Robinson-Patman suits,” resulting in a “marked drop-off” in the number of complaints issued.²³³

The internal dissent and judicial hostility that led to this decline in enforcement reflected the intellectual shift in how the statute was viewed. By the 1960s, the act had come under increasing fire from practitioners, economists, legal scholars, and enforcement officials for both its indeterminacy and its anti-consumer orientation. The critics included: the attorney general’s 1955 report on the antitrust laws;²³⁴ practitioner Rowe, the author of a treatise on the act’s complexities and an influential 1957 article criticizing the act;²³⁵ the aforementioned Commissioner Elman, who wrote key dissents in the 1960s from findings of liability under the act;²³⁶ Adelman, the Massachusetts Institute of Technology economist whose 1949 article and 1959 book excoriated the government’s Sherman Act case against A&P, and the effect of Robinson-Patman, also discussed above;²³⁷ Robert Pitofsky, who condemned the FTC’s Robinson-Patman enforcement as a key draftsman of an American Bar Association report in 1969, a quarter century before he became FTC chairman;²³⁸ and Posner, who added his critical analysis of the act in 1976.²³⁹

In 1977, this growing criticism led the DOJ to publish a major attack on Robinson-Patman, finding the act “protectionist” with a “deleterious impact on competition” and, ultimately, on consumers.²⁴⁰ The FTC, which had issued nearly 1,400 Robinson-Patman complaints over the preceding four decades, was reaching the same conclusion: The agency dramatically slowed enforcement in the 1970s and all but ended it thereafter.²⁴¹

Private actions have continued, but here, too, the courts have heeded the intellectual consensus against the act by reinterpreting it when possible, sometimes creatively, to align with the general consumer orientation of contemporary antitrust. A&P itself played a role in those judicial developments by persuading the Supreme Court in 1979 to reject “interpretations of the Robinson-Patman Act which . . . help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.”²⁴² The Supreme Court creatively interpreted the act in 2006, as it found that “the Robinson-Patman Act signals no large departure from th[e] main concern of antitrust”—promoting consumer welfare. Lower courts should thus avoid applying the act in ways “geared more to the protection of existing *competitors* than to the stimulation of *competition*.”²⁴³ (Emphasis in original.)

Conclusion

Much of the damage from Robinson-Patman has been undone. Abandonment by the FTC and sensible judicial opinions, much more consistent with Sherman Act principles—at least as those principles were understood until the rise of the neo-Brandeisians—represent one of the major success stories in antitrust legislation’s history, correcting one of its major mistakes. Some significant costs of business compliance remain, however, as do private actions. In secondary-line cases, the judiciary does not follow the Sherman Act requirement of requiring injury to competition as a prerequisite to a successful case.²⁴⁴ Despite all the progress, as Professor Hovenkamp states, unfinished business thus remains regarding Robinson-Patman.²⁴⁵

The question arises of whether the judicial rejection of aggressive Robinson-Patman interpretations, after decades of harm to consumers in particular and to the economy in general, inappropriately usurped congressional intent. Any such argument is incorrect. The original proposal coming immediately after the Supreme Court invalidated the NRA was harshly protectionist, reflecting codes written under the NRA. Yet the draftsmen were forced to compromise, and that compromise produced the incoherent, consistently ambiguous language that the FTC, after an initial period of moderation, chose to enforce aggressively. Into the 1960s, the courts largely supported the FTC's interpretations. Eventually, the FTC retreated from Robinson-Patman, ultimately abandoning enforcement. Modern courts, beneficiaries of decades of criticism showing the costs of the aggressive FTC version of Robinson-Patman, increasingly (though not completely) interpret Robinson-Patman consistent with the rest of antitrust—that is, as intended to protect the welfare of consumers.

The failure of the draftsmen to enact their original proposal with specific language implementing their protectionist intent facilitated change. The overwhelming condemnation of the FTC's aggressive enforcement and the statute's actual language, with all its problems and uncertainty, led the courts and the FTC itself to pursue a new course. Robinson-Patman was hardly the first time—and it certainly wasn't the last—that Congress sought to appease a constituency's demand for action with a statute that in fact fell short of those demands. If there is any fault here, it is that it took so long for the FTC and the judiciary to retreat from their initial mistakes.

Of course, these more recent developments were small comfort to the A&P and other chains in mid-20th-century America and smaller comfort still to the millions of American consumers forced to pay the equivalent of a federal tax on groceries and other necessities to attempt to support inefficient retailers and middlemen. Worse, this tax came with little to no countervailing benefits.

Today's Robinson-Patman supporters, including the current leaders of the FTC, frequently claim there was never an overall empirical evaluation of the statute. There is more than a little irony to this argument, as the FTC, on November 10, 2022, issued new "unfair methods of competition" guidelines claiming the ability to proscribe practices with unquantifiable harm, even in their "nascent" state. In any event, Professor Hovenkamp appropriately rejects this assertion about Robinson-Patman:

While a technical study of the cost of a particular statute is impossible, the DOJ's estimate that the [Robinson-Patman Act] cost the economy \$3 to \$6 billion annually was almost certainly too low. It included higher prices, but not compliance costs or job losses. Labor and consumers are both vertically related to production. They rise or fall together. Higher prices harm consumers and also lead to fewer jobs.²⁴⁶

With a statute whose authors intended it to harm retailers who used a new business model to lower prices to consumers, when enforcement of the statute attacked those very retailers, and with empirical studies found that those retailers were in fact harmed,²⁴⁷ such evidence should be more than enough. But there is much more. This

chapter shows myriad examples of anti-consumer enforcement, from limiting backhauls to hindering efficient warehousing, encouraging price coordination, making it more difficult for smaller retailers to obtain the efficiencies of the larger chains, and on and on. The argument that there is not an evidentiary case against Robinson-Patman is yet another rhetorical neo-Brandeisian canard.

None of this is to deny that monopsony, the anti-consumer power of a concentrated buyer, can be just as harmful as the anti-consumer power of a concentrated seller. But Robinson-Patman does not require such power as a prerequisite for liability; the Sherman Act does. If the problem is such power, the solution should be found in the statute that addresses the problem, not in the most widely condemned statute in antitrust legislation's long history.

In the end, the Robinson-Patman Act could not stop the retail revolution. With all the inefficiencies and absurdities, neither the act nor its enforcement addressed the numerous variables—other than price discrimination in the cost of goods—that influence retail success.²⁴⁸ The greater efficiency of vertically integrated chain stores, including better use of data, meant they were almost certain to prevail in the long run, as the business history of retail stores over the 20th century showed. Nevertheless, this ultimate success occurred with large, unnecessary costs whose origins reflected a desire to protect entrenched small businesses even at the expense of ordinary consumers.

Today, that opposition to retail chains seems long-ago history, originating in a populist furor to prevent the inevitable growth of the chains. Yet the underlying populism has returned in full, resisting the growth of large businesses even when they serve consumers better than their competitors, often indistinguishable from the same economic fallacies and protectionism behind the opposition to chain stores.

It is astonishing that the Biden administration, through its new chair of the FTC and its competition czar, with support in the Congress, desires to reinstate Robinson-Patman as a significant part of its antitrust arsenal. Both the president's competition executive order²⁴⁹ and the House Judiciary Committee²⁵⁰ see an important place for Robinson-Patman. Perhaps because they regard one of the most successful modern retailers, Amazon, as an enemy, they see that the historical enemy of large retailers, the Robinson-Patman Act, must be their friend. Instead, they should see the history recounted here as a lesson of what happens when populism that ignores the welfare of consumers produces bad law.

Notes

¹ Lina Khan, A remedy for Amazon-Hachette fight? CNN Opinion (May 30, 2014)

² XIV Herbert Hovenkamp, Antitrust Law ¶ 2302 ("While the economics of multistore distribution methods of numerous and varied, the proponents of the Robinson-Patman Act amendments focused on one thing: the perceived ability of large chain store operations such as the Great Atlantic and Pacific Tea Co. (A&P) to obtain lower prices for the goods that it purchased than smaller buyers were able to match."); *id.* ("The central 'evil' targeted by the Robinson-Patman Act was the *buying* power of large chain stores such as A&P.") (emphasis in original). Wright Patman later commented that "one certain big concern had really

caused passage of the Act, the A&P Tea Co.,” and A&P became subject to government attacks on its business model. Comments made during a 1956 Congressional hearing, as quoted by Frederick Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 Colum. L. Rev. 1059, 1061 (Dec. 1957).

³ Rowe, 57 Colum. L. Rev. at 1061.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Alfred Chandler, *The Visible Hand* 209 (1977); see also DEP’T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 170-175 (1977) (“DOJ Report”) (describing the substantial innovation in distribution during the 20th Century). See also the discussion of the A&P below in this section.

⁸ Chandler, *The Visible Hand*, at 209, 224-235.

⁹ Chandler, *The Visible Hand*, at 209:

Although wholesaler businesses would seek and receive legislative protection from competition throughout the 20th Century, during their heyday the rise of the major wholesalers was itself a substantial innovation in distribution that involved building and staffing complex organizations. Exploiting the new availability of railroads and telegraphs, the large wholesaler company bought directly for their account from manufacturers throughout the world, took ownership of the goods, arranged transportation through the railroad networks, and then used its own distribution network to re-sell these goods throughout the growing United States (especially away from the Eastern seaboard), most often selling to small, independent retailers. As large buyers and distributors, like the mass retailer business model, they maintained a high turnover of inventory, called “stock turn”.

For an overview of how these wholesalers evolved in the mid-19th Century, see *id.* at 215-224.

¹⁰ Chandler, *The Visible Hand*, at 224.

¹¹ Chandler, *The Visible Hand*, at 229.

¹² Rowe, 57 Colum. L. Rev. at 1061

¹³ Rowe, 57 Colum. L. Rev. at 1062; see also DOJ Report at 132 (“The total gross margin for a consumer item purchased through an independent included not only the retailer’s gross margin but also the gross margin of the wholesaler, broker or other middlemen from whom the independent purchased.”).

¹⁴ DOJ Report at 131-132; see also *id.* at 197 (larger organizations had a better ability to find the best pricing available). Alfred Chandler describes how, starting with department stores, large retail firms’ business model was based on high volume and low margins: “They were aimed at maintaining the high volume, high turnover flow of business by selling at low prices and low margins. Profits were to be made on volume, not markup.” Chandler, *The Visible Hand*, at 227; see also *id.* at 231-232 and 233-235 (describing same focus for mail order and chain store firms). More generally, these efficiencies could also be understood as a form of economies of speed, lowering costs and prices through maintaining a higher level of inventory turnover than possible under prior distribution methods. See *id.* at 235-239. Vertically integrating retail and various wholesale functions created other efficiencies in marketing and in shaping products to meet customer demand. DOJ Report at 194-197; Chandler, *The Visible Hand*, at 227-228.

¹⁵ Rowe, 57 Colum. L. Rev. at 1062; DOJ Report at 131.

¹⁶ Federal Trade Commission, Final Report on the Chain-Store Investigation (1934) (“1934 FTC Chain-Store Report”).

¹⁷ *Id.* See DOJ Report at 131 192-199. For other discussions of the attack on chain stores, see Robert Burns, *The Decline of Competition: A Study of the Evolution of American Industry* (1936), Richard C. Schragger, *The Anti-chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 Iowa L. Rev. 1011 (2005)

¹⁸ DOJ Report at 192-193. The differences ranged from 3 to 35 percent in four cities across the grocery and retail drug chains analyzed, with the rough medians in the 10-20 percent range: “The figures for grocery stores, depending on whether the advantage was weighed on the basis of chain store or independent sales volume, range from 16.6 percent to 19.9 percent in Detroit, 19.16 percent to 35.8 percent in Memphis, 20.5 percent to 23.6 percent in Washington, D. C., and 3.01 percent to 4.8 percent in Cincinnati. In the retail drug trade, the figures as to the percentage of selling price difference explained by purchase price differences, again depending on the weighing factor used, were 9.7 percent to 10.8

percent in Washington, 7.7 percent to 5.4 percent in Cincinnati, 5.3 percent to 3.9 percent in Memphis, and 17.4 percent to 18.3 percent in Detroit.” DOJ Report at 193.

¹⁹ DOJ Report at 193 (“It is obvious that even with the complete elimination of lower sales prices to chains (and some of these lower prices were cost justified), the remaining 80 percent to 90 percent of the cost difference would have remained and the smaller stores would have continued at a disadvantage if competition were confined solely to price.”). This data was available when Robinson-Patman passed, yet contrary to this data, the FTC concluded that lower cost of goods sold was a substantial factor in the retail price difference between chain stores and small independent retailers. 1934 FTC Chain Store Report at 53. The DOJ notes that the FTC itself in 1934 “did not, in all cases, base its final report and recommendations upon the statistics which it had gathered.” DOJ Report at 131.

²¹ See *Top 100 Retailers: The Nation’s Retail Power Players 2020*, STORES, (noting that Walmart has more than twice Amazon’s retail sales revenues).

²² See John Updike, *A&P*, *The New Yorker*, July 22, 1961, at 22. When Updike died in 2009, one journalist remarked: “I remember reading his short story ‘A&P’ in high school. Of course, everybody remembers reading ‘A&P’ in high school. It is perhaps Updike’s most widely anthologized work, this brief, bright jewel of a story about a young grocery clerk and his pointless act of gallantry.” Julia Keller, *John Updike at the A&P*, *CHI. TRIB.*, Feb. 1, 2009.

²³ Marc Levinson, *Monopoly in Chains: Antitrust and The Great A&P*, 12 *CPI ANTITRUST CHRON.* 2, 4 (2011) (“Levinson CPI”).

²⁴ *Id.*

²⁵ REPORT OF THE FEDERAL TRADE COMMISSION ON THE WHOLESALE MARKETING OF FOOD 160 (June 30, 1919).

²⁶ MARC LEVINSON, *THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA* 83 (2011) (“LEVINSON”).

²⁷ This is a fundamental tenet of any market economy, as illustrated by the famous Edgeworth Box. See generally Thomas M. Humphrey, *The Early History of the Box Diagram*, 82 *ECON. Q.* 37 (1996). Of course, although all contracts are presumptively mutually beneficial under the circumstances, they do not necessarily benefit consumers. A monopolist raise prices above the competitive level; similarly a monopsonist depresses prices. The question for government policy, including Antitrust, is whether useful remedies would help consumers.

²⁸ In absolute terms, A&P’s cost advantages were modest. See MORRIS ADELMAN, *A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY* 140-43 & app. IV (1959) (“ADELMAN”). But they were enough to make a competitive difference in this narrow-margin business with highly price-sensitive consumers. See LEVINSON, at 104.

²⁹ LEVINSON, at 92.

³⁰ *Id.* at 265.

³¹ *Id.* at 105.

³² *Id.* at 92.

³³ XIV Hovenkamp, ¶ 2302.

³⁴ *Id.* at 237.

³⁵ Rowe, 57 *Colum. L. Rev.* at 1062.

³⁶ XIV Hovenkamp, ¶ 2302.

³⁸ Posner, *The Robinson-Patman Act*, at 26.

³⁹ DOJ Report at 179.

⁴⁰ *Id.*; see also *id.* at 102. Ellis Hawley observes that the small merchants’ troubles were further exacerbated during the Great Depression because some of the unemployed started small outlets to eke out a living, intensifying competition among such merchants. Ellis Hawley, *The New Deal and the Problem of Monopoly* at 248 (1966).

⁴¹ DOJ Report at 104-105.

⁴² Hawley, at 147.

⁴³ Rowe, 57 *Colum. L. Rev.* at 1063.

⁴⁴ *Id.* For an important discussion of the parallel “fair trade” movement during this time, see generally Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the “New Competition,” 1890-1940* (2018)

⁴⁵ XIV Hovenkamp, ¶ 2302; Rowe, 57 Colum. L. Rev. at 1065.

⁴⁶ XIV Hovenkamp, ¶ 2302.

⁴⁷ XIV Hovenkamp, ¶ 2302.

⁴⁸ Hawley, at 261. The NRA is discussed in more detail in the next chapter.

⁴⁹ Levinson CPI, at 4. See also DOJ Report at 112 (“During the 1930’s, many states passed a variety of chain store taxation measures, with rates ranging in severity from mildly annoying to frankly confiscatory.”).

⁵⁰ DOJ Report at 252.

⁵¹ 1934 FTC Chain Store Report, at 91-92, as quoted in DOJ Report at 253.

⁵² The proposed tax would have been progressive, with “taxation on each outlet increased by the number of stores in the chain” and the “most restrictive effect” on chains that expanded into more than one state. This bill was so punitive that A&P would have had to pay \$523 million in taxes per year even though its annual profits were reported as \$9 million. DOJ Report at 112.

⁵³ Rowe, 57 Colum. L. Rev. at 1065 & n. 24; see also DOJ Report at 112-113 (describing politics of the debate and how chain stores allied with farmers and labor unions to defeat the federal chain store tax bill); Hawley, pp. 262-263. Even at the state level, eventually “chain store taxes were repealed or grew into disuse because they were blatantly direct[ed] at one group of businesses regardless of a particular chain’s way of doing business or ability to serve the public.” DOJ Report, at 252. While in existence, these state chain store tax laws also had important limitations. First, because the tax could only be applied based on chain stores within the state, Congressman Patman eventually proposed a national chain tax. Second, chain store taxes focused on the number of outlets, which “soon proved ineffectual to block the growing volume of business in each chain unit.” Rowe, 57 Colum. L. Rev. at 1065 (emphasis in original).

⁵⁴ DOJ Report at 108 (“The National Recovery Administration, in an ambitious attempt to relieve the nation’s ills, sought to impose stringent regulation on the distribution process. The codes, in effect from 1933 to 1935, governed the wholesale function, for example, by protecting wholesalers from any attempted diversion of goods from that portion of the distribution chain.”).

⁵⁵ XIV Hovenkamp, ¶ 2302. See also Rowe, 57 Colum. L. Rev. at 1066 (“The Codes of Fair Competition authorized by the National Industrial Recovery Act of 1933 in many cases expressed the objectives of the numerous dominant independent merchants who sought to freeze the orthodox pattern of distribution into law.”); DOJ Report at 109 (“A significant goal of the NRA codes was the preservation of the channels of distributions which existed prior to the depression and which were threatened both by that phenomenon and the competitive changes in distribution.”).

⁵⁶ Rowe, 57 Colum. L. Rev. at 1066.

⁵⁷ DOJ Report at 109.

⁵⁸ XIV Hovenkamp, ¶ 2302; Hawley at 249.

⁵⁹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁶⁰ DOJ Report at 111. The DOJ also noted that the Roosevelt Administration had been “reluctant to lend its support to direct attempts at preventing changes in the distribution patterns.” *Id.* As discussed in the next chapter, the populists pushing these measures were only one of multiple factions within the Roosevelt Administration.

⁶¹ Hawley, at 249.

⁶² DOJ Report at 151-152 (describing how the NRA was a precursor to the Robinson-Patman Act).

⁶³ H.R. 8442 (74th Cong. 1st Sess. 1935). Rowe, 57 Colum. L. Rev. at 1067; DOJ Report at 112-114, 151-152. See also Yale Brozen, Foreword to Richard A. Posner, Robinson-Patman Act: Federal Regulation of Price Differences (1976). (“The Supreme Court ruled NIRA unconstitutional on May 27, 1935.

Immediately following the decision, on June 11, the Robinson-Patman Act was introduced in Congress to restore many of the provisions of the defunct law, especially those designed to produce downward price rigidity.”).

⁶⁴ See Hugh Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1123 (1983).

⁶⁵ H.R. 8442 (74th Cong. 1st Sess. 1935). Rowe, 57 Colum. L. Rev. at 1067-68 & n.44 (referencing Congressman Patman stating “Mr. Teagarden wrote this bill” and describing his role in drafting and crafting the bill through the legislative process); see also DOJ Report at 114; Hawley at 251; Sawyer, at 303.

⁶⁶ DOJ Report at 116-117 n.210 (“The problem facing those involved in traditional forms of distribution compelled a natural alliance between small retailers and wholesalers; the wholesaler’s fate depended

upon the continued survival of his customer, the small retailer. Small retailers, in turn, unable due to their size to engage mass, direct buying, were totally dependent on their traditional supplier, the wholesaler. Thus, the small retailer was often willing to follow the lead of the wholesalers in attempting to protect their mutual interest.”).

⁶⁷ Frederick M. Rowe, “Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman,” 60 Yale L.J. 929, 930 n.7 (1951).

⁶⁸ Rowe, 60 Yale L.J. at 929.

⁶⁹ Rowe, 57 Colum. L. Rev. at 1061.

⁷⁰ DOJ Report at 178-179.

⁷¹ DOJ Report at 114.

⁷² See H.R. 8442, note 66. Rowe, 57 Colum. L. Rev at 1067. (“The Patman bill superimposed on section 2 a veritable code of pricing restrictions designed to cripple the mass distributor and protect the wholesaler’s business position.”); see also DOJ Report at 121 n.225 (“This version of the Act, like the NRA codes before it, would have protected the middlemen’s position by codifying his right to a functional discount while denying that discount to direct purchasing mass retailers”).

⁷³ DOJ Report at 179-180.

⁷⁴ DOJ Report at 107-108.

⁷⁵ Frederick M. Rowe, “Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman,” 60 Yale L.J. 929, 930 n.7 (1951).

⁷⁶ DOJ Report at 122-123 (emphasis added). For a contemporaneous, academic account of the wholesaler stakes in the federal debate involving first the NRA and then the Robinson Patman Act, see R. S. Alexander, The Wholesale Differential, 9 J. Bus. 314 (1936). An example of an NRA code protecting wholesalers can be found in the Code of Fair Competition for the Wholesale and Grocery Trade of 1934, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015016795356&view=1up&seq=5> This code is listed as Code #196, Volume V, page 1 (Jan 4, 1934).

⁷⁷ Hawley, p. 251.

⁷⁸ Hawley, pp. 251-252; Rowe, 57 Colum. L. Rev at 1069.

⁷⁹ Hawley, pp. 252-253; Rowe, 57 Colum. L. Rev at 1072-73.

⁸⁰ Rowe, 57 Colum. L. Rev at 1072.

⁸¹ Hawley, p. 254.

⁸² The Act applies only to the sales of goods in interstate commerce, and does not apply to services. The Act also applies only when a price differential exists in sales to different buyers, not to transactions where the price is the same even though there might be different costs. See the discussion in the DOJ Report at 4-5.

⁸³ 15 U.S.C. § 13(a), (b).

⁸⁴ 15 U.S.C. § 13(c), (d), (e).

⁸⁵ XIV Hovenkamp ¶ 2331a (discussing the “merging of primary-line Robinson-Patman Act theory with the basic Sherman Act theory of competitive harm”). The treatise thus left its primary-line injury discussion largely for the separate predatory pricing section. *Id.*

⁸⁶ DOJ Report at 5.

⁸⁷ XIV Hovenkamp, ¶ 2301a (“[S]econdary-line’ Robinson-Patman violations are vertical in nature.....The great majority of cases involve disputes between manufacturers or other suppliers regarding the way that the manufacturer distributes its own product – more specifically, the way that the product is priced to various resellers Were it not for the Robinson-Patman Act, a manufacturer’s pricing practices respecting sales to its various dealers would be treated in the same way as vertical nonprice restraints generally.” Such practices do not violate the antitrust laws without injuring consumers, which is rare.

⁸⁸ XIV Hovenkamp, ¶ 2301a.

⁸⁹ *Id.*

⁹⁰ Federal Trade Commission, Final Report on the Chain-Store Investigation 19-22 (1934) (“1934 FTC Chain-Store Report”).

⁹¹ New York Times, p.1 (Dec. 15, 1934).

⁹² Rowe, 57 Colum. L. Rev. at 1074. Rowe notes that the “technique of amending the original Clayton Act rather than enacting a separate law was a political masterstroke which invested an anti-chain store measure with the venerable trappings of antitrust.” *Id.*

⁹³ XIV Hovenkamp, ¶ 2301a. Ironically, Robinson-Patman probably encourages vertical integration. See DOJ Report at 55 (“Because the oligopolistic seller will almost never lower its price to all of its customers, the large buyer may be forced to integrate”).

⁹⁴ See XIV Herbert Hovenkamp, *Antitrust Law* ¶ 2300 n.1 (2nd ed. 2006). Subsequently, Professor Hovenkamp decided to include coverage of the Robinson-Patman Act in the treatise because “dislike for a particular statute” was not a sufficient reason to exclude coverage. *Id.*

⁹⁵ Rowe, 57 Colum. L. Rev. at 1074 (referencing *Sugar Institute v. United States*, 297 U.S. 553 (1936).)

⁹⁶ The 1944 indictment followed an earlier one in 1942, dismissed by a federal district court in Dallas.

Although the court of appeals reinstated most of the indictment, the Justice Department close not to proceed before a presumptively hostile judge. It thus dismissed the original indictment filing new charges in the Eastern District of Illinois, where the case was ultimately tried in 1945. LEVINSON, *supra* note 15, at 226-27. With Jon Nuechterlein, I discuss the long war against the A&P more fully in Timothy J. Muris & Jon Nuechterlein, *Antitrust in the Internet Era: The legacy of the United States v. A&P*, 54 Rev. Industrial Org. 651 (2019)

⁹⁷ *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), *aff’d*, 173 F.2d 79 (7th Cir. 1949).

⁹⁸ See, e.g., *id.* at 630-31.

⁹⁹ ADELMAN, *supra* note 17, at 15; see also the end of this section discussing Donald Turner’s similar analysis.

¹⁰⁰ ADELMAN, *supra* note 17, at 14; cf. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993). Harvard Business School professor Malcolm McNair explained for A&P at the trial: “The business of food distribution is just about the last business I can think of in which it would be feasible for anybody to develop a monopoly.” LEVINSON, *supra* note 15, at 232.

¹⁰¹ Kevin Carty, Leah Douglas, Lina Khan, and Matt Stoller, 6 Ideas to Rein in Silicon Valley, Open Up the Internet, and Make Tech Work for Everyone, *New York Magazine* (Dec. 11 2017)

¹⁰² *Id.* at 231.

¹⁰³ *Id.* In a similar view, the court of appeals affirmed the convictions in part on the ground that “[w]hen the gross profit rate is reduced in Area X [to meet competition], it is an almost irresistible conclusion that A&P had the power to compensate for any possible decline in net profits by raising the gross profit rate and retail prices in Area Y, where it was in a competitive position to do so.” 173 F.2d at 87. The argument is senseless: A&P presumably maximized long-term profits when setting its prices, making it irrational to deviate from a maximizing profit in Area X because the company lowered prices to meet competition in another.

¹⁰⁴ ADELMAN, *supra* note 28, at 16.

¹⁰⁵ 67 F. Supp. at 657.

¹⁰⁶ *Id.* at 658.

¹⁰⁷ LEVINSON, *supra* note 26, at 230-31.

¹⁰⁸ See, e.g., 67 F. Supp. at 636 (conduct “that leads directly to lower prices to the consumer may ... be restraint of trade” because the Sherman Act “has no concern with prices, but looks solely to competition”).

¹⁰⁹ LEVINSON, *supra* note 26, at 229.

¹¹⁰ *Id.* at 161-62.

¹¹¹ ADELMAN, *supra* note 28, at 17. The district court lent its own support to this view, expressing “doubt whether we ever needed the Robinson-Patman law,” given that “the Sherman Act, properly interpreted and administered, would have remedied all the ills meant to be cured.” 67 F. Supp. at 676.

¹¹² See *id.* (“[i]ntegration ... is not, of itself, a violation of the law”; “the chain store system ... is not in issue in this case”; “nor is A&P’s size, alone, of importance”).

¹¹³ *Id.* at 642.

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ *Id.* at 639 (emphasis added).

¹¹⁷ *Id.* at 655.

¹¹⁸ *Id.* at 658.

¹¹⁹ *Id.* at 678.

¹²⁰ 173 F.2d 79 (7th Cir. 1949).

¹²¹ LEVINSON, *supra* note 26, at 244.

¹²² *Id.* at 245.

¹²³ *Id.* at 249.

¹²⁴ Morris Adelman, *The A&P Case*, 63 Q.J. ECON. 283 (1949).

¹²⁵ ADELMAN, *supra* note 287.

¹²⁶ Note, *Trouble Begins in the “New” Sherman Act: The Perplexing Story of the A&P Case*, 58 YALE L.J. 969 (1949) (“Turner”); *see also* ADELMAN, *supra* note 28, at 18 & n.9 (identifying Turner as author of Yale note).

¹²⁷ Turner, *supra* note 73, at 977.

¹²⁸ *Id.* at 978.

¹²⁹ *Id.* at 970.

¹³⁰ *Id.*

¹³¹ *Id.* at 969-71 (footnotes omitted) (paragraph break omitted).

¹³² ROBERT BORK, *THE ANTITRUST PARADOX* 382 (1978)

¹³³ *See, e.g.*, William Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 6-7 (“[T]wo Harvard School scholars, Phillip Areeda and Donald Turner, spurred the rethinking of modern predatory pricing doctrine with their proposal in 1975 that a dominant firm can ordinarily be presumed to be acting legally under the U.S. antitrust laws when it sets its prices at or above its average variable costs.... Areeda and Turner, more than any other commentators, catalyzed the retrenchment of liability standards and motivated a more general and fundamental reassessment of U.S. doctrine governing dominant firms.”) (footnote omitted).

¹³⁴ *Woodman’s Food Mkt. v. Clorox Co.*, 833 F.3d 743, 746 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1213 (2017).

¹³⁵ XIV Hovenkamp, ¶2340a; Antitrust Modernization Commission (2007)

¹³⁶ *Dean Milk Co. v. FTC*, 395 F.2d 696, 701 (7th Cir. 1968). Robinson-Patman was such a large percentage of the FTC workload and protecting inefficient competitors from lower priced rivals was so predominant, the Act almost certainly influenced how the agency approached cases under the Sherman and Clayton Acts. It was thus more inclined to undertake predatory pricing cases, use efficiency as a reason to oppose mergers, and condemn mergers in markets with many competitors, as discussed in the next chapter.

¹³⁷ BORK, *Antitrust Paradox*

¹³⁸ XIV Hovenkamp, ¶ 2340c.

¹³⁹ IIIA Areeda, ¶ 721d.

¹⁴⁰ XIV Hovenkamp, ¶2340a, pp. 133-134. (discussing this adverse effect and the two that follow). The Justice Department also categorized the costs of Robinson-Patman in its 1977 report, finding significant costs to society from Robinson-Patman, both direct and indirect. The direct costs arise from the higher price levels with the Act’s inhibitions on competitive price-setting and its encouragement of price fixing. Indirect effects occur when businesses operate less efficiently, pay high legal fees, or otherwise incur greater costs because of Robinson-Patman, and when Robinson-Patman places a relatively greater burden on smaller business than on large companies. DOJ Report at 39.

¹⁴¹ For a detailed discussion of the fair trade movement, *see* Sawyer, *supra* note;

¹⁴² Frederick Rowe, *Pricing and the Robinson-Patman Act*, 41 Antitrust L.J. 98 (1971) (“For many years, the meeting competition proviso in Section 2(b) of the Robinson-Patman Act has been the prime axis for accommodating the inherently restrictive provisions of the Robinson-Patman Act to the Sherman Act’s mandates for vigorous competitive pricing by sellers.”).

¹⁴³ 15 U.S.C. §13(b).

¹⁴⁴ XIV Hovenkamp, ¶ 2352e (“The problem is hardly fanciful, and the case law discusses situations where buyers habitually lie or at least stretch the truth significantly in order to play sellers against each other.”).

¹⁴⁵ Rowe, 41 Antitrust L.J. at 99 (“How much should a seller know about his competitor’s prices before he can meet their equally low price in good faith under Section 2(b) – without at the same time risking Sherman Act illegality from excessive curiosity?”); DOJ Report at 60 (“[T]he potential Robinson-Patman justification implicit in the meeting competition requirements encourages the exchange of price information, and [this] exchange clearly promotes price stabilizing agreements.”).

¹⁴⁶ Rowe, 41 Antitrust L.J. at 99-100.

¹⁴⁷ *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 758 (1945).

¹⁴⁸ DOJ report at 23; *Forster Mfg. Co v FTC*, 335 F.2d 47 (1st Cir, 1964)

¹⁴⁹ DOJ Report at 59 (“While the Act, as interpreted, does not require that these efforts include checking the price quote directly with the competitor, some have contended, on the basis of court decisions, that discussions of price quotes among competitors which would otherwise violate the Sherman Act may be justifiable when done in compliance with the Robinson-Patman Act. That Robinson-Patman is increasingly becoming a cover for hard core price-fixing agreements was confirmed by former Assistant Attorney General Kauper before the Review Group, Mr. Kauper stated that on several occasions attorneys representing companies under investigation for price fixing argued that any discussion of prices was motivated by the need to comply with the meeting competition defense. The argument would also be made that agreements to eliminate discounts illegal under Robinson-Patman should not be prosecuted.”)

¹⁵⁰ Rowe, 41 Antitrust L.J. at 101-102 (discussing *Wall Products Co. v. National Gypsum*, 326 F.Supp. 295 (N.D. Calif. 1971). The Justice Department criticized Wall Products because the same type of price verification arrangement was found illegal in *United States v. Container Corp.*, 393 U.S. 333 (1969). See Rowe, 41 Antitrust L.J. at 102.

¹⁵¹ *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978).

¹⁵² Rowe, 41 Antitrust L.J. at 98-102.

¹⁵³ DOJ report at 61-62.

¹⁵⁴ See *Standard Oil Co.*, 41 F.T.C. 263 (1945). The obvious contradictions in the case led to a Yale Law School student note titled: “The Swinging Door – Or How to Obey One Antitrust Law by Violating Another,” 59 Yale L.J. 158 (1949).

¹⁵⁵ Ironically, the FTC argument anticipated use of the Supreme Court’s *Colgate* case, 250 U.S. 300 (1919), to defend against resale price maintenance claims. Today, resale price maintenance is no longer per se illegal because it is a form of intra-brand distribution restraint that can be pro-competitive.

¹⁵⁶ The Supreme Court reversed the case on other grounds. See the discussion in Rowe, 60 Yale L.J. at 942-44.

¹⁵⁷ See Rowe, 57 Colum. L. Rev. at 1059.

¹⁵⁸ DOJ Report at 10-15; XIV Hovenkamp, ¶ 2333c.

¹⁵⁹ DOJ Report at 9. See also *id.* at 27 (“The practical difficulty of establishing defenses to Robinson-Patman charges thus deters a rational businessman from engaging in selective price reductions.”)

¹⁶⁰ DOJ Report at 35. See also XIV Hovenkamp, ¶ 2340b1 (describing how Robinson-Patman inhibits selective price cuts that can undermine non-competitive pricing).

¹⁶¹ DOJ Report at 48-53. Richard Posner similarly discusses how a typical oligopolist would “cheat” or “defect” by granting “only selected discounts – probably to the larger buyers, for that way he can obtain a large profit per customer while minimizing the risk of detection by minimizing the number of customers with which he is dealing on a cut price basis.” Such “cheating has a tendency to spread” and “many cartels have collapsed as a result of the progressive deterioration of the cartel price structure by discriminatory price reductions.” Posner, *The Robinson-Patman Act*, at 14-15.

¹⁶² XIV Hovenkamp, ¶ 2340b1.

¹⁶³ DOJ Report at 47.

¹⁶⁴ DOJ Report at 48.

¹⁶⁵ XIV Hovenkamp, ¶ 2340b1.

¹⁶⁶ DOJ Report at 65 (“While the possibility that a new supplier will provide a better product or better service plays a role in a decision to switch suppliers, a more important reason is the ability of a new supplier to offer a commodity at a lower price. The necessity for a competitor seeking a new customer to offer a price advantage will be all the greater if the current seller is a firm of established reputation, and the prospective seller is a relative newcomer to the area or new entrant to the industry.”).

¹⁶⁷ See XIV Hovenkamp, ¶ 2340b2 (“The Robinson-Patman Act may serve to impede a firm’s entry into a new market by requiring a firm to set a price no lower than the price it is charging in other markets.”); DOJ Report at 64-74 (describing the inhibitions to geographic market entry arising from the Robinson-Patman Act).

¹⁶⁸ 366 U.S. 685 (1967). Joe Coniglio and I recently discussed the law and economics of predatory pricing, including *Utah Pie*, in *What Brooke Group Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation* (with Joseph V. Coniglio) The Global Antitrust Institute Report on the Digital Economy (2020)

¹⁶⁹ DOJ Report at 16; *see also id.* at 17 (FTC Commissioner in the 1970s expressing uncertainty of whether a firm can enter a new market geographically by selective price cuts). *See also* Kenneth Elzinga & Thomas Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & Econ 427 (1978)

¹⁷⁰ 496 U.S. 543 (1990)

¹⁷¹ XIV Hovenkamp, ¶ 2340b2.

¹⁷² DOJ Report at 32.

¹⁷³ DOJ Report at 33.

¹⁷⁴ XIV Hovenkamp, ¶ 2361a.

¹⁷⁵ *Id.*

¹⁷⁶ DOJ Report at 63-64.

¹⁷⁷ *Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

¹⁷⁸ Frederick M. Rowe, *Pricing and the Robinson-Patman Act*, 41 Antitrust L.J. 98, 103 (1971).

¹⁷⁹ *Great Atla. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 76-81 (1979).

¹⁸⁰ The extent of the price reduction depends on supply and demand conditions in the relevant markets.

¹⁸¹ XIV Hovenkamp, ¶ 2340b3.

¹⁸² Yale Brozen, Foreword to Richard A. Posner, *Robinson-Patman Act: Federal Regulation of Price Differences* (1976).

¹⁸³ XIV Hovenkamp, ¶2321, (“Initially the FTC took the completely unjustified position that even a backhaul allowance calculated to do no more than compensate for avoided freight costs constituted price ‘discrimination’ under the Robinson-Patman Act.”).

¹⁸⁴ DOJ Report at 90-91; Brozen, Foreword Richard A. Posner, *Robinson-Patman Act: Federal Regulation of Price Differences* (1976). On the FTC’s initial changes, *see* 39 Fed. Reg. 1260 (January 7, 1974). In a few adroitly drafted paragraphs, the FTC appeared to affirm allegiance to a strict backhaul policy, yet allowed sellers to pay some discounts and allowances previously prohibited. This important change was a victory for both retailers and consumers, and, as I learned as a young FTC staffer in the mid-1970s, was attributable to the then FTC General Counsel, Calvin Collier, later Chairman. Confusion did continue, however, especially for businesses unable to retain attorneys sophisticated in the arcana of Robinson-Patman. The Commission continued to “clarify” its position, while rejecting a straight forward cost justification for the practice, later blessed by a District Court in *Sweeney & Sons v. Texaco*, 478 F. Supp. 243 (E. D. PA. 1979). For a detailed analysis of backhauls, *see* American Bar Association, Section of Antitrust Law, Monograph No. 4, *The Robinson-Patman Act: Policy and Law*, Volume I (1980).

¹⁸⁵ 15 U.S.C. § 13(a).

¹⁸⁶ DOJ Report, at 18-22 (“The history of the cost justification defense before the FTC and the courts shows hostility to its use”).

¹⁸⁷ This example draws from Posner, *The Robinson-Patman Act*, at 41-42.

¹⁸⁸ DOJ Report at 84-88.

¹⁸⁹ *Id.* at 86-88 (“The effect is to prevent distribution systems from becoming more efficient or assuming new shapes.”).

¹⁹⁰ DOJ Report at 159-162 (describing the “faulty assumption” that costs are the sole determinants of price differences); Antitrust Modernization Commission: Report and Recommendations 318-20 (2007) (many legitimate reasons for priced differences and price discrimination).

¹⁹¹ *See, e.g., FTC v. Standard Motor Prods., Inc.*, 371 F.2d 613, 622 (2d Cir. 1967); *see generally* 1 ALFRED KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 150-53 (1988); *MCI Commc’ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1116 (7th Cir. 1983).

¹⁹² Walton Hamilton, *Cost as a Standard for Price*, 4 L. & CONTEMP. PROBLEMS 321, 323, 328 (1937).

¹⁹³ *Id.* at 333.

¹⁹⁴ 15 U.S.C. § 13(c).

¹⁹⁵ Posner, *The Robinson-Patman Act*, at 44; XIV Hovenkamp, ¶ 2362.

¹⁹⁶ *See Great Atlantic & Pacific Tea Co.*, 26 FTC 486 (1968), *aff’d*, 106 F.2d 667 (3rd Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Hovenkamp ¶ 2362c (such decisions yield the “unappealing policy result that parties may not agree with one another to eliminate a broker and reduce the market price accordingly”). Unlike a price discrimination under section 2(a) of the statute, a price difference arising from saving on brokerage costs was prohibited under section 2(c) regardless of establishing cost savings

under the cost justification defense (although some courts have sought to permit cost differences to matter, *see* Hovenkamp ¶ 2362h).

¹⁹⁷ Hovenkamp ¶ 2362c (“The disturbing thing about these decisions is that they condemn buyer-reseller relationships whether or not brokerage-like services were actually rendered. This seems an unjustified intrusion on firms’ ability to enter efficient transactions that have no harmful economic effects whatsoever and in many cases no injury of any kind to any identifiable party.”).

¹⁹⁸ Posner, *The Robinson-Patman Act*, at 45.

¹⁹⁹ Hovenkamp ¶ 2362d.

²⁰⁰ Posner, *The Robinson-Patman Act*, at 32-33, 45; DOJ Report, at 82 (through 1969, 180 of the 439 FTC final orders concerned section 2(c)).

²⁰¹ Posner, *The Robinson-Patman Act*, at 45. *See also id.* at 46 (“The greatest irony of section 2(c) is that it has so often been used to oppress small business. Many of the defendants in section 2(c) cases have been buying cooperatives composed of small food stores, which sought to obtain a discount for having adopted methods of centralized purchasing that dispensed with a need for a food broker and so made them more competitive with the chain stores.”).

²⁰² *Id.* at 45-46.

²⁰³ 15 U.S.C. §§ 13(d), 13(e).

²⁰⁴ DOJ Report at 91.

²⁰⁵ 390 U.S. 341 (1968).

²⁰⁶ DOJ Report, at 92.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 92-93.

²⁰⁹ DOJ Report at 97-98.

²¹⁰ Sokol, *Analyzing Robinson-Patman*, at 2075 (quoting Scherer testimony).

²¹¹ Posner, *The Robinson-Patman Act*, at 45; DOJ Report at 80-82. Fred Rowe notes the irony of how the FTC’s interpretation of the section 2(c) brokerage clause described above meant the “joint buying organizations of independent distributors thus lost all benefits of the exception they had sponsored, and were placed on an equal footing with the A&P.” Rowe, 57 *Colum. L. Rev.* at 1076.

²¹² XIV Hovenkamp, ¶2340b4, and the treatise offers the following illustration: “[S]uppose a major toothpaste manufacturer can minimize its costs and thus deliver its best price by selling toothpaste in carload lots, where it charges a uniform price of \$1.00 per tube. The firm would also be willing to sell in smaller quantities but would have to charge more and fears a Robinson-Patman Act prosecution. The Wal-Marts and Walgreens of the world readily purchase toothpaste by the carload, but in the case of local pharmacists and grocers who want only a small fraction of that amount, an intermediate distribution market springs up. These distributors also pay \$1.00 per carload, but they in turn resell the carload in small lots to small stores [Because the intermediary earns a markup], sales through the intermediary are likely to be at a higher price than direct sales by the manufacturer if free to charge any price it pleases.” *Id.*

²¹³ DOJ Report at 93-96.

²¹⁴ DOJ Report at 75-79.

²¹⁵ *Id.* at 76 (firms will incur the additional costs “when additional revenue that can be obtained from increased sales outweighs the additional costs”).

²¹⁶ Rowe, 57 *Colum. L. Rev.* at 1088.

²¹⁷ LEVINSON, *supra* note 15, at 165.

²¹⁸ *Id.*

²¹⁹ Rowe, 57 *Colum. L. Rev.* at 1075-1078.

²²⁰ Posner at 50, Rowe, 57 *Colum. L. Rev.*

²²¹ Posner, *The Robinson-Patman Act*, at 30.

²²² *Id.*

²²³ *Id.* (“It was natural that the commission, with its limited resources, should be pushed in the same direction [to seek the per se rules being developed elsewhere in antitrust law], but it may be doubted that the result of the process was as happy in the regulation of price differences and related marketing practices as it has been in traditional areas of antitrust enforcement.”).

²²⁴ Posner at 50, Rowe, 57 *Columbia Rev.* at 1078.

²²⁵ Posner, *The Robinson-Patman Act*, at 32-33.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See Alan Stone, *Economic Regulation and The Public Interest*: 98-99 (1977) (citing FTC report)

²²⁹ Timothy J. Muris, *How History Can Inform Practice in Modern U.S. Competition Policy* 10 (2004), available at http://www.law.gmu.edu/assets/files/publications/working_papers/04-20.pdf; Sokol, 83 Geo. W. L. Rev. at 2072.

²³⁰ Posner, *The Robinson-Patman Act*, at 31.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ Dep't of Justice, *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955).

²³⁵ Frederick Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059 (1957).

²³⁶ See, e.g., *Sunshine Biscuits, Inc.*, 59 F.T.C. 674 (1961) (Elman, Comm'r, dissenting from finding of Robinson-Patman violation), *rev'd*, 306 F.2d 48 (7th Cir. 1962) (adopting Elman's position).

²³⁷ ADELMAN, *supra* note 17.

²³⁸ ABA, *REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION* (1969).

²³⁹ RICHARD POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* (1976).

²⁴⁰ DEP'T OF JUSTICE, *REPORT ON THE ROBINSON-PATMAN ACT* 250 (1977) ("DOJ Report").

²⁴¹ See Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. W. L. REV. 2064, 2075-76 (2015).

²⁴² *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 (1979). The FTC was represented in the Supreme Court by Frank Easterbrook, then an attorney in DOJ's Office of the Solicitor General, who would become a leading member of the Chicago School and an important Circuit Court judge.

²⁴³ *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180-81 (2006).

²⁴⁴ See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L. J. 125 (2000)

²⁴⁵ *Id.*

²⁴⁶ Herbert Hovenkamp, *Can The Robinson-Patman Act Be Salvaged?* Promarket (October 13, 2022)

²⁴⁷ See, e.g., Thomas Ross, *Winners and Losers Under the Robinson-Patman Act*, 27 J.L. Econ 243 (1984)

²⁴⁸ DOJ Report at 181-183.

²⁴⁹ *Promoting Competition in the American Economy*, Exec. Order No. 14036, 86 Fed Reg 36987, 36993 (July 9, 2021).

²⁵⁰ Majority staff Report of H. Comm. on the Judiciary, 116 Cong. Investigation of Competition in Digital Markets 391 (Comm. Print 2020)

The Mid-Century Populist War Against Mergers

Introducing a March 2021 hearing on monopoly power, modern populist and Chairman of the House Judiciary Committee's Antitrust, Commercial, and Administrative Law Subcommittee David Cicilline (D-RI) spoke glowingly of long-ago merger history:

Congress enacted the Anti-Merger Act in response to the extensive record created by the Temporary National Economic Committee and the Federal Trade Commission on the dangers of severe economic concentration, and recommendations to reign in dominant companies that had captured key sectors of the U.S. economy.

As the FTC warned in 1948, "if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest."

Following its enactment, the Supreme Court broadly construed the Anti-Merger Act [Section 7 of the Clayton Act] in a series of decisions that reasserted the primacy of competition and the law over the rise and abuse of monopoly power—decisions which included *Brown Shoe* and *Philadelphia National Bank*.¹

Unfortunately, three problems exist with Rep. Cicilline's history: It is wrong on the facts, wrong on the law, and wrong on policy. On the facts, concentration was not growing and may have been decreasing, as was known when the law passed and shown convincingly shortly thereafter. The authors of the Federal Trade Commission (FTC) report on concentration even conceded it was wrong. On the law, the cases Chairman Cicilline cites approvingly—among the same cases that current FTC Chair Lina Khan calls "controlling precedents"² and that dominate the government's 2022 request for comments on merger enforcement, as discussed in Chapter 1—led to an incoherent era of case law. As Justice Potter Stewart famously said in dissent to a decision finding a merger illegal between two grocery chains with myriad competitors in Los Angeles and a combined market share of only 7.5 percent,³ "The sole consistency that I can find is that, in litigation under § 7, the Government always wins."⁴ On policy, to the extent a policy existed, it was the same misguided populist animus against business forms and practices that benefit consumers that was behind the Robinson-Patman Act, as discussed in the previous chapter.

So strong was the populist wave and the conviction that "big is bad" that lawyers defending mergers would desperately argue their merger did not lead to efficiencies and cost savings, lest the merger be viewed as one that allowed the merged firms to gain market share (i.e., get bigger) because cost savings would reduce prices.⁵ This episode of merger law is one that scholars until recently condemned nearly universally, yet so misguided are today's neo-Brandeisians that they mistakenly praise this history as fundamental to the antitrust law they now desire.

This chapter starts with the origins of a new merger law in aggressive antitrust policy that populists sought in the Franklin D. Roosevelt administration. FDR punted the issue to a commission that became the starting point for amending the merger law. It then

discusses the history behind the 1950 amendment to the Clayton Act, including populist support for the change and how supporters used a false, factual premise that mergers were causing aggregate concentration to increase. The chapter then describes the disastrous results of decades of a populist approach to mergers, focusing on the details of Supreme Court precedent. It next discusses the triumph of populism, further evidenced by an explanation of the frequent suspicion of efficient business practices as a reason to approve mergers. Finally, the chapter discusses lessons from this episode for today, especially the Biden administration's apparent desire to rely on this deeply flawed history.

Laying the Foundations: The Roosevelt Administration and the Temporary National Economic Committee's 1941 Report

While condemning the past 40 years, President Joe Biden praised older antitrust "traditions," including those of the second President Roosevelt.⁶ Yet New Deal antitrust policies reflected a war between competing factions.⁷ The populists reflected the views of the original Brandeisians decades before, advocating aggressive antitrust enforcement to break up big firms and, when necessary, prevent new ones from emerging. Others in the New Deal opposed the populists, supporting instead government-business cooperation.⁸

As detailed in the previous chapter, both the cartel-like activities of the National Recovery Administration (NRA) and the passage of the Robinson-Patman Act are prominent parts of FDR's contradictory competition policy—and among the worst anti-consumer episodes in the long history of American competition law. Because of the neo-Brandeisian praise for FDR and because of his administration's role in leading to the anti-consumer merger policy discussed in this chapter, we discuss briefly here the antitrust contradictions of the Roosevelt era. Only the tenure of the legendary Thurman Arnold, appointed in 1938 to lead the U.S. Department of Justice (DOJ) Antitrust Division, is at all worthy of emulation, and for Arnold, the anti-consumer animus of the populists hindered his attempts to protect consumers.

Most 1930s populists opposed "centralized wealth, centralized control, and centralized location," and this "preference for mere smallness tended to override the desire for competitive efficiency."⁹ Big business was a "curse" that often used monopolistic practices, harming local communities and democratic society and leading to big government, big labor, and big agriculture.¹⁰ To obtain a more decentralized ideal, the populists preferred rural communities and local self-sufficiency, opposing economic specialization with larger business firms relocating to a few locations that could serve the entire country.¹¹

In the Roosevelt administration, non-populists recognized the efficiencies of big businesses and sought to manage them through various forms of central planning.¹² Those who favored such planning in turn contained subgroups, each with influential advocates. On the left, central planners sought to not dismember large businesses but transfer their control to government.¹³ Those more in the middle sought government-

industry cooperation. On the right, industrialists and pro-business advocates argued that the problem was “chiseling” and “cutthroat competition,”¹⁴ and they wanted the government to assist trade groups in managing the market.¹⁵ Finally, advocates of large government spending increases emerged, applying the new Keynesian economics with little interest in populist antitrust, instead focused on managing aggregate demand.¹⁶ Advocates of each of these views interpreted the causes of the Great Depression to be consistent with their preferred policies.

As discussed in Chapter 2, the early years of the Roosevelt administration saw the creation of the NRA, rejecting populism to instead support managed cartels through coordinated government and large business control, along with government programs to support agricultural business through raising prices. Thus the “New Deal began with government sponsorship of cartels and business planning,”¹⁷ the apparent opposite of populist deconcentration based on the concept of “big is bad.”¹⁸ This early New Deal focus on government-sponsored business cartels eventually collapsed. Many contradictions existed, including the enormous problems and frustrations of planning the economy centrally¹⁹ and the Supreme Court ruling the NRA as an unconstitutional delegation of legislative power.²⁰

While the populists did not drive the administration’s approach to big business, particularly in the early years, they had considerable influence elsewhere—for example, in the securities laws.²¹ President Roosevelt often spoke like a populist, both to assuage that faction and when he thought it was to his political advantage, prominently in his first reelection campaign. FDR ran aggressively against big business, with his famous 1936 convention acceptance speech, “A Rendezvous with Destiny,” strongly populist. He argued that modern life had been impressed into the service of “economic royalists” who created a “new despotism” in which workers were subject to a “new industrial dictatorship” and “economic slavery.”²²

Following enactment of Robinson-Patman in mid-1936, a major populist victory, FDR’s second term turned to more aggressive antitrust enforcement. Besides populism and the Supreme Court’s decision against the NRA, the severe 1937 recession was probably an important catalyst for change. This recession sharpened the debate in the administration between those who sought renewed government-business cooperation with government aid and oversight of business planning and the populists, seeking deconcentration and the prevention of alleged monopolistic practices said to inhibit economic expansion.²³

Arnold, one of the Antitrust Division’s most famous heads, was appointed in 1938.²⁴ Arnold was aggressive, but he did not share the populist belief that bigness was inherently bad and, at least in theory, if not always practice, applied a practical test using efficiency and consumer welfare.²⁵

As the populists’ focus on constraining big companies through new legislation clashed with other New Deal factions, President Roosevelt temporized, punting the issue to that favorite of Washington, DC—a blue-ribbon committee.²⁶ Ever skillful at balancing the

competing groups, President Roosevelt's April 1938 announcement expressed populist concerns about large businesses, especially a growing "concentration of private power without equal in history."²⁷ To address this power, Roosevelt sought increased spending on antitrust enforcement under existing laws, including mergers and changes to the antitrust statutes, and proposed a "thorough study of the concentration of economic power in American industry,"²⁸ undertaken jointly by the FTC, DOJ, and other parts of the executive branch.²⁹ After Congress appropriated funds for the study, this investigation grew to include numerous members of Congress and became the Temporary National Economic Committee (TNEC).³⁰

The TNEC conducted extensive hearings for more than two years, publishing dozens of volumes of testimony and detailed economic studies.³¹ While the administration at first intended the TNEC to focus on economic concentration and monopoly power, the TNEC also became an important forum for Keynesian fiscal policy. By the time the TNEC began, in late 1938, the policy debate was not solely between more antitrust or central planning to cure the problems that caused the new recession. Instead, it was primarily between those seeking to emphasize antitrust action and the Keynesians, who sought instead to focus on government spending to counter the steep decline.³²

Regarding mergers, the committee recommended legislation to close the loopholes in the coverage of the original Clayton Act of 1914, most specifically the "asset loophole," whereby Section 7 of that act was limited to challenges to stock acquisitions and did not cover mergers through asset sales.³³ The TNEC also recommended legislation to provide prior notification of mergers and allow the FTC to forbid acquisitions beyond a certain size (not specified in the TNEC report), unless the merging companies could demonstrate "that the purpose and apparent effect of such consolidation would be desirable."³⁴ "Desirability" was to be determined by issues such as concentration and the effect on competition.

The TNEC's final report and recommendations, issued in 1941,³⁵ arrived in a markedly changed political atmosphere. The economy was recovering as the Roosevelt administration focused on defense mobilization, relying on the same large corporations that the populists had proposed to dismantle, and FDR's rhetoric shifted from condemning the "economic royalists" to promoting the "Arsenal of Democracy."³⁶ Although the TNEC report had little immediate effect or influence on antitrust, it nonetheless set the stage for post-World War II merger policy.

The 1950 Amendment to the Clayton Act

Although merger bills were introduced during the 1930s, the effort to amend Section 7 of the Clayton Act began in earnest after World War II. A key predicate for the Clayton Act amendment was that, using the TNEC findings, mergers were increasing industry concentration. The congressional debates contain numerous fears that increased concentration would harm the American way of life, even leading to Nazism or Communism. A widely referenced 1948 FTC study, claiming that mergers in the 1940s

contributed to concentration, would be used throughout the debate to support the new legislation.

As discussed below, the FTC was wrong. Industry concentration had not been increasing generally, nor was there evidence that recent mergers had contributed to greater concentration. The large trusts that so bothered the populists formed during the late 19th and early 20th centuries. That this predicate for change was false was known late in the congressional debates, but it was largely ignored. The congressional and court reliance on the FTC study and the fear of rising concentration prompted Massachusetts Institute of Technology Professor Morris Adelman to remark, in the same year he published his landmark study of the Great Atlantic and Pacific Tea Company (A&P) discussed in the previous chapter, that

if it is revolting to decide a case on no better a ground than that it was so decided under Henry IV—it is humiliating to have our courts decide it on the basis of what economists showed nearly a decade ago was a made-up story.³⁷

Legislative History. From 1943 to 1949, 16 bills were introduced in Congress to amend Clayton Act Section 7, with multiple public hearings on the proposals.³⁸ In 1949, Rep. Emanuel Celler (D-NY) introduced H.R. 2734, a bill similar to one Rep. Estes Kefauver (D-TN) had previously introduced. The House approved this bill in August 1949,³⁹ and after further hearings, Senate approval followed 16 months later.⁴⁰ President Harry Truman signed the bill on December 29, 1950.

The new law clarified the statute's coverage. The Section 7 substantive standard—whether the effect of an acquisition may be to “substantially lessen competition . . . or tend to create a monopoly”—was already incorporated in the 1914 language.⁴¹ The original language had two key limitations: First, as noted above, it addressed only acquisitions of shares, not acquisitions of assets (the “asset loophole”); second, it had been read to cover only horizontal mergers.⁴² Because certain accompanying language in the original statute might be claimed to prohibit all horizontal mergers, the key substantive language also had been interpreted using the Sherman Act's rule of reason.⁴³ That interpretation had led courts to focus on whether there was proof that the “substantially lessen competition” standard had already been met from the consummated merger, not whether it was reasonable to predict such effects in the future.

The TNEC report, following similar FTC recommendations, had proposed changes to the statutory language to plug the “asset loophole” and require prior notification and approval for mergers.⁴⁴ The new law closed the asset loophole,⁴⁵ but while the House Judiciary Committee endorsed prior approval in 1946, its bill died in the Rules Committee.⁴⁶ Rep. Kefauver introduced an identical bill in 1947 that, after extensive hearings, was reintroduced without prior approval and became the template for the final bill. (In 1976, the Hart-Scott-Rodino Act was enacted to require prior notification of mergers and eventually led to the merger review process now familiar to practitioners.)

Beyond closing the asset loophole, Congress amended Section 7 to make plain that it applied to not only horizontal mergers but also vertical and conglomerate mergers.⁴⁷ In so doing, the intent was that the underlying substantive standard no longer be interpreted under the Sherman Act's rule of reason.⁴⁸ Instead, the analysis was to focus on probabilities, not certainties—in this case, whether a merger would probably be anticompetitive.⁴⁹ Otherwise, the substantive statutory language remained unchanged from 1914 and focused on the underlying economic question of whether a merger harms competition.⁵⁰

That framework is consistent with the consumer-welfare approach the agencies and courts have used since the 1980s and the leading antitrust treatise endorses⁵¹—the “failed experiment” that the neo-Brandeisians deplore. As many have written, much of the congressional debate, however, was far more aggressive. Professor Derek Bok noted that the “curious aspect of the debates is the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency.”⁵² The Supreme Court referenced that Congress was concerned not only about concentration “but also of the threat to other values a trend toward concentration was thought to pose.”⁵³ The Phillip Areeda–Herbert Hovenkamp treatise observes that

problematically, a fair assessment of the congressional concerns articulated in Section 7's legislative history is that Congress's professed concern with the rising tide of industrial concentration seemed to camouflage a more general concern with the protection of competitors rather than, or even at the expense of, competition.⁵⁴

The statements and arguments of the major proponents illustrate the debate's underlying populist tone. Rep. Celler, floor manager and sponsor of the bill that became the amended Section 7, argued that, without an amendment, “big business will be hellbent for more and more mergers.”⁵⁵ Kefauver, at that time a senator, warned about the specter of more mergers, decrying the evils of having one's life controlled by individuals who lived far away:

Shall we permit the economy of the country to gravitate into the hands of a few corporations, even though they may have very widespread stockholder distribution, with central-office managers remote from the places where their products are made, and the destiny of the people determined by the decisions of persons who they never see, or even know of?⁵⁶

There was even fear that increased concentration would transform America into a fascist or socialist state;⁵⁷ Adolf Hitler and Karl Marx “were no strangers to debates on antitrust legislation.”⁵⁸ Sen. Herbert O'Connor (D-MD), floor manager of the bill in the Senate, concluded the debate by asserting that the amendment was necessary to “protect and preserve the American system of free enterprise.”⁵⁹

As we will see, this populist undertone would become a dominant theme in court review of mergers for most of the next three decades, with unfortunate results.

Key Factual Assertions Underlying the 1950 Amendment Were Wrong. As the Supreme Court concluded, passage of the 1950 amendment reflected a fear that mergers led to increasing concentration:

The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers.⁶⁰

Specifically, the advocates for the 1950 amendment alleged certain key facts. Crucially, they claimed that concentration in the United States was high and, more troubling, rising,⁶¹ with a contemporaneous wave of mergers causing small businesses to disappear into larger firms.⁶²

These factual claims relied on the 1948 FTC study the Supreme Court referenced. The study found that the importance of mergers in "promoting concentration has never been more clearly revealed than in the acquisition movement that is taking place at the present time" and that the "outstanding characteristic of the current merger movement has been the absorption of smaller, independent enterprises by larger concerns."⁶³ From this factual premise, the FTC gloomily foretold that collectivism awaited the country unless the Clayton Act was amended to prevent large corporations from merging their way to economic domination:

No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in. The Commission believes that the economic forces, on which it has been basing its warnings, require that a definite choice be made. Either this country is going down the road to collectivism, or it must stand and fight for competition as the protector of all that is embodied in free enterprise. Crucial in that fight must be some effective means of preventing giant corporations from steadily increasing their power at the expense of small business. Therein lies the real significance of the proposed amendment to the Clayton Act, for without it the rise in economic concentration cannot be checked nor can the opportunity for a resurgence of effective competition be preserved.⁶⁴

Such was the populist thinking underlying the FTC study used extensively in the congressional deliberations. As the introduction to this chapter quotes, today's populists rely on this passage to support their calls for renewed action.

But there was one problem with the FTC study: It was wrong. Overall concentration was not increasing due to mergers. Just before final passage of the Clayton Act amendments, a February 1950 article by John Lintner and Keith Butters identified fatal problems with the study, causing them to conclude that their analysis “essentially reverse[d]” the FTC’s overall conclusion.⁶⁵

The authors reviewed the FTC’s and other data and found that “mergers were a *much less* important source of growth for large companies than for smaller companies.”⁶⁶ (Emphasis in original.) Even among the largest 1,000 firms, reported growth among the lower 500 by merger was greater than among only the top 500 firms.⁶⁷ Indeed, when concentration was measured among only the top 500 or top 1,000 companies (without including other companies), Lintner and Butters found that mergers actually reduced concentration, reflecting how merger activity among smaller firms reduced the share of the largest firms.⁶⁸ They also found that merger activity among the largest firms was negligible.⁶⁹

Importantly, overall merger activity during the 1940s was small relative to either the economy’s growth or firms’ internal growth.⁷⁰ Lintner and Butters found that all the acquisitions of the largest 100 manufacturing firms accounted for only 8.3 percent of their asset growth from 1939 to 1946.⁷¹ Professor Adelman similarly calculated that, while not more than \$5 billion in assets was involved in all 1940–47 manufacturing and mining mergers, the total assets of all corporations in these fields increased by at least \$50 billion, meaning firms’ internal growth swamped by at least 10 times any merger effects.⁷²

Moreover, various methodological issues should have tempered any reliance on the FTC’s findings. The study measured concentration by the share of assets held by large corporations, not more traditional antitrust metrics such as quantity of sales, revenues, or capacity. The value of assets can be difficult to measure and subject to numerous accounting problems.⁷³

Beyond that, the FTC used a measure of assets, what it called “net capital assets,” that accounted for only one-third of the assets in its data.⁷⁴ The FTC did not include such assets as cash, accounts receivable, or inventories in its tabulation of assets held. The assets that remained in the net-capital-assets tabulation were physical assets, precisely those most subject to vagaries of measurement and accounting conventions. As Professor Adelman observes, “The percentage of net capital assets is the best measure of concentration if and only if one wishes to maximize the probable error of the estimate.”⁷⁵

The FTC also made arbitrary decisions that were hard to justify. Under its net-capital-assets metric, the FTC found that corporations exceeding \$100 million in asset holdings accounted for 46.1 percent of asset holdings among manufacturing firms. It excluded inventories from its calculation, arguing that because the inventory numbers changed from year to year, inclusion would have overestimated concentration in the particular year measured.⁷⁶ Because including inventories tended to reduce the measure of concentration in the data, excluding inventories *had the opposite effect* of being conservative. As Adelman stated, “The FTC explanation can therefore be paraphrased as follows: to have used the estimate of 41.1 per cent would have resulted in an overestimate of the degree of concentration; *therefore*, we are using an estimate of 46.1!”⁷⁷ (Emphasis in original.)

Proponents of the legislation alluded to Lintner and Butters only briefly during the congressional debate, simply dismissing them.⁷⁸ Tellingly, after the 1950 amendment passed, the FTC’s economists acknowledged, quietly in a footnote, that Lintner and Butters were correct, stating, “If the Commission had made any general statement on this point, it would probably have concluded, based on its data, that the recent mergers have not substantially increased concentration in manufacturing as a whole.”⁷⁹

The FTC study also had an even more fundamental problem: Beyond the question of whether mergers were increasing concentration, there was no real evidence that concentration itself was increasing. Lintner and Butters found that the increase in aggregate industrial concentration in the data was miniscule—less than a 1 percent increase over eight years.⁸⁰ The Areeda-Hovenkamp antitrust treatise concluded that “to the extent Congress believed that the post–World War II American economy had experienced a rising tide of concentration, it was probably wrong. While firms had grown in size, the markets that they served grew as well.”⁸¹

Professor Adelman reached similar conclusions in 1951 when he reviewed the evidence to analyze changes in manufacturing concentration since 1901. In assessing whether any increase in aggregate concentration had occurred and recognizing the uncertainty given the limits in the data, he concluded: (1) “The odds are better than even that there has actually been *some* decline in concentration,” (2) it was “a good bet that there has been no actual increase,” and (3) “the odds do seem high against any substantial increase.”⁸² (Emphasis in original.) Thus, not only was there a lack of evidence for increased concentration in the 1940s, but the same general conclusion could also be reached for the first half of the century, after the substantial activity of the trusts decades before.

In 1960, Professor Bok concluded that the contemporary economic literature from the 1940s and 1950s did not find any trend toward increased concentration or harmful effects from mergers:

Subsequent research and analysis have largely confirmed the conclusion that the postwar merger movement had rather harmless effects. There is even a strong suspicion in some of these writings that concentration did not increase significantly from 1940 to 1947 in more than a few industries,

and certainly there is a clear consensus that overall industrial concentration did not rise by more than a point or two during this period. Indeed, very serious doubts have been raised as to whether concentration has increased at all since the formation of United States Steel at the turn of the century. Various writers have also come to the conclusion that the latter day mergers have also been more innocuous than their predecessors in terms of the motives leading to combination. Though it is generally conceded that the great combinations at the turn of the century were often the result of a desire to gain control of the market, the anti-competitive motive seems to have become increasingly rare in later years, having been replaced by a number of tax, managerial, and commercial considerations of rather neutral value from an antitrust standpoint.⁸³

If the goal of antitrust is to protect consumers and competition, not competitors, concentration is an imperfect proxy. The increased concentration in grocery retailing, caused by the chain-store revolution that A&P led, as discussed in the previous chapter, benefited consumers while harming less-efficient competitors. By focusing on the welfare of consumers, modern antitrust analysis, including for mergers, uses concentration data as a sometimes-important input, but not an end in itself. Big is neither inherently bad nor inherently good.

Moreover, when calculating concentration, the measure the FTC and Congress used in the 1940s—aggregate concentration—is of little utility. That measure asks what share of the total economy large corporations control. Proper antitrust analysis uses the economic specifics of the relevant market and the effects a merger or another practice has on competition in that market, not generalized populist misconceptions about the role of large firms in the economy. Thus, basing aggressive antitrust enforcement on aggregate concentration trends would be misguided, whether or not such data showed a significant trend toward increased concentration.⁸⁴

The Agencies and Courts Begin to Implement the Amendment: Brown Shoe

Although populist rhetoric during the amendment process relied on key mistakes, the actual statutory language hardly required implementing those mistakes into law. Nonetheless, the populist rhetoric and mistakes drove merger law for most of three decades. Populists opposed any merger that did not maintain industries with numerous smaller firms. The Supreme Court, enforcement authorities, and many district courts would take that proposal to extremes. Mergers between firms that combined for less than 10 percent of a market were stopped as inconsistent with the populist interpretation of the Clayton Act. The Supreme Court itself would condemn mergers in industries with thousands of firms if the number of firms was shrinking, an inevitable result as competition produced economies of scale and scope.

The result was a Section 7 case law about which Supreme Court Justice Stewart famously opined that the “sole consistency that I can find is that in litigation under § 7, the Government always wins.”⁸⁵ The bar was set very low for challenging mergers, and the Court would lower the bar again if necessary for the government to win. Opinions

that appear to defy any rational explanation followed. As William Kovacic and Carl Shapiro concluded, “Most commentators today share Stewart’s gloomy assessment of merger jurisprudence in the 1960s and view the Supreme Court’s antipathy toward mergers and doubts about market forces as indefensible.”⁸⁶ How did this happen? Only extreme, misplaced populism would seem to explain this sorry history.

The story began in court in 1955, when the DOJ challenged a shoe company merger between Brown Shoe and G. R. Kinney.⁸⁷ At trial, the court ruled for the DOJ, blocking the merger, leading to the first Supreme Court decision under the 1950 amendment. (At the time, trial court decisions involving the DOJ under the merger statute were appealed directly to the Supreme Court.)

Brown Shoe was the third-largest retailer nationwide, and it made about 4 percent of all shoes.⁸⁸ Kinney was the eighth-largest retailer and manufacturer, although it accounted for less than 2 percent of retail sales and was the manufacturer of only 0.5 percent of all shoes.⁸⁹ Moreover, manufacturing overall was not concentrated, as the four largest firms made 23 percent of the country’s shoes and the 24 largest firms accounted for only 35 percent of all shoes manufactured.⁹⁰ At retail, the two combined for 2.3 percent of all stores selling shoes.⁹¹

To analyze retail competition, it is well understood today that local or regional competition is what matters. The merging parties noted that even the modest retail national shares overstated the relevant competitive overlap, given a lack of regional or local competition and the different customer focus of the two businesses.⁹²

The 1950 amendment clearly applied to vertical mergers, and the industry was vertically integrated as shoe manufacturers were adding or acquiring shoe retailers.⁹³ As a company integrated vertically, it would shift some sales at its retail outlets toward the shoes it manufactured, although it also sold shoes from other manufacturers; 20 percent of shoes sold at the Kinney retail outlets, for example, were Kinney manufactured.⁹⁴ The president of Brown Shoe testified that one purpose of the deal was to increase the share of Brown-manufactured shoes sold in Kinney stores, and the share increased from 0 to 7.9 percent while Brown owned Kinney.⁹⁵

Despite vertical integration, the Supreme Court found no evidence that the changes increased concentration. Although the number of shoe manufacturers decreased from 1,077 in 1947 to 970 in 1954,⁹⁶ the share of sales accounted for by the largest four, eight, and 15 manufacturers actually *declined* by several percentage points. In other words, the market share of the biggest firms was going down, not up.⁹⁷

The DOJ nevertheless challenged the merger in both manufacturing and retailing. It argued that the combined share of 4.5 percent in shoe manufacturing nationally was illegal⁹⁸ and that the retail merger was illegal both horizontally and vertically,⁹⁹ stressing how it would foreclose rivals by “enhancing Brown’s competitive advantage.”¹⁰⁰ To the government, the harm a combined Brown-Kinney did to smaller rivals was a major sin. Throughout the case, DOJ attempted to show that vertical integration allowed the new firm to reduce retail prices as much as \$2 or \$3 per pair of shoes, a quite significant decrease in the 1950s.¹⁰¹

In ruling for the DOJ, the trial court viewed the merger as illegal precisely because the efficiencies from vertical integration would lower prices and thereby harm nonintegrated rivals:

The testimony in this case further shows that independent retailers of shoes are having a harder and harder time in competing with company-owned and company-controlled retail outlets. National advertising by large concerns has increased their brand name acceptability and retail stores handling the brand named shoes have a definite advertising advantage. Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control and price control. *These advantages result in lower prices or in higher quality for the same price and the independent retailer can no longer compete* in the low and medium-priced fields and has been driven to concentrate his business in the higher-priced, higher-quality type of shoes—and, the higher the price, the smaller the market.¹⁰² (Emphasis added.)

The trial court found the vertical merger illegal nationally, but it rejected illegality nationally as a horizontal merger in manufacturing based on the minimal national overlap.¹⁰³ The court did oppose the horizontal merger because of local retail overlaps.

The Supreme Court affirmed the finding that the retail merger was illegal both vertically and horizontally. The Court found the primary vice of the vertical merger was that it could “clog” competition by foreclosing rivals and depriving them of a “fair opportunity to compete.”¹⁰⁴ The extent of foreclosure or clogging was measured primarily by “the size of the share of the market foreclosed,”¹⁰⁵ combined with an “examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe.”¹⁰⁶

There was no dispute that foreclosure should be assessed nationally. To try to highlight the degree of foreclosure, the Court stated that because Kinney “owned and operated the largest independent chain of family shoe stores . . . no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure.”¹⁰⁷

Yet the Court’s own recitation of the facts showed that Kinney sold 1.2 percent of retail shoes premerger, of which 20 percent were its own brand, representing less than 1 percent of all sales nationally. Thus, if Brown Shoe displaced all those sales through requiring sales of only its shoes in Kinney stores, which was not the practice of any vertically integrated shoe company, foreclosure would be less than 1 percent. There is no basis for finding that such minimal (and hypothetical) foreclosure could possibly harm competition. As the leading antitrust treatise states: “It cannot be emphasized too strongly that ‘small’ foreclosures cannot impair competition.”¹⁰⁸ When it owned Kinney stores, Brown Shoe did not displace all of the other 80 percent of shoes sold at Kinney

stores with its own shoes. The share of Brown-made shoes increased to only 7.9 percent of Kinney retail sales, meaning actual foreclosure was less than 0.1 percent.

Such an inordinate concern with miniscule foreclosure reflected the populist focus on protecting independent suppliers from competition, discussed in the previous chapter with the rise and enforcement of Robinson-Patman Act and the disapproval of vertically integrated firms using internal sources of supply, then called “self-dealing,” today often called “self-preferencing.”

There is no economic basis for this hostility toward internal supply of retail outlets. Indeed, it is standard economics that vertical integration eliminates double marginalization—the multiple economic markups along a vertical chain of production, which is an important source of vertical integration’s potential benefits.¹⁰⁹ There also is no basis for simply presuming that foreclosure from self-dealing harms competition, as “even in the case of complete self-dealing . . . foreclosure has no anticompetitive effect whatsoever in competitive markets and often little effect in oligopolistic markets.”¹¹⁰ Even when preexisting pricing is noncompetitive, self-dealing can disrupt oligopolistic coordination and thereby facilitate lower pricing.¹¹¹ And should foreclosure harm any smaller firms, “injury to competition is not obvious and an additional explanation must be supplied” to oppose the practice.¹¹²

That this populist concern with self-dealing would be imported into vertical merger law was presaged in the 1958 Bethlehem Steel case.¹¹³ There, Youngstown Sheet and Tube, the company selling to Bethlehem Steel, did not vertically integrate into certain lines of finished steel production, including wire rope. Instead, Youngstown both supplied wire rods as inputs to wire rope production by independent firms and bought some of the wire rope production from these independent firms for its own resale (about 1.3 percent of total rope production).¹¹⁴

The allegation was that the independent suppliers would be foreclosed if Bethlehem displaced these Youngstown purchases with its own production. Without explanation, the court characterized this 1.3 percent foreclosure as a “significant restriction.”¹¹⁵ Regarding Youngstown supplying steel wire rod input for independent wire production, the court declared, again without explanation, that “from a competitive standpoint, the most desirable source of . . . wire . . . is a . . . wire manufacturer, such as Youngstown, which does not compete in the manufacture and sale of wire rope.”¹¹⁶ Here, in stark terms, is the populist belief that it is preferable (“desirable”) for its own sake that nonintegrated firms not have to compete with vertically integrated ones.

In *Brown Shoe Company v. United States*, beyond finding that such trivial foreclosure was sufficient to find a vertical merger illegal, the Court’s focus on other “economic and historical factors” shows a populist focus on protecting smaller businesses, not consumer welfare and competition. The Court stated that “not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress.”¹¹⁷ The Court thus argued that the statutory language should be interpreted to avoid “adverse effects upon local control of industry and upon small business.”¹¹⁸

Such sentiments reflected the populist tradition of protecting small business and local community control. As Professor Bok noted, the congressional debates on the 1950 amendments raised various “sociological” arguments about the effects of concentration, but there was a paucity of remarks about the economic effects on price, quality, and innovation.¹¹⁹ In the end, nevertheless, the actual statutory language lacks any sociological element. And there is no coherent basis to encompass such values in merger analysis or a reason for believing that “preserving large numbers of small inefficient firms at the expense of vastly larger numbers of even smaller consumers” could achieve these values.¹²⁰ That is one reason why the Areeda-Hovenkamp antitrust treatise discusses how noneconomic antitrust goals are “incoherent and indefensible”¹²¹ and argues that Section 7

is properly viewed, not as a vehicle for the direct preservation of alleged noneconomic values by maintaining large numbers of firms, but as a vehicle for contributing to that goal by preventing those mergers that have anticompetitive effects in the economic sense.¹²²

The Supreme Court also worried about a “trend toward concentration in the industry.”¹²³ In fact, the data showed no trend toward concentration in shoes, only a trend toward vertical integration.¹²⁴ Such a trend has no adverse competitive implications; indeed, if anything, as the Areeda-Hovenkamp treatise discusses, a “trend toward vertical integration indicates only that vertical integration offers reduced costs.”¹²⁵ But from the Court’s populist perspective, a trend toward vertical integration was bad because it harmed independent, smaller manufacturers.¹²⁶

Finally, reflecting the attacks on retail chains discussed in the previous chapter, the Court evinced a concern about the power of large national chains and suggested that limiting their power might be sufficiently important even if only a small share of the market is foreclosed:

Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition. Testimony in the record from numerous independent retailers, based on their actual experience in the market, demonstrates that a strong national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories. A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers.¹²⁷

Here, the Court's majority doubts whether smaller independent firms can compete with the lower prices and more attractive inventories national chains offer. Similarly, Justice John Marshall Harlan, concurring on the merits of the decision, voiced concern that the merging parties' integration would threaten smaller competitors through lower prices:

With a large manufacturer such as Brown behind it, the Kinney chain would have a great competitive advantage over the retail stores with which it vies for consumer patronage. As a manufacturer-owned outlet, the Kinney store would doubtless be able to sell its shoes at a lower profit margin and outlast an independent competitor.¹²⁸

Well aware of this populist view, the merging parties argued that the acquisition's vertical integration would *not* lead to efficiencies.¹²⁹

The majority did not ignore the implication that it preferred higher prices and less consumer welfare to protect small businesses. The Court tried to rationalize its view:

Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.¹³⁰

To quote the Areeda-Hovenkamp treatise, "This passage is self-contradictory on its face: lower cost distribution is an objective of competition and inconsistent with the protection of less efficient rivals."¹³¹ Indeed, the Court basically implies that a merger that would lower costs and prices through vertical integration would still be condemned if it is contrary to the populist goal of decentralization. Such thinking would permeate subsequent litigation for years. At the FTC, particularly, the argument that vertical integration lowers prices and forecloses rivals from the market, and thus should lead to illegality, underscored numerous cases through the 1970s.¹³²

The Court's vertical analysis most directly reflected populism, but the horizontal discussion would also lead to problems in future cases. The DOJ did not appeal the trial court's conclusion that the merger did not violate Clayton Act Section 7 in a national manufacturing market. Instead, the horizontal issue before the Court was whether the merger reduced local retail competition. If one assumes the markets were defined properly and entry at the local level would not occur by other chains in response to the exercise of market power and higher pricing,¹³³ the record then suggests a handful of smaller, local markets in which the combined share could raise issues under modern standards.¹³⁴ The modern approach to such local overlaps would be to allow the overall

merger to proceed, subject to divesting one of the parties' stores in the overlapping location to a third-party buyer.

But the Court's discussion of horizontal retail overlaps went much further. In discussing the local overlaps as a basis for finding the merger illegal, the Court listed 118 separate cities where the combined shares exceeded 5 percent for either men's, women's, or children's shoes and 47 cities where the share exceeded 5 percent in all three lines.¹³⁵ A combined retail share of 5 percent could not raise any meaningful competitive issues, yet the Court declared it could not approve such a merger.¹³⁶ That declaration would form the starting point and standard for the many merger cases to come.

Warren Court Merger Law Develops: "The Government Always Wins"

The next Supreme Court decision, in *United States v. Philadelphia National Bank*, involved significantly higher market shares—at least 30 percent, with an opinion not as overtly populist but instead relying on market-share presumptions then favored in antitrust economics.¹³⁷ These presumptions were broadly consistent with populism, but they did not require abandonment of consumer welfare. Yet the court made clear subsequently that consumers would be abandoned, finding virtually any pretext to support the government's decision to prosecute mergers that, even at the time, were widely understood as not able to harm consumers. We start with *Philadelphia National Bank* and then find decision after decision of a decidedly populist bent.

The *Philadelphia National Bank* Framework for Horizontal Mergers. *Philadelphia National Bank* created the legal framework for merger review that remains relevant today, especially in litigation. Under the decisions, a merger is presumptively illegal if it "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, [because such a merger] is so inherently likely to lessen competition substantially."¹³⁸ The Court stated that such a presumptively illegal merger "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."¹³⁹ As the Court concluded, this framework for litigation dispenses with "elaborate proof of market structure, market behavior, or probable anticompetitive effects."¹⁴⁰ A simple approach was justified in significant part on the false populist factual predicate in the congressional history of a trend toward concentration.¹⁴¹

As a practical matter, the *Philadelphia National Bank* framework has meant that once a market is defined and market shares calculated, the merger will be found presumptively illegal if the shares meet certain thresholds. Within this framework, over the past 60 years, once the presumption has been applied, only rarely have analyses of other competitive factors saved a merger in court. Consequently, merger litigation has focused on defining the market and firm shares in that market.

During the 40 years the neo-Brandeisians reject, the actual internal merger review process at the antitrust agencies was far more complex and nuanced than a simple structural approach based on market-share screens.¹⁴² The vast majority of antitrust

reviews were resolved at the agency level, and actual merger reviews were thus far more sophisticated than the simple *Philadelphia National Bank* framework.

Nonetheless, if an agency challenged a merger and a remedy could not be agreed on with the merging parties—and settlements happened much more frequently than litigation—lawsuits over the merger usually devolved to the *Philadelphia National Bank* framework. At that point, the FTC and DOJ typically downplayed sophisticated analysis and argued that simple merger screens create a presumption of illegality under *Philadelphia National Bank*. Because those screens can determine outcomes, merging parties often defended with issues such as market definition, because the government must establish them before the *Philadelphia National Bank* presumption could be invoked to control the case.

The *Philadelphia National Bank* framework is not itself inherently populist. Many legal and economic commentators support a structural approach to merger litigation under Section 7; the Areeda-Hovenkamp treatise, for example, argues for simplification.¹⁴³ The potential problem, however, is that simplifying merger review to focus mainly on narrow issues can preclude a detailed analysis of overall competitive effects. To minimize error, the framework depends greatly on properly defined markets and setting appropriately the market-share thresholds for applying the presumption of illegality. Otherwise, the simplified framework can greatly over-deter pro-competitive and efficient mergers.¹⁴⁴

The *Philadelphia National Bank* framework therefore is susceptible to abuse, even on its own terms. The Supreme Court exacerbated the problem in the 1960s and early 1970s by applying a populist agenda to the framework. This agenda could be effectuated through arbitrary market definitions so that the calculated market shares satisfy the thresholds. Nevertheless, the market-share thresholds themselves were the main problem with application of *Philadelphia National Bank*. As Areeda and Hovenkamp summarize:

Beginning with *Philadelphia National Bank*, later decisions made “undue” or “substantial” market shares presumptive proof of illegality, apparently rebuttable only by proof that the acquired firm were a “failing company.” Moreover, the threshold of “substantial” aggregate shares fell quickly from the 30 percent figure in *Philadelphia National Bank* to 7 or 8 percent in *Von’s Grocery* and to 4.5 percent for a majority of the Court in *Pabst Brewing*. Thus the Department of Justice in its 1968 Merger Guidelines could confidently state that absent a “failing company” defense, it ordinarily would challenge a merger involving two firms each with 4 percent or more of a highly concentrated market, or 5 percent or more in any market.¹⁴⁵

No rational basis exists for such low market-share thresholds, as later adjustments to the merger guidelines reveal. After discussing problematic market definition cases, I

discuss how populism drove the Court to find illegality even with very low market shares.

Achieving Populist Goals Through Dubious Market Definition. The *Philadelphia National Bank* framework hinges on defining markets correctly. Otherwise, a merger can be found presumptively illegal based on shares calculated for an arbitrary and meaningless market. Yet the populist focus on deconcentration—and its opposition to mere bigness—does not rely on the technocratic exercise of defining economically correct markets. If the Supreme Court thought that size itself was a problem, then it could implement its populist instincts through inaccurate market definition.

That is what happened in the next two Supreme Court Section 7 cases after *Philadelphia National Bank*. Even with the *Brown Shoe* standard that a low market share was sufficient to find illegality, the companies in the cases before the Court lacked sufficiently high market shares under a proper market definition, and the government initially lost both when the trial court rejected the proposed market definition. Because the cases involved large companies and the Court was inclined to oppose bigness for its own sake regardless of whether the merger harmed consumers, the Court gerrymandered the market definitions to reverse the trial courts.

*United States v. Aluminum Company of America*¹⁴⁶ involved the Aluminum Company of America's (Alcoa) 1959 purchase of Rome Cable. Alcoa made and sold aluminum-based products, including aluminum wire and cable for conducting electricity; it had no presence in copper wiring and cable. Alcoa was the leading producer of aluminum, but its share of aluminum production had declined materially, from 52 percent in 1948 to 36 percent in 1960; its share of aluminum cable and wire had declined similarly, from 42.8 percent to 23.5 percent.¹⁴⁷ Alcoa's share was declining not only because of entry into aluminum production and the finished product business but also because demand was shifting toward a form of covered or insulated wire for which it lacked the proper manufacturing expertise.¹⁴⁸

Rome Cable, by contrast, was primarily a copper-based company, one of the 10 largest manufacturers of copper-based cable and wire for conducting electricity.¹⁴⁹ Besides its copper-based products, it also owned a small aluminum-based cable and wire manufacturer.¹⁵⁰ Unlike Alcoa, Rome Cable was expert in manufacturing the insulated cable wire that was growing in demand.¹⁵¹ As the trial court and then Justice Stewart found, the deal was not designed to enhance market power, but instead to allow Alcoa to gain Rome's expertise and diversify its product line into the copper-based cable and wire products in which it had no presence.¹⁵² The DOJ challenged the deal nevertheless, losing at the trial court.

Reversing that decision, the Supreme Court began by characterizing Alcoa generally as a "leader in markets in which economic power is highly concentrated."¹⁵³ With this pejorative characterization of Alcoa, the Court then did a two-step charade on market definition to find sufficient market shares for a violation.

At trial, there was no dispute that bare aluminum cable (used primarily in overhead transmission lines) was a market separate from copper-based conductor products that did not compete in such applications; Rome Cable's trivial 0.3 percent share of that market was insufficient for finding a violation of the Clayton Act.¹⁵⁴ With respect to conductor wire and cable, there was also no dispute that aluminum and copper-based products competed in the same market. Given the hundreds of competitors, the trial court found that Alcoa and Rome Cable's combined presence was too small to find a substantial lessening of competition to violate Section 7; the DOJ did not appeal this finding.¹⁵⁵

To find a violation, the Court needed to define some market in which the merging parties had a sufficient presence. First, to remove from the denominator the copper products that Alcoa did not sell, it found there were separate submarkets for aluminum and copper conductors, although there was no dispute that there was interchangeability in production between these products.¹⁵⁶ The Court itself had found in *Brown Shoe* that such interchangeability should be relevant in market definition,¹⁵⁷ but it ignored the interchangeability here.¹⁵⁸

Second, having removed copper-based products from the share equation, the Court lumped together the now-separated aluminum conductor market with the bare aluminum cable market to create an overall aggregated aluminum conductor market.¹⁵⁹ As Areeda and Hovenkamp observe, the "Court's aggregation into one 'market' of bare and insulated aluminum conductor in order to show large shares for the merging firms was *indefensible*."¹⁶⁰ (Emphasis added.) Justice Stewart noted, in dissent, that not even the DOJ claimed bare and insulated aluminum competed with each other, and different facilities and engineering skills were needed to make them.¹⁶¹

Under the Court's indefensible and artificial "aluminum conductor" market definition, while Alcoa had a 27.8 percent share, Rome Cable's share still was only 1.3 percent, given its small presence in aluminum-based products. By modern standards, such a small acquisition by a nondominant firm would not raise significant concerns. Yet the Supreme Court was bent on preventing large firms like Alcoa from getting larger. The *New York Times* report on the case understood the bias against size:

The case seemed, therefore, to fit in with a new doctrine that antitrust observers believe has been developing. This is that the biggest companies in their fields will simply not be permitted to expand further by acquisition of other companies, however small.¹⁶²

United States v. Continental Can Company, the next Supreme Court Section 7 case, used, if possible, even worse sleight of hand to find illegality.¹⁶³ Continental Can, a leading supplier of metal containers (the Supreme Court called it "dominant") with about a 33 percent share of metal containers sales,¹⁶⁴ acquired Hazel-Atlas Glass Company, the third-largest provider of glass containers, with around a 10 percent share.¹⁶⁵ Because Continental Can sold no glass containers while Hazel-Atlas sold no metal ones, a market defined as glass or metal containers separately would have no competitive overlap. Sellers of metal and glass containers, however, did compete to

persuade some end-use customers to use metal versus glass or vice versa. In this competition, however, metal and glass also competed with other types of containers, most prominently plastic.

At the trial, the DOJ did not argue its Section 7 case under the market-share rubric subsequently used in *Philadelphia National Bank*. The DOJ instead stated it had “omit[ted] analysis of statistics regarding market share simply because those traditional yardsticks are generally unavailable to measure the full consequences which an inter-industry merger would have on competition.”¹⁶⁶ The DOJ then attempted to prove its case by evidence it stated showed substantial competition between metal and glass container companies. The government’s theory was that it could prove its case simply by showing there was such competition, the metal and glass industries were separately highly concentrated, and the merging parties were each dominant in their respective industries.¹⁶⁷

The trial court rejected those arguments, concluding that the government had not shown a reasonable probability of substantial anticompetitive effects.¹⁶⁸ Among other problems, while metal and glass containers competed for a variety of end-use customers, there was little evidence that the merging parties overlapped significantly in such interindustry competition.¹⁶⁹ The trial court viewed the merger benignly, stating that Continental Can had been attempting to diversify its packaging capabilities with recent acquisitions, acquiring Hazel-Atlas further diversified it into glass containers, and the DOJ had not shown that the acquisition would harm competition.¹⁷⁰ Observing the government’s approach to the case, the trial court also reflected that the DOJ seemed more concerned with mere size and whether large companies might gain an advantage than whether consumers and competition would be harmed:

The Government views with alarm every advantage which Continental or Hazel Atlas might gain as a result of the merger and sees in each the spectre of anticompetitive effects. But the mere fact that the competitive position of acquiring or acquired companies may be improved by a merger does not establish that the merger is harmful or has any of the proscribed anti-competitive effects. The test is not whether, as a result of a merger, either the acquired or acquiring company obtains advantages which help it to compete more effectively. Obviously were this so, any merger permitted under the Act could have no sound business justification. The object of the Clayton Act is not to discourage businesses from taking steps to compete more effectively but to keep competition vigorous and effective. Opportunities to offer improved products, to make cost reductions or to give better service to customers are not in themselves indications of anti-competitive effects.¹⁷¹

On appeal, the Supreme Court reversed this decision, finding the merger illegal, although it did not accept DOJ’s theory. Instead, it decided to fit the case within *Philadelphia National Bank* by constructing an artificial market definition consisting of the sales of only metal and glass containers.¹⁷² In a market so defined, Continental Can

had a 21.9 percent share and Hazel-Atlas had a 3.1 percent share,¹⁷³ numbers sufficient to find the merger illegal under *Philadelphia National Bank*.

In dissent, Justice Harlan noted that the government had not even argued this as a proper market definition at the trial and was not suggesting seriously it was proper on appeal.¹⁷⁴ The majority's approach, he argued, was arbitrary in including metal and glass but excluding other competitive packaging, such as plastic, as "glass and metal containers form a distinct line of commerce only in the mind of this Court."¹⁷⁵ The leading treatise similarly notes:

Shares of an unduly broad "market" can mislead concerning the competitive significance of a merger between two producers operating in different geographic or product markets. Indeed, such shares may have no competitive significance at all. A merger of two firms operating in different but related markets often tempts the enforcement authorities to amalgamate those markets, to treat the merger as horizontal, and to treat the merging parties' shares of the amalgamated market as if an obviously meaningful market were involved. The Supreme Court did so in *Continental Can*. In judging a can producer's acquisition of a bottle maker, the Court created a "market" for glass and can containers, ignoring end uses and other containers.¹⁷⁶

Justice Harlan called the majority's market definition exercise one in which it

chooses instead to invent a line of commerce the existence of which no one, not even the Government, has imagined; for which businessmen and economists will look in vain; a line of commerce which sprang into existence only when the merger took place, and will cease to exist when the merger is undone.¹⁷⁷

The Court's opinion, unfortunately, did show the malleability of the *Philadelphia National Bank* framework to achieve populist ends. In markets where the merging firms overlap, setting market-share thresholds very low achieves the populist objection to bigness, as happened in *Brown Shoe* and subsequent case law discussed below. Yet because the Court objects to bigness even when the merging firms were large but did not significantly overlap, it could simply conjure market definitions to achieve the desired market shares to block mergers involving large firms. Justice Harlan concluded that the "Court's spurious market share analysis should not obscure the fact that the Court is, in effect, laying down a 'per se' rule that mergers between two large companies in related industries are presumptively unlawful under § 7."¹⁷⁸

Achieving Populist Goals by Applying *Philadelphia National Bank* to Low Market Shares. While *Rome Cable*, as the case is commonly known, and *Continental Can* hinged on market definition, in its next two cases, the Supreme Court lowered the share thresholds dramatically to apply the *Philadelphia National Bank* presumption of illegality. Although *Brown Shoe* found the merger illegal based on analyzing the overall effects of combined market shares as low as 5 percent, *Philadelphia National Bank* applied a

presumption of illegality to a merger with a combined market share of at least 30 percent. These next two cases would lower the *Philadelphia National Bank* threshold for finding a merger presumptively illegal to the 5 percent range that was sufficient to find a substantial lessening of competition in *Brown Shoe*.

Lowering the share threshold would have a much more practical effect than did manipulated market definitions. Imposing a populist vision against bigness through arbitrary market definition requires dubious behavior by a court, bordering on bad faith. In both *Rome Cable* and *Continental Can*, the trial court found the merger legal, and the Supreme Court reversed that decision through defining implausible, alternative markets. In these cases, a populist vision was only assured through Supreme Court intervention. By contrast, when the Supreme Court advanced populism by establishing that mergers are presumptively illegal with combined shares as low as 5 percent, the lower courts and enforcement agencies could apply such “tests” mechanically.

United States v. Von’s Grocery Company followed *Rome Cable* and *Continental Can*,¹⁷⁹ when the DOJ sued to block Von’s Grocery’s 1960 acquisition of Shopping Bag Food Stores, both of which were grocery store chains in metropolitan Los Angeles.¹⁸⁰ After the district court ruled for the merging parties,¹⁸¹ the Supreme Court reversed that decision in 1966, in likely its most populist Section 7 ruling.

Von’s was the third-largest grocery store chain in Los Angeles, Shopping Bag was the sixth, and together their combined share was only 7.5 percent of all groceries sold in Los Angeles.¹⁸² Dozens of grocery store chains operated in Los Angeles, along with thousands of single stores.¹⁸³ There was no evidence presented that Los Angeles lacked grocery stores or would in the future because of the acquisition.¹⁸⁴

While lower courts would read *Von’s Grocery* consistent with lowering the share percentage thresholds under *Philadelphia National Bank* to single digits, the majority opinion did not rely on the presumption. Instead, the opinion was pure populism, emphasizing the decline of individual stores in Los Angeles and the rise of grocery chains and supermarkets. For the Court, the key fact was that “the number of owners operating single stores in the Los Angeles retail grocery market decreased from 5,365 in 1950 to 3,818 in 1961” and that by 1963 “the number of single-store owners had dropped still further to 3,590.”¹⁸⁵ Simultaneously, grocery store chains were becoming more prevalent. To the Court, “powerful business combinations” were driving out of business “small dealers and worthy men.” These trends in the Los Angeles grocery store business increased the “concentration of economic power in the hands of a few,” contrary to a desire to “preserve competition among a large number of sellers.”¹⁸⁶ Such “fear of the evils which flow from monopoly,” the Court argued, was why Congress amended Section 7.¹⁸⁷

In reality, the trends on which the Court focused simply reflected technological change and cost efficiency, not the evils of monopoly and concentration of economic power. Thirty-three years before, these same phenomena led to the attack on A&P and the

passage of the Robinson-Patman Act, explained in the previous chapter. Nowhere does the majority grapple with the reality that it was more efficient to operate larger chains and that consumers preferred larger chains' offerings. As Justice Stewart noted in his dissent, the Court's decision was simply a populist attempt to turn back the clock:

Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so-called "Mom and Pop" grocery stores—the bakery and butcher shops, the vegetable and fish markets—that are now economically and technologically obsolete in many parts of the country. No action by this Court can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway. The transformation of American society since the Second World War has not completely shelved these specialty stores, but it has relegated them to a much less central role in our food economy. Today's dominant enterprise in food retailing is the supermarket. Accessible to the housewife's automobile from a wide radius, it houses under a single roof the entire food requirements of the family. Only through the sort of reactionary philosophy that this Court long ago rejected in the Due Process Clause area can the Court read into the legislative history of § 7 its attempt to make the automobile stand still, to mold the food economy of today into the market pattern of another era.¹⁸⁸

Beyond its paean to the past, other problems with the opinion were numerous. Crucially, no economic basis existed to believe that an industry with this many sellers could have noncompetitive behavior. As the Areeda-Hovenkamp treatise notes:

Reducing the numbers of sellers in a market from 1,000 to 100 or even to 50 is not an economically meaningful increase in concentration. Fifty firms are far too many for recognized interdependence or for other than the most overt and readily detectable collusive price fixing.¹⁸⁹

Indeed, this problem refutes *Brown Shoe* and its belief that a 5 percent combined share was problematic. If an industry had 20 firms, each with a 5 percent share, then "tacit collusion would be highly unlikely to succeed."¹⁹⁰

The majority opinion also "gave no weight to apparently easy entry into food retailing."¹⁹¹ Los Angeles was booming, with firms opening new grocery stores to meet the growing demand.¹⁹² Even if the acquisition had a meaningful effect on concentration, no anticompetitive strategy to raise price could have succeeded in that environment.

Finally, the Court defined the geographic market as the entire Los Angeles metropolitan area, even though consumers do not drive across the whole area to get groceries. The district court found that Von's stores were in the southern and western parts of Los

Angeles, while Shopping Bag was more in the north and east, meaning even the 7.5 percent share calculation greatly exaggerated the extent of the overlap.¹⁹³

It was *Von's Grocery* that prompted Justice Stewart's famous quip that the "sole consistency that I can find is that in litigation under § 7, the Government always wins."¹⁹⁴ *Von's Grocery* is widely regarded as the nadir of the Supreme Court's Section 7 rulings and has had few defenders. Even Tim Wu, leading neo-Brandeisian and one of the likely drafters of "the failed 40 years" theme, rejects this decision.¹⁹⁵

Thus it was surprising that new Assistant Attorney General Jonathan Kanter, in criticizing the consumer-welfare standard important to the past 40 years, cited *Von's Grocery*.¹⁹⁶ One cannot tell whether he was consciously endorsing the opinion's controversial sweep or was ignorant of the implication of using such a reviled case. Either reason is troubling. Consciousness in the face of *Von's Grocery's* widespread opprobrium would be extreme conduct; ignorance would reveal neo-Brandeisians' support of "traditions," the implications of which they do not understand fully.

The next ruling after *Von's Grocery*, *United States v. Pabst Brewing Company*, was also deeply problematic.¹⁹⁷ Pabst, the 10th-largest American brewer, acquired Blatz Brewing, the 18th largest, in 1958.¹⁹⁸ The nationwide overlap was minimal, although the two companies did overlap significantly in Wisconsin. When the trial court ruled that the merger did not violate Clayton Act Section 7, the Supreme Court reversed the decision and found the acquisition illegal.

In *Pabst*, the problem was less the rejection of the trial court's decision than it was the Supreme Court's rationale. Even Justices Stewart and Harlan concurred in the result, agreeing that the acquisition raised some significant issues and the district court should not have dismissed the case mid-trial.¹⁹⁹ The Supreme Court once again found a "trend toward economic concentration" based merely on the decline in the number of firms, from "714 in 1934 to 229 in 1961, and the total number of different competitors selling beer ha[ving] fallen from 206 in 1957 to 162 in 1961."²⁰⁰ Even with the decline, such numbers are too high to sustain plausible theories of competitive harm.

Such trends are meaningless without understanding their source and whether they allow beer companies to lower costs and compete more effectively. In fact, the Court acknowledged that there might be reasons firms were growing, independent of merger activity.²⁰¹ After stating that it would be "fantastic" to assume mergers were not part of the cause, the Court stated it did not matter, based on the claim that Congress had intended the 1950 Clayton Act amendments to fight such trends and protect small businesses:

Many believe that this assumption of Congress is wrong, and that the disappearance of small businesses with a correlative concentration of business in the hands of a few is bound to occur whether mergers are prohibited or not. But it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are

forbidden, which in effect the courts would be doing should they now require proof of the congressional premise that mergers are a major cause of concentration. We hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be.²⁰²

Here, the FTC's flawed 1948 analysis continued to have impact two decades later, although long discredited and acknowledged even in the FTC as mistaken. The Court rejected any challenge to a premise that mergers were a major cause of concentration because, it stated, Congress had believed so in 1950. As problematic as reliance on false factual predicates from two decades earlier may have been, what was to have a more precedential and practical effect was that the Court found that the market shares in any of the proposed geographic markets were sufficient to find the merger illegal under Clayton Act Section 7.²⁰³ That meant that small combined market shares of only 4.5 percent nationwide were sufficient to find illegality.²⁰⁴ Combined with the 7.5 percent share in *Von's Grocery*, the *Philadelphia National Bank* threshold for presumptive illegality had plummeted.

Von's Grocery and *Pabst Brewing* were the peak of Supreme Court populism in merger cases, with the effect felt for years. The Areeda-Hovenkamp treatise summarized the incoherence of Warren Court precedent:

It is difficult to derive clear rules from these cases, even if one were to treat as jest Justice Stewart's conclusion that the only consistency in the cases was that the government always won. The opinions do not adequately describe either the relevance of a trend toward concentration or how a trend affects the market-share size that will be taken as presumptive proof of illegality. The market-share figures are not tied to any clearly articulated levels of concentration. And, with no case raising the point, there is no strong clue as to what aggregate shares would be presumptive proof of illegality in a relatively unconcentrated industry with no concentration trend.

In sum, the reliance on concentration information in these cases seems quite unfocused and ad hoc. Further, the Court clearly found cause for concern and even alarm at concentration ratios that today are found to be quite modest.²⁰⁵

The Triumph of Populism

Whether economically coherent or not, the combination of *Philadelphia National Bank's* presumption of illegality with very low market shares when applying that threshold based on the populism underlying *Brown Shoe*, *Von's Grocery*, and *Pabst Brewing* effectively made mergers easy to challenge. The effects of these rulings became evident both in the DOJ's "1968 Merger Guidelines" and the case law.

The “1968 Merger Guidelines” were the initial guides from the DOJ (the FTC did not participate) and reflected the recent Supreme Court cases. The 1968 guidelines followed the *Philadelphia National Bank* framework and focused on market structure—that is, concentration as measured by market shares in defined markets subject to substantial entry barriers.²⁰⁶ This structural analysis was to be conclusive in all but “exceptional circumstances,” with efficiencies generally rejected as irrelevant.²⁰⁷ In “highly concentrated” markets (defined as markets where the four largest firms had a combined share of at least 75 percent), mergers between firms each with at least a 4 percent share (8 percent combined) would ordinarily be challenged. In markets not “highly concentrated,” mergers between firms each with a 5 percent share (10 percent combined) would ordinarily be challenged.²⁰⁸

These ultralow thresholds are slightly less aggressive than in *Von’s Grocery* and *Pabst Brewery*, but they are still incoherent under modern economics and were hardly demanded under the economics of the day.²⁰⁹ Populism, not a concern for economics or consumer welfare, would appear to explain these standards. Subsequently, the guidelines were adjusted with the evolution of economics and agency practice. For example, the “1968 Merger Guidelines” definition of a highly concentrated market, based on four firms having a 75 percent share, would equate roughly to a Herfindahl-Hirschman index (HHI) measure of slightly over 1,400.²¹⁰ Beginning with the “1982 Merger Guidelines” issued in the Reagan administration, 1,400 would only have been considered a “moderately concentrated” market; with the Obama administration’s 2010 guidelines, that HHI is now considered “unconcentrated.”²¹¹

Similarly, to view a merger between firms with 5 percent share as problematic is far from later guidelines. In the 1982 guidelines, Reagan DOJ antitrust chief William Baxter endorsed an approach that made a merger between any two firms in an industry with six equally sized firms the marginal case. In 2010, the Obama administration DOJ effectively reduced six to five, then four, and then three.²¹² Mergers between firms in an industry that measures 1,400 HHI would imply that the marginal case is an industry with somewhere around eight to seven equally sized firms.²¹³

The 1968 extreme view of merger enforcement, in both Supreme Court precedent and DOJ guidelines, supported years of mergers declared unlawful, even when doing so made little economic sense. One cannot do justice to all the cases that arose or the many pro-competitive mergers and acquisitions that were deterred or prevented long before reaching a court decision. Nevertheless, illustrative lower court opinions from this era include:²¹⁴

- *United States v. Atlantic Richfield Company*²¹⁵ found a merger illegal between the ninth- and 12th-largest competitors for gasoline in the southeastern United States, with a combined retail market share of 7.4 percent. The court noted that the combined shares in *Brown Shoe*, *Von’s Grocery*, and *Pabst*—5 percent, 7.5 percent, and 4.49 percent, respectively—were sufficient for illegality²¹⁶ and stated that the Supreme Court favored keeping a large number of small competitors in business.²¹⁷

- *Beatrice Foods Company v. Federal Trade Commission*²¹⁸ affirmed an administrative trial and FTC decision finding a merger between sellers in the paint roller and paintbrush markets illegal when the market shares were 10.7 percent and 9.9 percent, respectively.²¹⁹ Because of the existing precedent, the merging parties did not even attempt to argue that such low shares were insufficient to reduce competition substantially and based their merger defense on other arguments.²²⁰
- *Boyertown Burial Casket Company v. Amedco*²²¹ found a merger among casket suppliers summarily illegal both nationally and in the Los Angeles metropolitan area, where the combined market share of sales was 6 percent and 10.3 percent, respectively.²²² The court also found a trend toward concentration, because the number of casket suppliers had fallen from 571 to 450, and the four largest suppliers' share of 27 percent had increased to 36–37 percent.²²³
- *Federal Trade Commission v. PepsiCo*²²⁴ affirmed an administrative and FTC finding of a merger as illegal when PepsiCo acquired a very small competitor with a 1 percent share of a “non-cola” market and about a 0.3 percent share of a market with cola drinks. The court stated that the precedent supported illegality from eliminating a very small competitor when the overall number of bottlers had fallen from 5,400 to 2,300 since 1948.²²⁵

As such examples demonstrate, merger challenges arose and were upheld with little significant overlap or lessening of competition. Justice Stewart's lament notwithstanding, there was a rationale underlying the merger policy this chapter describes—populist hostility toward bigness. Moreover, in these cases, bigness hardly meant the “robber barons” of the gilded age or other such industrial giants; it merely meant size, and probably hundreds of American firms met that test.

Although the 1950 statute hardly required it, the Supreme Court for a time wrote this hostility into law, making it extraordinarily difficult for firms of significant size to acquire even noncompetitors, unless the deal escaped the government's purview in the days before businesses were required to notify the government of significant mergers to allow the antitrust authorities time to decide whether to challenge. This fear of bigness was amplified by the sentiments the FTC expressed, re-quoted by Chairman Cicilline to introduce this chapter and based on faulty analysis, as is so often the case with antitrust populists—both those today and their ancestral brethren whom they quote frequently and fondly.

The Supreme Court had another major card to play, a surprising one given its previous cases. In 1974, the government finally lost when the Court affirmed 5–4, in an opinion by Justice Stewart, a district court decision against the DOJ's attack on a merger of coal mining companies, despite combined market shares of 23 percent and 12 percent in relevant geographic markets and in industries that were highly concentrated by the standards of the day. The Court held that the merging companies had limited ability to compete aggressively for new business and thus their combined shares overstated the competitive significance of the merger at issue.²²⁶ Although the lower courts would turn against the FTC in merger cases by the end of the decade, as discussed in the

conclusion of this chapter, and the Supreme Court has long abandoned its populism of the 1960s to become a firm proponent of the consumer-welfare standard, its numerous antitrust decisions have not included any regarding merger substance for nearly 50 years.

To the Populists, Merger Efficiencies Were Bad, Not Pro-Consumer Benefits

The frequent hostility toward efficiency throughout this era provides additional evidence of the populist hold over merger law. As the leading treatise notes, “Several decisions from the Warren era seemed to condemn mergers precisely because they created efficiencies that would injure rivals.”²²⁷ The disfavor toward large firms becoming more efficient runs through the merger cases from this era. Efficiencies from greater scale and scope were considered bad, not good; as the Robinson-Patman Act showed, to the populists that was true whether the efficiencies were achieved through internal growth or acquisition.

This hostility led lawyers defending mergers to strange contortions before the antitrust agencies and courts.²²⁸ Merging parties were aware that the agencies and Supreme Court would react hostilely to any suggestion that the merged firm might increase share from being a better competitor; to that end, as noted above, Brown Shoe argued that vertical integration would not reduce costs. If a large firm attempting a merger was already more efficient through business success and internal growth, it would try to deny these facts, lest that be viewed as a strike against the merger. If a merger allowed a firm to become more efficient and lower prices, it would deny such a possibility, lest post-merger growth through lower pricing be viewed unfavorably because it would gain market share.

By the time merging parties were litigating cases before the FTC during the 1970s, merger review standards and the government approach to consumer welfare and efficiencies had badly deteriorated. One study of 18 1970s horizontal cases litigated to disposition found eight in which the existence of efficiencies was viewed as a basis for illegality—or a lack of efficiencies as a basis for legality.²²⁹ In not one of those 18 cases was the possibility of efficiencies even considered as supporting legality.²³⁰ When evidence of efficiencies existed, the FTC never attempted to weigh likely efficiencies against likely increases in market power to assess the overall effect.²³¹ As Professor Wesley J. Liebeler noted in 1981:

If both efficiency creation and facilitation of collusion are regarded as detrimental, the wonder is that respondents can ever win a merger case before the FTC. It is not surprising that most of them seem to believe that they must convince the Commission that the merger involves no possibility of increased efficiency to have even a chance to preserve the merger. This condition is scandalous.²³²

Suspicion of efficiencies was particularly acute in conglomerate—or potential competition—mergers. In these, the two firms do not compete in any market, but one fear is that a larger firm in one market might acquire another (typically) smaller firm in a different market and then use its larger overall size to dominate the acquired firm’s

market. While such mergers do not lessen competition directly in any market, they play into populist fears about large firms getting bigger. And when the government challenged such a conglomerate merger, it often argued that the larger firm would foreclose rivals through greater efficiency. Thus, in *In re Foremost Dairies*, the FTC held that proof for finding a violation of Clayton Act Section 7 in a conglomerate merger could consist only of evidence that the merged firm's "overall organization gives it a decisive advantage in efficiency over its smaller rivals."²³³

Reflecting this view, in 1957 the FTC challenged Procter & Gamble's acquisition of Clorox, then the largest manufacturer of liquid household bleach. Procter & Gamble did not manufacture bleach, although it was a large producer of multiple consumer products, including soaps, detergents, and related products, making the case a conglomerate merger, with no direct overlaps.²³⁴ After administrative hearings, an earlier rejection of the case by the FTC, a subsequent FTC order finding the merger illegal, and an appellate ruling overturning the FTC decision, the case came before the Supreme Court.²³⁵ The FTC had found that the merger, by giving Procter & Gamble control of Clorox, would make rivals less likely to challenge Clorox's already leading market position in liquid bleach.²³⁶ The Supreme Court reversed the appellate court, agreeing with the FTC.

Efficiencies were important to the case, as the FTC argued that Procter could obtain advertising at lower costs than could rivals. Reflecting the fear of arguing that a merger was likely efficient, Procter & Gamble tried arguing that the merger was legal because the FTC could not establish that any efficiencies would result from the acquisition:

[The government is unable to prove] any advantages in the procurement or price of raw materials or in the acquisition or use of needed manufacturing facilities or in the purchase of bottles or freight costs. [T]here is no proof of any savings in any aspect of manufacturing. There is no proof that any additional manufacturing facilities would be usable for the production of Clorox. There is no proof that any combination of manufacturing facilities would effect any savings, even if such combination were feasible.²³⁷

The FTC had focused in particular on whether Procter & Gamble could market Clorox more effectively through advertising and volume discounts, disadvantaging rivals.²³⁸ In its opinion, the appellate court had noted that it seemed "difficult to base a finding of illegality on discounts in advertising."²³⁹ Nonetheless, the Supreme Court stated that "possible economies cannot be used as a defense to illegality" and that "Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition."²⁴⁰

This is the confused logic underneath many of the decisions on efficiencies in particular and size in general. For the Court, protecting competition meant protecting the existence of numerous smaller rivals, even at the expense of consumer welfare and efficiencies. The competition to be protected was the populist notion of a decentralized economy—preferring small firms and local self-sufficiency—and its suspicion of economic specialization. As with populist support for Robinson-Patman, the desire "for

mere smallness overrode the desire for the efficiency that helped consumers and businesses alike.”²⁴¹

Modern merger law recognizes that efficiencies are pro-competitive and therefore count in favor of a merger under appropriate conditions.²⁴² Nevertheless, the neo-Brandeisians appear ready to claim that the law rejects this favorable view.²⁴³ It is unclear whether they will go so far as to again count efficiencies against mergers formerly, although their populist views, reflected in renewed “big is bad” sentiment, clearly indicate a thumb on the scale against the consumer benefits of more efficient, larger firms.

Conclusion

This, then, is the world of populist merger enforcement, the world that the neo-Brandeisians praise. It is a world in which the consumer-welfare standard does not exist. Consumers are so irrelevant that merging companies dare not claim they will decrease their prices because increasing their market share will harm their competitors. It is a world in which the government (almost) always wins, even if the courts must create markets that exist only on the pages of their opinions. It is a world in which the courts use progress to condemn mergers. Under such antitrust laws, the forces that create new businesses—replacing older ones with usually larger, more efficient competitors that lower costs and improve quality for their customers—are viewed with hostility, although they often benefit the less well-off the most.

Our trip through this history is hardly academic. In a September 2022 speech, FTC Chair Khan discussed her work on revising the merger guidelines and stressed “fidelity to the law” as a guiding principle. She claims the antitrust agencies “began straying” at the beginning of the 40 years President Biden condemned. She argues that the agencies “sidestepped controlling precedent and the statutory text” by “administrative fiat.”²⁴⁴

In reviewing these charges, consider the statute first. The key language of Section 7 prohibits a merger if the “effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”²⁴⁵ It is therefore competition that is to be protected, not deconcentration, competitors, or populist or other values, however defined, if they conflict with competition. On its face, the statute does not define an effect on competition, despite assertions otherwise. Modern merger guidelines analyze a merger in its totality to determine whether there is a likely anticompetitive effect. Most important, mere concentration is no longer enough; a merger, even among leading firms in a concentrated industry, may still pass muster on a variety of grounds, including the merger’s justifications and the unlikelihood of anticompetitive effects. The number of firms is a highly important, but not conclusive, fact in this latter inquiry.

Certainly, nothing in the statutory language prohibits this modern approach. Modern enforcers argued, until President Biden, that it was a better reading of the statutory requirement of likely lessening of competition than was 1960s populism. Competition,

after all, is inextricably linked with the effect of business actions on marketplace players, especially the ultimate beneficiaries of competition: consumers.

Besides the statute, Chair Khan also relies on precedent, criticizing her predecessors for abandoning “controlling” case law. She quotes well-known scholar and then-Judge Richard Posner, who observed, in upholding an FTC challenge to a hospital merger, that the agency avoided reliance on the Supreme Court’s 1960s Section 7 decisions discussed in this chapter, except for *Philadelphia National Bank*, although none had been overruled.²⁴⁶

But two paragraphs later, Judge Posner had much more to say, concluding that “it was prudent for the Commission, rather than resting on the very strict merger decisions of the 1960s, to inquire into the probability of harm to consumers.”²⁴⁷ Why prudent? Because

the most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von’s* are found in other cases, where the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act. Applied to cases brought under section 7, this principle requires the district court (in this case, the Commission) to make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or further above the competitive level.²⁴⁸

Four years later, then-Judge Clarence Thomas, in an opinion joined by then-Judge Ruth Bader Ginsburg before both judges joined the Supreme Court, quoted this passage from Judge Posner approvingly in rejecting a DOJ challenge to a merger under Section 7.²⁴⁹

I was one of the FTC officials in the 1980s who rejected reliance on previous anti-consumer merger law, and we were aware of the developments these important judges referenced. Not only did we want to avoid citing decisions increasingly disfavored, but we also wanted to avoid any implication that those decisions were analytically sound. We wanted further to signal that enforcement was in fact changing, especially following the 1970s, when the FTC had embarked on an aggressive “big is bad” campaign. Practically, change was necessary because the judiciary had begun uniformly to reject the theories that had been accepted in the 1960s and into the 1970s.

Indeed, the courts were forcing change on the government by the early 1980s. Academics led rejection of both populist merger policy and the economic theories then popular in the 1960s in industrial organization that attacked even modest levels of concentration. The courts next changed, dramatically so, as the FTC’s judicial record

attests. Through 1976, it was rare for the agency to lose, whether in mergers or elsewhere, except perhaps in Robinson-Patman Act cases. In cases decided in the next six years, however, the FTC won just 13 of 35 substantive decisions, only eight of the 22 involving mergers.²⁵⁰ The agency was winning only 36 percent of its merger cases, a record that could not be defended, either before Congress or the public.

Moreover, some of the decisions were sharply critical of the agency. For example, in *Fruehauf Corporation v. Federal Trade Commission*, the Second Circuit held that the FTC's finding was based on "speculation rather than facts" and that its legal conclusion was a "non sequitur" that "flies in the face of undisputed contrary evidence."²⁵¹ Change was at hand.

Returning to today, in the 30-plus years since Judges Posner and Thomas spoke, joined by Judge Ginsburg, the courts, led by the Supreme Court, have recast antitrust law. That change, across a broad spectrum of cases, has repudiated the populist, competitor-protection underpinnings of the merger law discussed in this chapter in favor of standards protecting consumers. Although the Court has not spoken substantively on a merger case in decades, there is every reason to expect that it will continue its long-standing promotion of consumer welfare when it next considers a merger.

At bottom, those who support a noneconomic approach to merger law rely on the legislative intent this chapter has discussed at length. Chair Khan emphasizes that history in support of her arguments, including noting that the FTC's post-World War II study was "a major driver" of that history.²⁵² She makes no mention of the fact, by now known widely in the antitrust community, that the study was incorrect and acknowledged as such by the agency.

And, of course, contrary to the interpretation of statutes more prevalent in the 1960s, judges today focus much less on divining intent from legislative history and other non-textual sources and much more on the statute's text.²⁵³ The key statutory passage, discussed above, rests on the meaning of competition. If Congress wanted courts to ignore economics and instead give primacy to whether a merger would harm competitors, today's courts are likely to insist on legislative text that so mandates this reading. Such language does not exist in Clayton Act Section 7.

President Biden's antitrust enforcers face perhaps a more fundamental question, one of their own making: If fidelity to law is central to their merger program, how far does fidelity to the merger law discussed in this chapter extend? A few examples reveal how adhering to the reasoning of now-repudiated Supreme Court cases would result in enforcement actions that even the most ardent neo-Brandeisian should find difficult to embrace:

- The Biden enforcers have signaled apparent readiness to declare that the law forbids an efficiency defense. If they read 1960s merger law to support that conclusion, do not the same cases require more—namely, counting such

competitive advantages against mergers? Lawyers arguing for mergers certainly performed handstands 60 years ago to avoid claiming their mergers reduced costs and prices. They feared they would be accused of planning to lower prices, therefore taking market share from competitors, harming rivals, and thus committing the paramount sin of the era: increasing concentration. Both the harm to rivals and the increased concentration could themselves have been enough to jeopardize a merger, and they thus prompted such vigorous denials from the merging parties. Will such arguments be the new requirement for merging firms, de jure or de facto? Does not fidelity to 1960s merger law, as the neo-Brandeisians read that law, require as much? Of course, modern merger lawyers and guidelines do not believe the old cases prevent them from arguing that such attributes are positive, but the neo-Brandeisians see them abandoning the law.

- Another important question is the appropriate level of combined market shares for illegality, presumptive or otherwise. Is it as low as *Pabst* (4.5 percent), *Brown Shoe* (5 percent), and *Von's Grocery* (7.5 percent)? If not this low, why not? The Johnson administration's 1968 guidelines rejected those low levels in favor of an apparent 10 percent level for un-concentrated markets. Were they too abandoning fidelity to the law?
- Individual cases provide a third, related example:
 - Because *Brown Shoe*, for example, has never been overturned, are vertical mergers with trivial foreclosure necessarily illegal? (The previous question raises the problem of whether *Brown Shoe*'s tiny 5 percent overlap in concentrated horizontal markets would be sufficient today for illegality.)
 - Although a leading critic of post-1980 antitrust law and a supporter of much more aggressive enforcement of the amended Clayton Act Section 7, former Biden competition czar Wu also criticized the *Von's Grocery* decision.²⁵⁴ That position drew a sharp rebuke from another leading neo-Brandeisian, Sandeep Vaheesan, former Consumer Financial Protection Bureau official and now legal director of the Open Markets Institute, a major progressive think tank with which Chair Khan was affiliated.²⁵⁵ Does fidelity require support even of *Von's Grocery*, the highly criticized Warren Court merger decision? If not, what are the principles that support fealty to some decisions but not others?

Perhaps the new leadership will decide that the necessity of winning cases requires less fidelity to controlling precedent, or perhaps even some of the extremes of their populist predecessors will prove too much for them. The recently released revised FTC guidelines for defining unfair methods of competition under Section 5 of the FTC Act are not a promising example for those who want specific guidance from their government. There, despite alleging that considerable amounts of old, apparently settled law supported aggressive, independent use of FTC Act Section 5 beyond the antitrust laws, the actual guidelines serve primarily to provide discretion for the FTC to proscribe practices it does not like, as Commissioner Christine Wilson explained in her comprehensive dissent.²⁵⁶ Perhaps the revised merger guidelines will follow a similar tack, leaving discretion instead of guidance on which of the cases the neo-Brandeisians will actually follow and for which they will condemn their predecessors in charge of the antitrust agencies for abandoning.

What remains true is that the condemned 40 years was a bipartisan era, with the last merger guidelines, from President Barack Obama's appointees, less aggressive in measuring concentrated markets than those of President Ronald Reagan's. Although the precise details are as yet unknown, the Biden administration will surely jettison that bipartisanship to return to the long-dead, anti-consumer populism portrayed in this chapter and throughout this report. That populism died in antitrust for good reasons, well understood for decades. It is unfortunate that another generation will apparently have to learn those hard lessons yet again.

Notes

¹ David N. Cicilline, "Cicilline Opening Statement for Antitrust Hearing on Monopoly Power," press release, March 18, 2021, <https://cicilline.house.gov/press-release/cicilline-opening-statement-antitrust-hearing-monopoly-power>.

² See Lina M. Khan, "Remarks of Chair Lina M. Khan as Prepared for Delivery" (speech, Fordham Annual Conference on International Antitrust Law & Policy, September 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

³ *United States v. Von's Grocery Company*, 384 US 270, 272–73 (1966).

⁴ *Von's Grocery*, 384 US at 301 (dissenting opinion).

⁵ Wesley J. Liebler, "Bureau of Competition: Antitrust Enforcement Activities," in *The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior*, ed. Kenneth Clarkson and Timothy Muris (Cambridge, UK: Cambridge University Press, 1981), 94–95.

⁶ White House, "Promoting Competition in the American Economy," *Federal Register* 86, no. 132 (July 14, 2021): 36987, 36993, <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>.

⁷ See Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (Princeton, NJ: Princeton University Press, 1966).

⁸ Hawley, *The New Deal and the Problem of Monopoly*, 12–13, 286–92, 295–96.

⁹ Hawley, *The New Deal and the Problem of Monopoly*, 287–88; and Philip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 5th ed. (Philadelphia, PA: Wolters Kluwer, 2020), § 111e(1).

¹⁰ Hawley, *The New Deal and the Problem of Monopoly*, 287; and Areeda and Hovenkamp, *Antitrust Law*, § 111e(1)–(2).

¹¹ Hawley, *The New Deal and the Problem of Monopoly*, 287–88.

¹² Hawley, *The New Deal and the Problem of Monopoly*, 13–14; and Areeda and Hovenkamp, *Antitrust Law*, § 111e(1).

¹³ Hawley, *The New Deal and the Problem of Monopoly*, 13–14.

¹⁴ Hawley, *The New Deal and the Problem of Monopoly*, 13.

¹⁵ For an important discussion of early 20th-century trade associations, see Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890–1940* (New York: Cambridge University Press, 2018).

¹⁶ Hawley, *The New Deal and the Problem of Monopoly*, 278–79, 459–60. The Keynesians focused on what economists call macroeconomics, while competition policy concerned microeconomics, especially the discipline known as industrial organization. On the difficulty of antitrust policy bearing on macroeconomic goals, see Areeda and Hovenkamp, *Antitrust Law*, § 111f(2) (noting difficulty of antitrust policy bearing on macroeconomic goals).

¹⁷ Hawley, *The New Deal and the Problem of Monopoly*, 15.

¹⁸ Hawley, *The New Deal and the Problem of Monopoly*, 27–31; and Areeda and Hovenkamp, *Antitrust Law*, § 111e(1). Perhaps some populists were concerned over the big firms' low prices, reflecting a shared concern with the advocates for more government management, especially early in the deflationary 1930s.

¹⁹ Hawley, *The New Deal and the Problem of Monopoly*, 72–110. When the Franklin D. Roosevelt administration embraced active antitrust prosecution later in the 1930s, businessmen would complain when challenged on improper cooperative behavior: “You prosecute us for doing what the [National Recovery Administration] prosecuted us for not doing.” See Hawley, *The New Deal and the Problem of Monopoly*, 444.

²⁰ *A. L. A. Schechter Poultry Corporation v. United States*, 295 US 495 (1935). As first introduced shortly after the decision, what become the Robinson-Patman Act was heavily influenced by National Recovery Administration codes. As explained in Chapter 2, it was later enacted in a significantly different form.

²¹ Hawley, *The New Deal and the Problem of Monopoly*, 283–86, 309–11.

²² See Franklin D. Roosevelt, “Acceptance Speech for the Renomination for the Presidency, Philadelphia, Pa.” (speech, Philadelphia, PA, June 27, 1936),

<https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa>.

²³ Hawley, *The New Deal and the Problem of Monopoly*, 402–3.

²⁴ Before Thurmond Arnold’s appointment, the US Department of Justice (DOJ) initiated several cases that became important precedents, including the prosecution of price-fixing in the petroleum industry, the suit to break up Alcoa, and cases related to dealer complaints about automobile financing. Hawley, *The New Deal and the Problem of Monopoly*, 374–76.

²⁵ Hawley, *The New Deal and the Problem of Monopoly*, 416, 428, 448.

²⁶ As Professor Ellis Hawley notes, given the circumstances, this was “no action at all, [it was] an evasion of the whole issue by tucking it away in a government investigation, which in all probability would end by expressing the same conflicting views with which it had started.” Hawley, *The New Deal and the Problem of Monopoly*, 403.

²⁷ Franklin D. Roosevelt, “Message to Congress on Curbing Monopolies.” (speech, April 29, 1938), <https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies>.

²⁸ Roosevelt, “Message to Congress on Curbing Monopolies.” 12.

²⁹ Roosevelt, “Message to Congress on Curbing Monopolies.” 11–14.

³⁰ Hawley, *The New Deal and the Problem of Monopoly*, 413–14.

³¹ Hawley, *The New Deal and the Problem of Monopoly*, 456–65. Thus, while the administration at first intended the Temporary National Economic Committee (TNEC) to focus on economic concentration and monopoly power, the TNEC became an important forum for Keynesian fiscal policy.

³² For some basic background on the TNEC, see Encyclopedia.com, s.v. “Temporary National Economic Committee (TNEC),” <https://www.encyclopedia.com/economics/encyclopedias-almanacs-transcripts-and-maps/temporary-national-economic-committee-tnec>.

³³ The original Clayton Act Section 7 focused on holding companies that used stock acquisitions, which led to limitations in the statutory language. For brief discussions of the case law on the asset loophole, see Milton Handler and Stanley D. Robinson, “A Decade of Administration of the Celler-Kefauver Antimerger Act,” *Columbia Law Review* 61, no. 4 (April 1961): 629–79, <https://www.jstor.org/stable/1120198>; and Student Note, “Corporate Consolidation and the Concentration of Economic Power: Proposals for Revitalization of Section 7 of the Clayton Act,” *Yale Law Journal* 57, no. 613 (1948): 620–21, <https://core.ac.uk/download/pdf/157778561.pdf>.

³⁴ Investigation of Concentration of Economic Powers, S. Doc. 35, 77th Cong., 1st sess., 1941.

³⁵ Investigation of Concentration of Economic Powers, S. Doc. 35.

³⁶ Franklin D. Roosevelt, “December 29, 1940: Fireside Chat 16: On the ‘Arsenal of Democracy’” (speech, December 29, 1940), <https://millercenter.org/the-presidency/presidential-speeches/december-29-1940-fireside-chat-16-arsenal-democracy>.

³⁷ M. A. Adelman, “Economic Aspects of the Bethlehem Opinion,” *Virginia Law Review* 45, no. 5 (June 1959): 685–86, <https://www.jstor.org/stable/1070847>.

³⁸ *Brown Shoe Company v. United States*, 370 US at 311–12 (1962).

³⁹ The House vote was 223–92, with 117 not voting. 95 Cong. Rec. 11506 (1949).

⁴⁰ The Senate vote was 55–22, with 19 not voting. 96 Cong. Rec. 16507 (1950).

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- ⁴¹ See *Brown Shoe*, 370 US 294, 311, n. 18 (showing changes in the statutory language in the 1950 Section 7 amendment).
- ⁴² *Brown Shoe*, 370 US at 312–14. See also Areeda and Hovenkamp, *Antitrust Law*, 4th ed. IV: para. 902b.
- ⁴³ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 902b.
- ⁴⁴ *Brown Shoe*, 370 US at 314, n. 26 (citing Investigation of Concentration of Economic Powers, S. Doc. 35, 38–40).
- ⁴⁵ *Brown Shoe*, 370 US at 316.
- ⁴⁶ H.R. 1480, 79th Cong., 2nd sess. (1946).
- ⁴⁷ *Brown Shoe*, 370 US at 317.
- ⁴⁸ *Brown Shoe*, 370 US at 318; and Areeda and Hovenkamp, *Antitrust Law*, IV: para. 902b.
- ⁴⁹ *Brown Shoe*, 370 US at 323 (“Congress used the words ‘may be to substantially lessen competition’ to indicate its concern was with probabilities, not certainties”).
- ⁵⁰ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 903b.
- ⁵¹ See Areeda and Hovenkamp, *Antitrust Law*, IV: paras. 903b, 904 (“§7 is properly viewed not as a vehicle for the direct preservation of alleged noneconomic values by maintaining large numbers of firms, but as a vehicle for contributing to that goal by preventing those mergers that have anticompetitive effects in the economic sense”).
- ⁵² Derek C. Bok, “Section 7 of the Clayton Act and the Merging of Law and Economics,” *Harvard Law Review* 74, no 2 (December 1960): 226, 236, <https://www.jstor.org/stable/1338755>. Derek Bok, later president of Harvard, was an influential scholar, with this article contributing significantly to his influence.
- ⁵³ *Brown Shoe*, 370 US at 315–16.
- ⁵⁴ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 903b.
- ⁵⁵ 95 Cong. Rec. 11485 (1949) (statement of Rep. Emanuel Celler (D-NY)).
- ⁵⁶ 96 Cong. Rec. 16450 (1950) (statement of Sen. Carey Estes Kefauver (D-TN)).
- ⁵⁷ See, for example, 95 Cong. Rec. 11486 (1949) (statement of Rep. Celler); 96 Cong. Rec. 16507 (1950) (statement of Sen. Herbert O’Conor’s (D-MD)).
- ⁵⁸ Bok, “Section 7 of the Clayton Act and the Merging of Law and Economics,” 236.
- ⁵⁹ 96 Cong. Rec. 16505 (1950) (statement of Sen. O’Conor).
- ⁶⁰ *Brown Shoe*, 370 US at 315.
- ⁶¹ Bok, “Section 7 of the Clayton Act and the Merging of Law and Economics,” 234–35.
- ⁶² Bok, “Section 7 of the Clayton Act and the Merging of Law and Economics.”
- ⁶³ Federal Trade Commission, *Report of the Federal Trade Commission on the Merger Movement, a Summary Report* (Washington, DC: United States Government Printing Office, 1948), 25–28.
- ⁶⁴ Federal Trade Commission, *Report of the Federal Trade Commission on the Merger Movement, a Summary Report*, 68–69.
- ⁶⁵ John Lintner and J. Keith Butters, “Effect of Mergers on Industrial Concentration, 1940–1947,” *Review of Economics and Statistics* 32, no. 1 (February 1950): 30–31, https://www.jstor.org/stable/1928273#metadata_info_tab_contents.
- ⁶⁶ Lintner and Butters, “Effect of Mergers on Industrial Concentration, 1940–1947,” 31.
- ⁶⁷ Lintner and Butters, “Effect of Mergers on Industrial Concentration, 1940–1947,” 44.
- ⁶⁸ Lintner and Butters, “Effect of Mergers on Industrial Concentration, 1940–1947,” 47.
- ⁶⁹ Lintner and Butters, “Effect of Mergers on Industrial Concentration, 1940–1947,” 48.
- ⁷⁰ By contrast, on the relative roles of internal growth and mergers, the Federal Trade Commission (FTC) stated that “a very large part of the rise in economic concentration has been due to consolidations, acquisitions, and mergers.” Federal Trade Commission, *Report of the Federal Trade Commission on the Merger Movement, a Summary Report*, 22–23.
- ⁷¹ Lintner and Butters, “Effect of Mergers on Industrial Concentration, 1940–1947,” 31.
- ⁷² M. A. Adelman, “The Measure of Industrial Concentration,” *Review of Economics and Statistics* 33, no. 4 (November 1951): 269, 294, <https://www.jstor.org/stable/1926455>.
- ⁷³ Adelman, “The Measure of Industrial Concentration,” 269, 273–74.
- ⁷⁴ Adelman, “The Measure of Industrial Concentration,” 273.
- ⁷⁵ Adelman, “The Measure of Industrial Concentration,” 274.
- ⁷⁶ Adelman, “The Measure of Industrial Concentration,” 273.
- ⁷⁷ Adelman, “The Measure of Industrial Concentration,” 274.

⁷⁸ 96 Cong. Rec. 16457 (1950).

⁷⁹ Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 226, 232. As Professor Bok describes, the concession of the entire point was tucked into a final footnote of a reply article, with much of the article positioning itself more loudly as taking issue with various aspects of John Lintner and J. Keith Butters's article and arguing they had misinterpreted FTC statements. See John M. Blair and Harris F. Houghton, "The Lintner-Butters Analysis of the Effects of Mergers on Industrial Concentration, 1940–1947: A Reply," *Review of Economics and Statistics* 33, no. 1 (February 1951): 63–67, <https://www.jstor.org/stable/1925999>. Lintner and Butters published a rejoinder in the same journal noting the concession and the surface nature of the response and disputing further statements. John Lintner and J. Keith Butters, "Rejoinder to Drs. Blair and Houghton," *Review of Economics and Statistics* 33, no. 1 (February 1951): 67–71, <https://www.jstor.org/stable/1926000>.

⁸⁰ Lintner and Butters, "Effect of Mergers on Industrial Concentration, 1940–1947," 31 (as measured by a Gini coefficient).

⁸¹ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 903b. n. 5.

⁸² Adelman, "The Measure of Industrial Concentration," 292–93.

⁸³ Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 232–33.

⁸⁴ New York University Professor Lawrence White, formerly the chief economist of the DOJ Antitrust Division, reviewed the aggregate concentration data twice in the past 20 years, finding that, despite extensive merger activity, aggregate concentration has decreased since the early 1980s—the period of the alleged failed 40-year experiment—with a modest increase if the starting point was the mid-1990s. Lawrence J. White, "Trends in Aggregate Concentration in the United States," *Journal of Economic Perspectives* 16, no. 4 (Fall 2002): 137–60, <https://www.jstor.org/stable/3216918>; and Lawrence J. White and Jasper Yang, "What Has Been Happening to Aggregate Concentration in the U.S. Economy in the 21st Century?," *Contemporary Economic Policy* 38, no. 3 (July 2020): 483, <https://onlinelibrary.wiley.com/doi/abs/10.1111/coep.12460>.

⁸⁵ *Von's Grocery*, 384 US at 301 (dissenting opinion).

⁸⁶ William E. Kovacic and Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," *Journal of Economic Perspectives* 14, no. 1 (Winter 2000): 51, <https://www.aeaweb.org/articles?id=10.1257/jep.14.1.43>.

⁸⁷ *Brown Shoe*, 370 US at 296. After the district court denied a preliminary injunction, the merger was consummated in 1956, subject to a hold separate order whereby Brown Shoe operated Kinney separately, keeping the Kinney assets identifiable pending a full trial.

⁸⁸ *Brown Shoe*, 370 US at 303–4.

⁸⁹ *Brown Shoe*, 370 US at 297–98, 303.

⁹⁰ *Brown Shoe*, 370 US at 300.

⁹¹ *Brown Shoe*, 370 US at 345–46. The combined percentage was 7.2 percent, if the term "shoe outlets" was defined more narrowly as only those outlets that the Census Bureau defined as "shoe stores." While there were data on Kinney's national retail sales (1.2 percent), the actual percentage of shoes sold at retail of the two firms combined is unclear from the factual record.

⁹² *Brown Shoe*, 370 US at 298.

⁹³ *Brown Shoe*, 370 US at 303, 332.

⁹⁴ *Brown Shoe*, 370 US.

⁹⁵ *Brown Shoe*, 370 US at 303–4, 332.

⁹⁶ *Brown Shoe*, 370 US at 301.

⁹⁷ "See *Brown Shoe*, 370 US at 374, n. 9 (Harlan, J., dissenting in part and concurring in part) ("Whereas the largest four manufacturers supplied 25.9% of the Nation's needs in 1947, the largest eight supplied 31.4%, and the largest 15 supplied 36.2%, in 1955 the equivalent percentages were 22%, 27%, and 32.5%").

⁹⁸ *Brown Shoe*, 370 US at 297.

⁹⁹ *Brown Shoe*, 370 US at 297–98.

¹⁰⁰ *Brown Shoe*, 370 US at 297.

¹⁰¹ Timothy J. Muris, "The Efficiency Defense Under Section 7 of the Clayton Act," *Case Western Reserve Law Review* 30, no. 3 (Spring 1980): 381, 403, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2304&context=caselrev>.

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- ¹⁰² *United States v. Brown Shoe Company*, 179 F. Supp. 721, 738 (E.D. Mo. 1959).
- ¹⁰³ *Brown Shoe*, 370 US at 299.
- ¹⁰⁴ *Brown Shoe*, 370 US at 323–24.
- ¹⁰⁵ *Brown Shoe*, 370 US 328.
- ¹⁰⁶ *Brown Shoe*, 370 US at 329. Peterman’s comprehensive analysis of the case reinforced the conclusion that the merger could not possibly have harmed consumers. See John L. Peterman, “The Brown Shoe Case,” *Journal of Law and Economics* 18, no. 1 (1975): 81, <https://www.journals.uchicago.edu/doi/abs/10.1086/466807>.
- ¹⁰⁷ *Brown Shoe*, 370 US at 331.
- ¹⁰⁸ See Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 1004f.
- ¹⁰⁹ See Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 1022.
- ¹¹⁰ Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 1004a.
- ¹¹¹ Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 1004d.
- ¹¹² Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 1004a.
- ¹¹³ *United States v. Bethlehem Steel Corporation*, 168 F. Supp. 576 (S.D.N.Y. 1958). Professor Morris Adelman’s penetrating analysis shows the anti-consumer implications of a populist anti-vertical merger policy. See Adelman, “Economic Aspects of the Bethlehem Opinion.”
- ¹¹⁴ *Bethlehem Steel*, 168 F. Supp. at 612.
- ¹¹⁵ *Bethlehem Steel*, 168 F. Supp. at 613. See also Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 1004e2 (“No reasons were stated by the court to support this characterization on such a small percentage”).
- ¹¹⁶ *Bethlehem Steel*, 168 F. Supp. at 612.
- ¹¹⁷ *Brown Shoe*, 370 US at 333.
- ¹¹⁸ *Brown Shoe*, 370 US.
- ¹¹⁹ Bok, “Section 7 of the Clayton Act and the Merging of Law and Economics,” 236–37.
- ¹²⁰ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 904.
- ¹²¹ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 111.
- ¹²² Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 904.
- ¹²³ *Brown Shoe*, 370 US at 332.
- ¹²⁴ Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 103e (“The Court made much of ‘trends,’ but its language shifted unaccountably between a ‘concentration trend’ and a ‘vertical integration trend.’”).
- ¹²⁵ Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 103e. Even an actual trend toward increased concentration is not an appropriate basis on which to ban a merger: “No good case can be made for relying on trends toward concentration as an exacerbating factor. In most cases concentration trends indicate efficiencies that must be duplicated by those wishing to survive in a market. For example, new technology may be subject to more significant scale economics In that case a concentration trend should, if anything, suggest a more lenient approach to small firm mergers, since prohibiting such mergers could not forestall the trend and might even accelerate it by hastening the small firms’ disappearance.” Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 932e.
- ¹²⁶ *Brown Shoe*, 370 US at 332.
- ¹²⁷ *Brown Shoe*, 370 US at 344.
- ¹²⁸ *Brown Shoe*, 370 US at 372–73 (Harlan, J., dissenting in part and concurring in part).
- ¹²⁹ Muris, “The Efficiency Defense Under Section 7 of the Clayton Act,” 404 (“Brown denied what, by any definition, is a consumer benefit from increased efficiency”).
- ¹³⁰ *Brown Shoe*, 370 US at 344.
- ¹³¹ Areeda and Hovenkamp, *Antitrust Law*, 5th ed., I: para. 112b2.
- ¹³² See the finding that vertical integration would lead to lower costs that could then be used to force out rivals through lower prices in *In re Ash Grove Cement Company*, 85 FTC 1123, 1148 (1974) (initial decision).
- ¹³³ Both of these assumptions are debatable. On entry, if local prices rose, it may not have been difficult for one or more of the other existing retail chains to have added outlets in that location, especially given the narrow geographic areas involved, such as Batavia, New York; Hobbs, New Mexico; and Topeka, Kansas. Moreover, *Brown Shoe* used a multifactor approach to market definition that has confused courts for decades. Only with the “hypothetical monopolist” market definition in the DOJ “1982 Merger Guidelines” was the issue revised in a more useful direction.

¹³⁴ *Brown Shoe*, 370 US at 341–43. For example, the Supreme Court stated that the combined retail share for children’s shoes was greater than 20 percent in 32 different local markets. Although a combined share of 20 percent would likely be too low to raise issues in a properly defined market, in six of the markets the combined share for children’s shoes was greater than 40 percent, and in Dodge City, Kansas, the combined share was 49 percent. Those shares may have raised issues under modern standards in properly defined markets.

¹³⁵ *Brown Shoe*, 370 US at 343.

¹³⁶ *Brown Shoe*, 370 US at 343–44.

¹³⁷ *United States v. Philadelphia National Bank*, 374 US 321 (1963).

¹³⁸ *Philadelphia National Bank*, 374 US at 363.

¹³⁹ *Philadelphia National Bank*, 374 US.

¹⁴⁰ *Philadelphia National Bank*, 374 US.

¹⁴¹ *Philadelphia National Bank*, 374 US.

¹⁴² For discussion of the complexity of FTC merger analysis beyond simple market shares, see the FTC’s three data releases on historical merger enforcement. Federal Trade Commission, *Horizontal Merger Investigation Data: Fiscal Years 1996–2011*, January 2013, <https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf>; Federal Trade Commission, *Horizontal Merger Investigation Data: Fiscal Years 1996–2007*, December 1, 2008, https://www.ftc.gov/sites/default/files/documents/reports_annual/horizontal-merger-investigation-data-fiscal-years-1996-2007/081201hsrmergerdata_0.pdf; and Federal Trade Commission and US Department of Justice, *Merger Challenges Data, Fiscal Years 1999–2003*, December 18, 2003, <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/201898.pdf>.

¹⁴³ See Areeda and Hovenkamp, *Antitrust Law*, 4th ed., IV: para. 905c. (“There is a strong need to judge mergers on the basis of generally applicable rules or presumptions framed in terms of a limited number of factual issues that appear to be both significant and capable of practical resolution”). See also Areeda and Hovenkamp, *Antitrust Law*, IV: paras. 925–28. For the opposing viewpoint, see Douglas H. Ginsburg and Joshua D. Wright, “*Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance,” *Antitrust Law Journal* 80, no. 2 (2015): 386, <https://www.jstor.org/stable/26411541> (“We can find no serious defense of the proposition that a *PNB*-like presumption reflects the best of modern economic thinking about mergers or that presuming the illegality of transactions above any particular threshold is good economic policy for consumers”).

¹⁴⁴ See Areeda and Hovenkamp, *Antitrust Law*, IV: para. 905d. Indeed, the *Philadelphia National Bank* structural framework can likely only survive as a coherent approach with thresholds set at a sufficiently high level, and the antitrust agencies still analyze the merger beyond a simple structural approach based on market shares. In particular, a class of close cases will exist in which the structural presumption is weak at best and the agencies look in detail at all relevant facts. See Federal Trade Commission, *Horizontal Merger Investigation Data: Fiscal Years 1996–2011*; *Horizontal Merger Investigation Data: Fiscal Years 1996–2007*; and Federal Trade Commission and US Department of Justice, *Merger Challenges Data, Fiscal Years 1999–2003*. That is precisely what the agencies have done for much of the past 40 years, and thus as a practical matter, the adverse effects of the Supreme Court’s 1960s Clayton Act Section 7 decisions were largely ignored in the agency review process. Nevertheless, this process occurs in the shadow of the case law, and that case law still reflects *Philadelphia National Bank*’s framework.

¹⁴⁵ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 902c.

¹⁴⁶ *United States v. Aluminum Company of America*, 377 US 271 (1964).

¹⁴⁷ *United States v. Aluminum Company of America*, 214 F. Supp. 501, 507 (N.D.N.Y. 1963).

¹⁴⁸ *Aluminum Company of America*, 214 F. Supp. at 507–8.

¹⁴⁹ *Aluminum Company of America*, 214 F. Supp. at 508.

¹⁵⁰ *Aluminum Company of America*, 214 F. Supp.

¹⁵¹ *Aluminum Company of America*, 214 F. Supp.

¹⁵² *Aluminum Company of America*, 377 US at 287 (Stewart, J., dissenting).

¹⁵³ *Aluminum Company of America*, 377 US at 277.

¹⁵⁴ *Aluminum Company of America*, 377 US at 282.

¹⁵⁵ *Aluminum Company of America*, 377 US at 282–83.

¹⁵⁶ One can argue that the record showed different markets on the demand side. The modern approach to market definition measures only the demand side. Even that approach, however, uses supply-side substitutability calculating shares when facilities are easily switchable, as existed here. See US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, §§ 5.1, 5.2, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

¹⁵⁷ *Brown Shoe*, 370 US at 325 n.42, 326.

¹⁵⁸ See *Aluminum Company of America*, 377 US at 285 (dissenting); and Areeda and Hovenkamp, *Antitrust Law*, XI: para. 11561a n.5 (“The court said nothing about the evidence of supply-side substitutability, and Justice Stewart noted in dissent that fabricating facilities were completely interchangeable between copper and aluminum, that there were no distinct customers or vendors, and that fabricators switch readily from one product or conductor metal to another in accordance with market conditions”).

¹⁵⁹ *Aluminum Company of America*, 377 US at 277.

¹⁶⁰ Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 530f.

¹⁶¹ *Aluminum Company of America*, 377 US at 286 (Stewart, J., dissenting).

¹⁶² *New York Times*, “High Court Bars Merger by Alcoa,” June 2, 1964, <https://www.nytimes.com/1964/06/02/archives/high-court-bars-merger-by-alcoa-acquisition-of-rome-cable-blocked-a.html>.

¹⁶³ *United States v. Continental Can Company*, 378 US 441 (1964).

¹⁶⁴ *Continental Can*, 378 US at 458–59.

¹⁶⁵ *Continental Can*, 378 US at 460.

¹⁶⁶ *Continental Can*, 378 US at 470 n.6 (quoting the DOJ brief).

¹⁶⁷ *Continental Can*, 378 US. at 470 n.6.

¹⁶⁸ *United States v. Continental Can Company*, 217 F. Supp. 761, 783–84 (S.D.N.Y. 1963).

¹⁶⁹ See, for example, *Continental Can Company*, 217 F. Supp. at 794–96 (analyzing a DOJ proposed market for beer containers consisting of beer bottles and metal cans and finding that, if such a market exists, the presence of the acquired company, Hazel-Atlas’s was “completely insignificant” and “practically non-existent”).

¹⁷⁰ *Continental Can Company*, 217 F. Supp. at 785.

¹⁷¹ *Continental Can*, 378 US at 785–86.

¹⁷² *Continental Can*, 378 US at 457–58.

¹⁷³ *Continental Can*, 378 US at 459–60.

¹⁷⁴ *Continental Can*, 378 US at 470–71 (Harlan, J., dissenting).

¹⁷⁵ *Continental Can*, 378 US at 471–72.

¹⁷⁶ Areeda and Hovenkamp, *Antitrust Law*, XIB: para. 571a.

¹⁷⁷ *Continental Can*, 378 US at 476–77 (Harlan, J., dissenting).

¹⁷⁸ *Continental Can*, 378 US at 476.

¹⁷⁹ *Von’s Grocery*, 384 US 270.

¹⁸⁰ On a personal note, in the early and mid-1960s, unaware of the drama unfolding in court, during the summers I frequently walked about a mile round trip with a dime in southern San Diego County to the nearby Von’s store to purchase the *Los Angeles Times*, a newspaper superior to those in San Diego, particularly its sports pages, the main focus of my youthful interest.

¹⁸¹ *Continental Can*, 378 US at 271–72.

¹⁸² *Continental Can*, 378 US at 272.

¹⁸³ *Continental Can*, 378 US at 272–74.

¹⁸⁴ *Continental Can*, 378 US at 290–92 (Stewart, J., dissenting). Justice Potter Stewart’s dissenting opinion discusses the dynamism of the Los Angeles marketplace and the trial court’s findings of no increase in concentration.

¹⁸⁵ *Von’s Grocery*, 384 US at 272–73.

¹⁸⁶ *Von’s Grocery*, 384 US at 274.

¹⁸⁷ *Von’s Grocery*, 384 US.

¹⁸⁸ *Von’s Grocery*, 384 US at 288–89 (Stewart, J., dissenting).

¹⁸⁹ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 927b.

¹⁹⁰ Richard A. Posner, *Antitrust Law*, 2nd ed. (Chicago: University of Chicago Press, 2001), 125. Richard Posner notes that the Court's view that the difference between 57 percent and 5 percent was not critical to when Section 7 should be applied suggests that the Court's real concern was not with lost competition.

¹⁹¹ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 941e.

¹⁹² *Von's Grocery*, 384 US at 287–88 (Stewart, J., dissenting).

¹⁹³ *Von's Grocery*, 384 US at 295–96 (Stewart, J., dissenting).

¹⁹⁴ *Von's Grocery*, 384 US at 301 (Stewart, J., dissenting). The Phillip Areeda–Herbert Hovenkamp treatise notes that, while the remark may have been in jest, “some credence is lent to the remark by the majority's resort to dubious market definitions in *Rome Cable* and *Continental Can*, the near abandonment of market definition issues in *Pabst*, and *Von's Grocery's* astonishing reliance on the fact that the number of single-store groceries dropped from 5,365 in 1950 to 3,818 in 1961 in the Los Angeles market.” Areeda and Hovenkamp, *Antitrust Law*, IV: para. 926b n.13.

¹⁹⁵ Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018), 104.

¹⁹⁶ US Department of Justice, “Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture,” May 18, 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>.

¹⁹⁷ *United States v. Pabst Brewing Company*, 384 US 546 (1966).

¹⁹⁸ *Pabst Brewing*, 384 US at 547–48.

¹⁹⁹ *Pabst Brewing*, 384 US 555–61 (Harlan, J., concurring in the result). Under modern standards, a combined 24 percent share in Wisconsin with multiple firms still competing would not likely raise any serious issues.

²⁰⁰ *Pabst Brewing*, 384 US at 550. In Wisconsin, the number of companies selling beer has declined from 77 in 1953 to 54 in 1961. Unlike in *Von's Grocery*, this decline in numbers reflected increases in the shares of the largest firms: “Between 1957 and 1961 the Nation's 10 leading brewers increased their combined shares of sales from 45.06% to 52.60%. In Wisconsin the four leading sellers accounted for 47.74% of the State's sales in 1957 and by 1961 this share had increased to 58.62%.” *Pabst Brewing*, 384 US at 551.

²⁰¹ *Pabst Brewing*, 384 US at 552.

²⁰² *Pabst Brewing*, 384 US at 552–53.

²⁰³ *Pabst Brewing*, 384 US at 548–50.

²⁰⁴ *Pabst Brewing*, 384 US at 551–52.

²⁰⁵ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 926b.

²⁰⁶ See US Department of Justice, “1968 Merger Guidelines,” <https://www.justice.gov/archives/atr/1968-merger-guidelines> (“Market structure is the focus of the Department's merger policy”).

²⁰⁷ US Department of Justice, “1968 Merger Guidelines.”

²⁰⁸ US Department of Justice, “1968 Merger Guidelines.”

²⁰⁹ While the populist Supreme Court 1960s decisions supported aggressive thresholds, the “1968 Merger Guidelines” were shaped by Donald Turner, then head of the Antitrust Division, who was also focused on the structure-conduct-performance (SCP) paradigm then prevalent in industrial organization. See Oliver E. Williamson, “The Merger Guidelines of the U.S. Department of Justice—In Perspective,” US Department of Justice, 2002, <https://www.justice.gov/archives/atr/merger-guidelines-us-department-justice-perspective> (discussing Turner's role in creating the “1968 Merger Guidelines” and his belief in the SCP paradigm). See also Areeda and Hovenkamp, *Antitrust Law*, IV: para. 928 (“For believers in SCP, virtually all useful conclusions about market performance could be gleaned from information about the number of firms in a market, relative size, and barriers to entry”). That the SCP economic paradigm, like populism, would allow merger challenges based on low market share allowed structuralist courts and the populists to lend each other general support. See Williamson, “The Merger Guidelines of the U.S. Department of Justice—In Perspective” (discussing how the SCP paradigm, “albeit unintentionally,” gave “impetus, even legitimacy, to populist antitrust”). The SCP paradigm and the simple market concentration doctrine that many used to guide public policy came under withering critique, and modern industrial organization gives these ideas little credibility today as a basis for antitrust policy. See Timothy J. Muris, “Economics and Antitrust,” *George Mason Law Review* 5, no. 3 (1997): 303 (discussing history of critique of the simple market concentration doctrine.) See also Richard Schmalensee, “Inter-Industry Studies of

Structure and Performance,” in *Handbook of Industrial Organization*, ed. Richard Schmalensee and Robert Willig (1989) (surveying and summarizing the SCP literature).

²¹⁰ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 926c. The 1,400 number assumes that the four firms are equally sized and the remaining fringe adds little to industry concentration.

²¹¹ See Areeda and Hovenkamp, *Antitrust Law*, IV: para. 926c; and US Department of Justice and Federal Trade Commission, “1982 Merger Guidelines,” <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf>.

²¹² Federal Trade Commission, “Federal Trade Commission Workshop on Horizontal Merger Guidelines Review Project,” January 26, 2010, 23–24, <https://perma.cc/WS2T-MJ5F> (“The assumption there was sort of a six to five [merger] was the threshold where we would start getting concerned, it looks more like where we are today is five to four or four to three”).

²¹³ There is no obvious way to derive the “true” marginal case from the 1968 guidelines, as that term is understood today. Bill Baxter, drafter of the 1982 guidelines, indicated that he believed the Herfindahl-Hirschman index thresholds in the 1982 guidelines implied six to five equally sized firms would be the marginal case and, as indicated above, the Obama administration moved the marginal case to four to three equally sized firms. Although one can try to apply modern concepts to the 1968 guidelines’ highly concentrated markets, as in the text accompanying this note, the 1968 guidelines also condemned a merger of two firms each with a 5 percent share in an un-concentrated market. It is dubious whether this means they would have attacked such a merger in the industry composed of 20 equally sized firms; again, they simply did not think then in terms of the number of significant competitors and the marginal merger, concepts that have become common in modern times. Nevertheless, that the 1968 guidelines were willing to challenge mergers in un-concentrated markets—and do so at combined market shares as low as 10 percent—reveals the strong impact of the Supreme Court’s populist decisions. The guidelines were less aggressive than the case law, but only mildly.

²¹⁴ The Areeda-Hovenkamp treatise provides a more comprehensive summary of such horizontal merger decisions. See Areeda and Hovenkamp, *Antitrust Law*, IVA: Appendix A.

²¹⁵ *United States v. Atlantic Richfield Company*, 297 F. Supp. 1061, 1070–73 (S.D.N.Y. 1969).

²¹⁶ *Atlantic Richfield Company*, 297 F. Supp. 1070–71.

²¹⁷ *Atlantic Richfield Company*, 297 F. Supp. 1071.

²¹⁸ *Beatrice Foods Company v. Federal Trade Commission*, 540 F.2d 303 (7th Cir. 1976).

²¹⁹ *Beatrice Foods*, 540 F.2d 306 n.3.

²²⁰ *Beatrice Foods*, 540 F.2d 310.

²²¹ *Boyertown Burial Casket Company v. Amedco*, 407 F. Supp. 811 (E.D. Pa. 1976).

²²² *Boyertown Burial Casket*, 407 F. Supp. 819.

²²³ *Boyertown Burial Casket*, 407 F. Supp. 818–19.

²²⁴ *Federal Trade Commission v. PepsiCo*, 477 F.2d 24 (2d Cir. 1973).

²²⁵ *PepsiCo*, 477 F.2d 27.

²²⁶ *United States v. General Dynamics Corporation*, 415 US 486 (1974).

²²⁷ Areeda and Hovenkamp, *Antitrust Law*, IV: para. 970 c2.

²²⁸ See Muris, The Efficiency Defense Under Section 7 of the Clayton Act,” 403–6 (summarizing how Brown Shoe’s lawyers avoided arguing—in fact, denied—that the merger would lead to efficiencies).

²²⁹ Liebeler, “Bureau of Competition,” 94.

²³⁰ Liebeler, “Bureau of Competition.”

²³¹ Liebeler, “Bureau of Competition,” 94–95.

²³² Liebeler, “Bureau of Competition,” 95.

²³³ *In re Foremost Dairies*, 60 FTC 944, 1084 (1962).

²³⁴ See *Federal Trade Commission v. Procter & Gamble Company*, 386 US 568, 570–74 (summarizing the respective businesses of the companies).

²³⁵ *Procter & Gamble*, 386 US at 570.

²³⁶ *Procter & Gamble*, 386 US at 374–75. The FTC also conjectured that Procter & Gamble would have entered the liquid bleach business absent the merger. *Procter & Gamble*, 386 US at 375–76.

²³⁷ See Williamson’s remarks about the 1968 guidelines (quoting the Procter & Gamble brief) in Williamson, “The Merger Guidelines of the U.S. Department of Justice—In Perspective.”

²³⁸ *Procter & Gamble*, 386 US at 576.

²³⁹ *Procter & Gamble*, 386 US (quoting the appellate opinion).

²⁴⁰ *Procter & Gamble*, 386 US 380. On the failure of the underlying evidence to support anticompetitive theory, see John L. Peterman, “The Clorox Case and the Television Rate Structures,” *Journal of Law and Economics* 11, no. 2 (October 1968): 321, <https://www.journals.uchicago.edu/doi/10.1086/466653>. *Procter & Gamble* is one of a handful of Supreme Court cases involving potential competition mergers. Unlike the horizontal cases discussed in this chapter and the vertical aspects of *Brown Shoe*, the Court left important questions involving potential competition unresolved. For example, although *Procter & Gamble* appeared to be thought of as the most likely entrant into the bleach business, the Supreme Court did not view the case as a definitive precedent on the doctrine of “actual potential competition.” Six years after the *Procter & Gamble* decision, the Supreme Court “left for another day” whether the Clayton Act should condemn a merger that would “leave competition in the marketplace exactly as it was, neither hurt nor helped,” and therefore could be challenged only “on the grounds that the company could, but did not, enter de novo or through a ‘toehold’ acquisition.” *United States v. Falstaff Brewing Corporation*, 410 US 526, 537 (1973).

²⁴¹ See Hawley, *The New Deal and the Problem of Monopoly*, 287. Strictly from a legal standpoint, the Court’s language does not compel rejection of efficiencies as justification for a merger. For example, the *Procter & Gamble* Court discussed “possible” efficiencies, when the legal standard is certainly higher than a mere possibility. See Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 410–13 for details.

²⁴² See Areeda and Hovenkamp, *Antitrust Law*, IVA: para. 971–75. Although courts and the government recognize an efficiency “defense,” in litigation such arguments rarely succeed.

²⁴³ See Khan, “Remarks of Chair Lina M. Khan as Prepared for Delivery”; and Leah Nylen, “DOJ’s Kanter Says Efficiency Defense for Mergers Is Under Review,” *Bloomberg Law*, September 13, 2022, <https://news.bloomberglaw.com/mergers-and-acquisitions/dojs-kanter-says-efficiency-defense-for-mergers-is-under-review> (noting that Assistant Attorney General for Antitrust Jonathan Kanter called this an area “where antitrust policy has diverged from the law”).

²⁴⁴ See Khan, “Remarks of Chair Lina M. Khan as Prepared for Delivery,” 5–8.

²⁴⁵ *Acquisition by One Corporation of Stock of Another*, 15 U.S.C §18 (1950).

²⁴⁶ *Hospital Corporation of America v. Federal Trade Commission*, 807 F.2d 1381, 1985 (7th Cir. 1986).

²⁴⁷ *Hospital Corporation of America*, 807 F.2d 1386.

²⁴⁸ *Hospital Corporation of America*, 807 F.2d.

²⁴⁹ *United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990). Chapter 4 of this report also considers legal developments that the judges reference, as does the following discussion of the FTC’s failures in court.

²⁵⁰ Carol Crawford, Timothy Muris, and John Peterman, “Federal Trade Commission Law Enforcement in the 1980s,” October 1984, 41 (on file with the author). These cases began before the Reagan administration appointees arrived, and those appointees opposed the few in this total that were decided administratively during their tenures, with their dissenting votes later upheld on appeal.

²⁵¹ Crawford, Muris, and Peterman, “Federal Trade Commission Law Enforcement in the 1980s.”

²⁵² Chairman Cicilline, Professor Bok, and many others cite the FTC’s “1948 Merger Report,” while Chair Khan cites the 1947 report. Both FTC reports use the same incorrect data.

²⁵³ See *Bilski v. Kappos*, 561 US 593 (2010); and *Ratzlaf v. United States*, 510 US 135, 147–48 (1994).

²⁵⁴ See note 195 and accompanying text.

²⁵⁵ Sandeep Vaheesan, “Two-and-a-Half Cheers for 1960s Merger Policy,” Harvard Law School Antitrust Association, December 12, 2019, <https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy>; Open Markets Institute, “Open Markets Applauds President Biden’s Choice to Nominate Lina Khan for Commissioner of the Federal Trade Commission,” press release, March 22, 2021, <https://www.openmarketsinstitute.org/publications/open-markets-applauds-president-bidens-choice-to-nominate-lina-khan-for-commissioner-of-the-federal-trade-commission>.

²⁵⁶ The FTC’s new policy and the statement of Commissioner Christine S. Wilson can be found at Federal Trade Commission, “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,” November 10, 2022, <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>; and Federal Trade Commission, “Dissenting Statement of Commissioner Christine S.

Wilson Regarding the ‘Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,’” November 10, 2022, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-of-commissioner-wilson-on-policy-statement-regarding-section-5>.

Erroneously Blaming Chicago and Abandoning Consumers

Assuming the role of chief neo-Brandeisian, in 2021 President Joe Biden blamed previous antitrust policy on Robert Bork, whose tumultuous, failed nomination for the Supreme Court in 1987 began with testimony before the Senate Judiciary Committee chaired by then-Senator Biden. The president charged: “Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork and pulled back on enforcing laws to promote competition.”¹

Chapter 1 summarized why this view of Bork and the Chicago school as villains responsible for 40 years of failure is fallacious, and here those inaccuracies are explained in greater detail. Chicago was important in antitrust history, especially in winning a dispute among economists about the competitive impact of concentration, but Chicago was hardly alone, or even preeminent, in leading criticism of the populist errors dissected in the previous two chapters.

The first section describes the crucial role of Chicago before the 40 years, while the next section discusses the relentless focus of Chicago on consumers, a key attribute of Chicago scholars, one shared across the antitrust consensus that developed. The third section discusses Chicago’s secondary role in policy-setting during the 40 years, while the last section considers how scholars have returned to debate the concentration issue today. As it was 50 years ago, the threat of concentration is again overstated.

The Impact of Chicago

Well before the rise of the neo-Brandeisians, the modern relevance of the Chicago school was occasionally debated within antitrust circles, including a development known as neo-Chicago economics. In a seminar on that subject in 2012, Bruce Kobayashi and I began, “We come both to praise and bury the Chicago school of antitrust,” and subtitled our article “Time to Let Go of the 20th Century.”² Critics condemn Chicago as mere pro-business ideology; to the contrary, the Chicago economists were rigorous, developing testable hypotheses, and then finding data to test them. This focus on empiricism was in sharp contrast to much of what came to be known as post-Chicago economics, focusing on theory with considerably less emphasis on the real-world circumstances under which theoretically problematic practices could in fact harm consumers.

This Chicago focus on empiricism was crucial to perhaps the most impactful influence of Chicago economics on antitrust, involving the role of concentration. The 1968 Merger Guidelines, discussed in Chapter 3, illustrate the economic debate in practice, as well as the extent to which the populism of that era exceeded even the aggressive economic analysis then popular. Those guidelines had slightly more rigorous standards for mergers in concentrated than un-concentrated markets. In the former, defined as four firms with 75 percent of the market, mergers of two firms as small as 4 percent each were presumptively illegal, a presumption extraordinarily difficult to overturn in practice. This presumption followed from the simple market concentration doctrine, finding concentration levels necessarily problematic that would not be so today, and were not

under the Reagan administration's 1982 merger guidelines, themselves significantly tougher numerically than those of President Barack Obama 28 years later.³

Most economists into the mid-1970s posited that competition required a large number of firms, and numerous empirical studies showed that large firms in concentrated industries had higher accounting rates of return. In fact, the concentration doctrine had both theoretical and empirical flaws. Theoretically, numbers alone do not produce competition, which requires interactions among firms even in the so-called perfect competition model.⁴ Of course, the number of firms has an important influence on the ability of firms to engage in noncompetitive behavior, but even firms with large market shares often engage in intense competition. A famous example involves carbonated soft drinks, widely thought to be a mature industry in the 1970s. Nevertheless, Coca-Cola, the leading firm, and its main rival, Pepsi-Cola launched the "cola wars," greatly expanding the sale of carbonated soft drinks over the coming decades, despite high concentration in that business.⁵

It was empirical evidence, not theory, that caused the demise of the simple market concentration doctrine. As the antitrust agencies were embarking on a broad-based deconcentration campaign, Chicago economists developed the evidence that convinced their profession that the doctrine lacked empirical support. Various economists had explained the methodological flaws in the studies that showed the correlation between concentration and higher accounting markups.⁶ The work of Harold Demsetz, at UCLA, but long associated with Chicago, was perhaps the most influential. Demsetz accepted at face value the studies that supported the attacks on concentration and argued that if the large firms had higher rates of return because of market power, then smaller firms in concentrated industries should also earn higher rates of return than smaller firms in unconcentrated industries because they would benefit from the lack of competition. On the other hand, if the large firms in concentrated industries were more profitable because they were more efficient, then the smaller competitors in those industries, not as efficient as their larger brethren, would not have higher profits than smaller firms in unconcentrated industries. This simple but extraordinarily powerful test showed that the evidence supported efficiency, not market power.⁷

Other Chicago scholarship was extremely important, including that by Nobel laureate George Stigler, who wrote a seminal article on the economics of information that helped change attitudes about advertising. The critics of market concentration often turned to advertising as a vehicle that allegedly entrenched large businesses, but Stigler and others showed that advertising could be pro-competitive. Empirical evidence, beginning in the 1970s, frequently showed the pro-competitive benefits of advertising, supporting Stigler's view that "advertising was an immensely powerful tool for the elimination of ignorance."⁸

Because the market concentration doctrine supported an attack on bigness, it was consistent with the populist impulses of the post-World War II era. As with the 1968 merger guidelines, however, the populists did not require concentration, and we saw in Chapter 3 that the Supreme Court cases were not limited to markets with high concentration, even by the standards of the 1960s. Bowing to the reality of Supreme Court decisions, the 1968 guidelines proscribed mergers in non-concentrated industries

at levels as low as two firms with 5 percent each, making them presumptively illegal. These numbers were actually higher than those of the Supreme Court, which would have supported challenges to mergers with market shares half that size. As Chapter 3 discusses, only populism, not the economics of that era, could explain such an aggressive anti-merger law.

Importantly, Chicago economics was only one of many voices condemning the anti-consumer excesses of Robinson-Patman and 1960s merger law, discussed in Chapters 2 and 3, as well as other doctrine. Those excesses were attacked in many corners of antitrust, because the centrality of using antitrust law to the benefit of consumers was the focus of many strands of antitrust analysis. We turn next to that issue and then to the policy agenda of modern antitrust. We shall see that however important Chicago economics was in winning the debate over concentration and in focusing antitrust on protecting consumers, once those debates were won, Chicago was not the central voice in setting the antitrust agenda over the 40 years the neo-Brandeisians so often attack.

The Centrality of Protecting Consumers

By its nature, antitrust law studies the behavior of businesses in the marketplace, and economics is the discipline that focuses on that very question. The antitrust laws are often said to protect competition, and in using economics over many decades, even before the rise of the Chicago school, many in the antitrust community focused on consumers as the ultimate beneficiaries of competition. They rejected efforts to use antitrust in other ways, most significantly to protect competitors, not consumers.

The emphasis on consumers, often called the consumer welfare standard, has obvious benefits over alternatives. Populists historically have desired to protect certain groups of competitors, but the simple truth is that maintaining strong competition and protecting favored competitors are irreconcilable goals. In practice, an antitrust law that protects particular classes of businesses will inevitably cause the competitors of the protected to pull their punches. The result? Consumers lose. This monograph's detailed discussions of two of populism's most determined efforts to establish protected groups of competitors demonstrates that point.

Yet, some populists would add additional objectives into the policy mix. White House Competition Adviser Tim Wu, while an academic, proposed to have antitrust decisions consider whether "the complained of conduct or merger tend[s] to implicate important non-economic values, particularly political values." As an example, Professor Wu asked, "Might it tend to preserve a long-standing, politically influential oligopoly?"⁹ The potential for abuse is obvious. Thus, President Trump complained in 2018 that it was so "sad and unfair" that the Sinclair Broadcast-Turner merger was blocked because it "would have been a great and much needed conservative voice for and of the People," noting that it was "disgraceful . . . liberal fake news NBC and Comcast gets approved."¹⁰ One doubts that Adviser Wu favors such intervention, yet his proposal would seem to allow it.

Today's populists also make inaccurate claims about the modern consumer welfare standard. In particular, they say it focuses on short-term price and output, ignoring longer-term issues like product quality and innovation.¹¹ Yet, the 2010 merger

guidelines have an entire section titled “innovation and product variety,” and economists frequently calculate prices adjusted for differences in product quality.¹² This does not mean, of course, that there was agreement in individual cases. Nevertheless, agreement was widespread on the centrality of using economics, with consumers at the center of the antitrust analysis, a consensus that has been shattered with the recent Biden appointees.

The historical focus on the centrality of economics and consumer welfare predates the Chicago school, as the long opposition to the Robinson-Patman Act and the contemporaneous attacks on the A&P demonstrate. Those critics began before the rise of the Chicago school to antitrust prominence, and of the many voices discussed in Chapter 2, almost none were affiliated with Chicago, with some overtly hostile. The leading legal critic of Robinson-Patman, Fred Rowe, began his criticism as a Yale student in 1951, published the major treatise on the act in 1962, and continued his criticism thereafter. Economists Morris Adelman (MIT) and Donald Turner (Harvard) began their criticism of the attacks on the A&P in the 1940s, and Adelman published his comprehensive book on the subject a decade later. FTC Commissioner Philip Elman wrote his important dissents in Robinson-Patman cases in the 1960s. The American Bar Association published reports in 1956 and 1970, parts of which criticized Robinson-Patman, and the DOJ issued its devastating critique in 1977. The staff reporter for the 1970 ABA report, NYU Professor Robert Pitofsky, was later commissioner and chairman of the FTC. Richard Posner, who had been on the ABA 1970 commission, published a monograph highly critical of FTC enforcement in 1976.¹³

Significantly, of these six individual critics, only Posner could be labeled part of the “Chicago school” of antitrust. Each of the other Robinson-Patman critics was either clearly unconnected to the Chicago school or, in Pitofsky’s case, an outspoken opponent.¹⁴ What these six shared was a basic commitment to economic rigor and consumer welfare—a commitment that transcends any particular “school.”

There were other prominent, non-Chicago school critics of populist antitrust. Two important examples were Professors Milton Handler of Columbia and Thomas Kauper of Michigan, head of the Antitrust Division in the 1970s. Both were sharply critical of the tendency to protect competitors, rather than competition and consumers. In his article, “The ‘Warren Court’ and the Antitrust Laws: Of Economics, Populism, and Cynicism,” Kauper observed that the Warren Court’s decisions “often seem less concerned with the economically necessary level of rivalry within the market than with what may be described as the ‘rights’ of the individual firms which comprise the market,” rights that were being treated as “values to be protected as ends in themselves.”¹⁵

One other issue about the welfare of consumers and antitrust law concerns the narrow definition that Bork used, the technical textbook combination of consumer and producer surplus, as the goal of antitrust. Although as a matter of technical economics in measuring total welfare, both forms of surplus are relevant, the issue is not useful for antitrust policy. As a practical matter, neither issues of policy nor individual cases should turn on application of that definition. In my long experience in making real-world decisions, the precision necessary to see whether the technical definition matters is unavailable.¹⁶

Policy During the 40 Years

President Biden was correct in one crucial aspect of his condemnation of the previous 40 years, albeit the point was implicit—namely, that a bipartisan consensus underlay the policy of those decades. That consensus placed consumers at the center of the antitrust universe and economics as the North Star to guide policy. Of course, there were disagreements on how to apply economics to particular issues, especially regarding cases charging individual firms with monopolization. The sharpest disagreements were not between Republicans and Democrats, however, but between the FTC and the DOJ, especially in this century, with the FTC the more aggressive agency.¹⁷

The Chicago school was instrumental in helping move antitrust from its era of big is bad, the government always wins merger cases, emphasis on per se rules, and competitor protection. As discussed in Chapter 1, however, the Chicago scholars, like the revolutionaries of 1776, focused on winning the revolution, not on agreeing to an agenda once the revolution succeeded. Mergers provide an important example. Bork would have made 4–3 mergers presumptively legal, the line that the Obama administration made the marginal case.¹⁸ At the other extreme, Posner presumptively barred mergers leaving a four firm concentration level greater than 60 percent.¹⁹ William Baxter, the Chicago scholar who had the pen for the 1982 merger guidelines, was between Bork and Posner, making 6–5 mergers the marginal case.

Predatory pricing was similarly divisive among Chicago scholars, ranging from Frank Easterbrook's proposal of a rule of per se legality for monopolist price cuts to Richard Posner's criticism of the Areeda-Turner test as too pro-defendant. It was that test, from the two Harvard professors, that swept the legal field, dramatically changing predatory pricing policy and law.²⁰ As Chapter 1 discussed, the neo-Brandeisian war on low prices is one of their least attractive policies. And modern predatory pricing law is yet another example of why blaming Bork or Chicago for today's antitrust law is a meaningless distraction. Indeed, not long after their predatory pricing article, Areeda and Turner began their treatise, today Areeda and Hovenkamp, by far the most influential source on antitrust law for courts, scholars, and practitioners alike. Justice Breyer, the former Harvard colleague of Areeda and Turner, would become one of the most influential jurists of the 40 years, with antitrust views antithetical to those of many progressives.

As with Baxter, individual Chicago scholars made important contributions during the 40 years. Bork, Posner, and Easterbrook wrote multiple antitrust opinions as circuit court judges. The Supreme Court often cited Chicago scholarship, especially as it “cleaned up” antitrust doctrine, usually without directly overruling previous decisions. Nevertheless, as the disputes of the '60s and '70s became more and more distant, the Chicago focus on those disputes became less and less relevant.

A final illustration of the importance of Harvard to development of modern antitrust concerns the 1977 Brunswick decision, in which the Supreme Court definitively stated that “the antitrust laws were enacted for the protection of competition, not competitors.”²¹ Reviewing Court materials, William Kovacic persuasively attributes that

holding, written by Justice Thurgood Marshall, to the influence of Harvard, not Chicago.²²

Today's Claims About Concentration

Like past populists, today's neo-Brandeisians support their "big is bad" beliefs with claims that concentration is increasing. As discussed in Chapter 3, they rely on the mistaken 1948 FTC study for historical support, apparently for help to return to an aggressive interpretation of Section 7. Use today of a 75-year-old report that even its authors repudiated reflects stunning ignorance of the facts and the historical record.

Modern studies are said to show that concentration has increased, but these too are unavailing, with some familiar methodological flaws. The studies most often cited aggregate businesses into categories much larger than the antitrust markets that the courts and the agencies have used for decades based on the breakthrough hypothetical monopolist test of the 1982 merger guidelines.²³ Werden and Froeb conclude that concentration measures using aggregated industrial data "mask any actual changes in the concentration of markets, which can remain the same or decline despite increasing concentration for broad aggregations of economic activity."²⁴ Other studies reveal serious geographic market aggregation problems. Rossi-Hansberg and colleagues used eight-digit SIC codes to evaluate national and local concentration between 1990 and 2014. Although it increased nationally, concentration decreased locally, and the more geographically disaggregated the data, the more pronounced the downward trend.²⁵

Benkard et al.'s recent NBER study is especially important.²⁶ They use brand purchase data from 1994 to 2019 to define product markets, finding concentration declined both nationally and locally. They then aggregated these product markets into broad sectors. Consistent with the studies that had found increased concentration on which today's populists rely, this procedure also found increased concentration, both nationally and locally. Thus, concentration in markets defined like those under antitrust law decreased, while increasing in artificially aggregated sectors.

Besides concentration trends, other studies show markups increased over time, with neo-Brandeisians arguing these data show increased market power.²⁷ Studies of the simple market concentration doctrine decades ago show such an increase could be consistent with either market power or increased efficiency. Demsetz's famous study shows the latter. History appears to be repeating as Doppler and colleagues use Nielsen scanner data to estimate marginal costs, prices, and markups between 2006 and 2019 for hundreds of consumer products to test whether markups have increased and, if so, determine the source of the increase.²⁸ As with Demsetz, they find an efficiency explanation: Markups have increased for pro-competitive reasons, specifically decreased marginal costs, not anti-competitive ones.

Conclusion

The numerous criticisms the Biden administration's neo-Brandeisians make of the antitrust world that they inherited reveal their anathema to the recent past, the "experiment failed" in the president's words. Antitrust during those 40 years hardly

spoke with one voice, and there were numerous debates about various doctrines and sometimes even more vigorous debate over particular cases.²⁹ As heated as those debates sometimes became, the participants spoke a common language and shared a common vision, that of using economics to protect consumers. The neo-Brandeisians' worldview is much different, with their proposals for radical antitrust intervention untethered to economic analysis of the impact on consumers. Their populism shines through, beginning with their name and continuing, as this monograph details, with their affinity for two of the great populist mistakes of antitrust history: the Robinson-Patman Act and early enforcement under amended Section 7 of the Clayton Act, especially in the 1960s.

Thus, we have actual tests of these two different approaches. The antitrust world fought hard to shed itself of the mistakes that the new leadership praises and condemns their immediate predecessors for abandoning. This monograph details the reasons antitrust abandoned both the Robinson-Patman Act and populist merger enforcement. There is no reason to travel those roads again. Once was more than enough!

Notes

¹ Joe Biden, President, U.S., Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (Jul. 9, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

² Bruce H. Kobayashi & Timothy J. Muris, Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century, 78 Antitrust L.J. 147 (2012).

³ See *supra* Ch. 3, at 26 (discussing the changes in HHI concentration thresholds under the horizontal merger guidelines).

⁴ In the perfect competition model, an individual firm cannot raise price by restricting output, given the large number of firms. As a technical and logical matter, if one firm reduces output, price must increase, even if by a tiny amount, unless another firm acts to increase output. Such acts form the basis of competitive markets, not just numbers of firms.

⁵ See Timothy J. Muris, David T. Scheffman, & Pablo T. Spiller, STRATEGY, STRUCTURE, AND ANTITRUST IN THE CARBONATED SOFT-DRINK INDUSTRY PINCITE (1993).

⁶ See Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973).

⁷ See Steven Berry, *Market Structure and Competition, Redux*, FTC Micro Conference, Nov. 2017, https://www.ftc.gov/system/files/documents/public_events/1208143/22_-_steven_berry_keynote.pdf.

⁸ George J. Stigler, *The Economics of Information*, 64 J. POL. ECON. 213, 220 (1961).

⁹ Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI Antitrust Chron 1,9 (April 2018)

¹⁰ Donald J. Trump (@realDonaldTrump), Twitter (July 24, 2018), archived at <http://perma.cc/VMP5-BQP8>.

¹¹ Lina M. Khan, 126 Yale L.J. 710, at 716, 737 (2017); see also Marshall Steinbaum and Maurice E. Stucke, The Effective Competition Standard: A New Standard for Antitrust, 87 U Chi L Rev 595, 610 (2020).

¹² See Joshua D. Wright and Douglas H. Ginsburg, The Goals of Antitrust: Welfare Trumps Choice, 81 Fordham L Rev 2405, 2410 & nn 29–31 (2013); also United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 6.4 (2010) [*hereinafter* 2010 Horizontal Merger Guidelines], available at <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

¹³ RICHARD POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES (1976).

¹⁴ How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (Pitofsky ed., 2008). Rowe was also critical of various aspects of the Chicago School. See

Frederick Rowe, *The Decline of Antitrust and Delusions of Models; The Faustian Pact of Law and Economics*, 72 Geo. L.J. 1511 (1984).

¹⁵ Thomas E. Kauper, The “Warren Court” and the Antitrust Laws: of Economics, Populism, and Cynicism, [67 Mich. L. Rev. 325 (1968), see also Milton Handler, The Twentieth Annual Antitrust Review—1967, 53 Virginia L. Rev. 1667 (1967).

¹⁶ Herbert Hovenkamp, Is Antitrust’s Consumer Welfare Principle Imperiled?, 45 J. Corp. L. 101, 130 (2019). For a practical application of the consumer, welfare standard, see the opinion of another noted Chicago scholar, Judge Easterbrook, stating “the core question in Antitrust is output,” in *Chicago Professional Sports LP v NBA*, 95 F.3d 593 (7th Cir. 1996).

¹⁷ While the FTC continued to bring monopolization cases, the DOJ essentially abandoned the field until it sued Google late in the Trump Administration. Moreover, the DOJ attacked an FTC case publicly in court. I discuss the issues in an amicus brief filed in support of the FTC in that case before the Ninth Circuit. Brief of *Amicus Curiae* Timothy J. Muris in Support of Appellee, Fed. Trade Comm’n v. Qualcomm Inc., (Nov. 2019), available at <https://cdn.ca9.uscourts.gov/datastore/general/2020/02/27/19-16122-Timothy%20J.%20Muris%20Amicus%20brief.pdf>.

¹⁸ Robert H. Bork, Antitrust Paradox 221-22 (1993); 2010 Horizontal Merger Guidelines, *supra* note 12, at 19.

¹⁹ See RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (1976).

²⁰ See Phillip Areeda and Donald F. Turner, 1–3 Antitrust Law: An Analysis of Antitrust Principles and Their Application (Little, Brown 1978)

²¹ Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

²² William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, 2007 COLUM. BUS. L. REV. 1, 55-61 (2007).

²³ See, e.g., Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise of Inequality*, in TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS (Martin Guzman ed., 2018); *Business in America: Too Much of a Good Thing*, ECONOMIST (Mar. 31, 2016), <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing>; David Autor, et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645, 645 (2020). Other studies include Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. & ECON. S3 (2014); Gustavo Grullon, Yelena Larkin, & Roni Michaely, *Are US Industries Becoming More Concentrated?* 23 REV. FIN. 697 (2019); Matias Covarrubias, Germán Gutiérrez, & Thomas Philippon, *From Good to Bad Concentration? US Industries over the Past 30 Years*, 34 NBER MACROECONOMICS ANNUAL 1 (2020). On the merger guidelines, see U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (1992) [hereinafter 1992 GUIDELINES], <https://www.justice.gov/atr/horizontal-merger-guidelines-0>. Compare 1982 GUIDELINES, at 3-4 (“In general, the Department seeks to identify a group of products such that a hypothetical firm that was the only present and future seller of those products could raise price profitably.”), with 1992 GUIDELINES at § 1.1 (“In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control.”)

²⁴ Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, 33 Antitrust 74, 74 (2018).

²⁵ Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, in NBER Macroeconomics Annual 2020, volume 35 (Martin Eichenbaum & Erik Hurst, eds., forthcoming 2020), *preliminary draft available at* <https://www.nber.org/chapters/c14475>; see also Robert Kulick & Andrew Card, *Industrial Concentration in the United States: 2002-2017*, American Enterprise Institute (2022) (finding serious aggregation problems), available at <https://www.aei.org/articles/industrial-concentration-in-the-united-states-2002-2017/>.

²⁶ C. Lanier Benkard, Ali Yurukoglu, & Anthony Lee Zhang, *Concentration in Product Markets*, NBER Working Paper 28745 (Apr. 2021), available at https://www.nber.org/system/files/working_papers/w28745/w28745.pdf

²⁷ Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. Econ. 561, 562 (2020); see Gustavo Grullon, Yelena Larkin, & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697 (2019).

²⁸ Hendrik Döpper et al., Rising Markups and the Role of Consumer Preferences, Harv. Bus. Sch. Working Paper No. 22-025 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939126.

²⁹ See *supra* Ch. 1, nn. 12, 21 (citing Timothy J. Muris & Jonathan E. Nuechterlein, Chicago and Its Discontents, 87 UNIV. OF CHI. L. REV. 495 (2020); Bruce H. Kobayashi & Timothy J. Muris, CHICAGO, POST-CHICAGO, AND BEYOND: Time To Let Go of the 20th Century, 78 Antitrust L.J. 147 (2012)).