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## The Political Economy of the Decline in Antitrust Enforcement in the United States

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**Stigler Center**

for the Study of the Economy and the State

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in Antitrust Enforcement in the United States**

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# **The Political Economy of the Decline in Antitrust Enforcement in the United States**

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Antitrust enforcement in the United States has declined since the 1960s. We investigate the political causes of this decline by looking at who made the crucial decisions and the strength of their popular mandate. Using a novel framework to understand the determinants of regulatory capture and several new datasets, we find that there was no public support for the weakening of antitrust enforcement. The decline in antitrust enforcement was the result of a collection of technocratic decisions made in politically unaccountable ways, mostly by regulators and judges. Behind the scenes, big business played a major role in influencing these agents; but other factors (like the increase in private sector pay relative to government pay) and intellectual currents mattered as well.

## Introduction

There is a growing consensus among economists that U.S. industries have become less competitive in the last 50 years. There is less consensus, however, on the cause. Some blame technology, others a decline in antitrust enforcement. Indeed, there is evidence that antitrust enforcement, whether through actions by the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) or through private litigation, has decreased over time. We focus on the enforcement theory, and after documenting the decline in enforcement, discuss why the decline took place.

The conventional wisdom is that an intellectual movement in economics that began at the University of Chicago, and spread to other universities like Harvard, revolutionized antitrust law by injecting a high degree of skepticism into antitrust analysis.<sup>2</sup> Leading figures in this movement

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<sup>2</sup> The term “Chicago School” is usually used, and we will use it as well, but the term is a bit misleading. Members of the school held different views on many issues (see Anu Bradford, Adam S. Chilton, and Filippo Lancieri, “The Chicago School’s Limited Influence on International Antitrust,” *The University of Chicago Law Review* 87, no. 2

eventually persuaded the antitrust community that prevailing antitrust law was too restrictive, and that enforcement was often unnecessary and even counterproductive.<sup>3</sup> This explanation of the decline in antitrust enforcement assumes that ideas drive political change, ignoring any political economy consideration. By contrast, we focus on politics, starting with the observation that there is growing evidence that the policy of reduced antitrust enforcement was not neutral from a distributional point of view.<sup>4</sup> In this paper, we study how political economy considerations drove the evolution of U.S. antitrust enforcement in the last seventy years.

It is tempting to argue that the decline of antitrust enforcement is due to the influence of business. But a simple theory that business gets what it wants is obviously inadequate. Business has always been powerful in the United States, while the enforcement of antitrust law has waxed and waned at various times. Moreover, businesses have different attitudes about antitrust law: some (especially small companies or new entrants) support it, or at least take advantage of it, as Netscape did against Microsoft, and Yelp and Epic are doing now against Google and Apple. Large businesses, however, generally oppose antitrust law, as it can be an impediment to their own growth. Meanwhile, public support for antitrust has fluctuated. Enthusiasm about antitrust law, driven by hostility toward monopoly and concentrated capital, prevailed in the late nineteenth and early twentieth centuries; at other times, the public has seemed indifferent to antitrust.<sup>5</sup> As a result, the explanation for the decline of antitrust enforcement is unavoidably complex.

Our starting point for understanding the decline of antitrust is the admittedly stylized premise that when policy is made with a high degree of public awareness through democratically accountable officials, the policy is likely to advance public values and the public interest. In the U.S. system, the most democratically accountable officials are the members of Congress and the

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(2020): 297–330.) and quite a few scholars sometimes associated with the “Harvard School” also expressed skepticism about many aspects of antitrust enforcement. A notable example is Phillip Areeda and Donald F. Turner, “Predatory Pricing and Related Practices under Section 2 of the Sherman Act,” *Harvard Law Review* 88, no. 4 (1975): 697–733., which had an immense influence on the judiciary and all but destroyed predatory pricing claims. See Herbert Hovenkamp, “The Areeda–Turner Test for Exclusionary Pricing: A Critical Journal,” *Review of Industrial Organization* 46, no. 3 (2015): 209–28. See also William E. Kovacic, “The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,” *Colum. Bus. L. Rev.*, 2007, 1. (describing the key role played by Harvard scholars such as Phillip Areeda, Donald Turner and Stephen Breyer in shaping modern US, pro-defendant antitrust laws), William E. Kovacic, “The Chicago Obsession in the Interpretation of US Antitrust History,” *The University of Chicago Law Review* 87, no. 2 (2020): 459–94. (acknowledging the pivotal role played by the Chicago School but criticizing the “Chicago Obsession” as incomplete and unreliable). Elhauge and other scholars have described a Harvard School with more moderate principles than the Chicago School, but from our standpoint Harvard and Chicago are quite similar. Indeed, in the course of arguing that the Harvard School had exerted more influence on the Supreme Court than the Chicago School, he relies on seven then-recent Supreme Court cases in which all the plaintiffs lost (just not as badly as they would have if the Chicago School had prevailed). Einer Elhauge, Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?, 3 *Comp. Pol’y Inter’l* (2007).

<sup>3</sup> See for example, Robert Pitofsky, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press, 2008).; Lina Khan, “Amazon’s Antitrust Paradox,” *The Yale Law Journal* 126, no. 3 (2017): 710–805. at 737; Herbert Hovenkamp and Fiona Scott Morton, “Framing the Chicago School of Antitrust Analysis,” *U. Pa. L. Rev.* 168 (2019): 1843.

<sup>4</sup> See, for example, Amit Zac, “Economic Inequality and Competition Law: A Comparative Analysis of the USA Antitrust Model,” *Mimeo*, 2020. and part I, below.

<sup>5</sup> For example, Americans’ confidence in big business has fluctuated over time, currently being at one of historical lows. See Gallup Inc, “Gallup Polls - Big Business,” Gallup.com, July 2021, <https://news.gallup.com/poll/5248/Big-Business.aspx>. This decrease has been particularly acute where tech companies are concerned—with most of the public wanting regulation—but applies across the board.

President. While they are, of course, influenced by interest groups like business, we assume that interest group influence is not complete; that it must overcome the influence of voters; and that the influence of voters is greatest when the policy in question has the attention of the public.

Elected officials appoint and confirm judges and top regulators, and in the case of most regulators, the president can fire them. Elected officials can also exert influence on judges and regulators by controlling budgets and jurisdiction. But we assume that judges and regulators enjoy some degree of autonomy from both the political class and the public, which they can use for good or ill. We also assume that regulators and judges face more complex incentives than elected officials do—for example, incentives arising from economic opportunities after their term is completed. We use this simple framework to organize our description of the decline of antitrust enforcement. Part I summarizes the data on the decline of U.S. antitrust enforcement and associated winners, and Part II describes our theory.

Part III, an empirical section, relies on various sources of data that can help us grasp the motivations behind the changes in U.S. civil antitrust enforcement over the past decades. Part III.A. focuses on actors subject to direct democratic accountability: the President and Congress. We find that antitrust considerations were present in high-level political agendas until the Carter administration. After Carter, concerns around monopoly and antitrust enforcement all but vanished from public debate. Part III.B then explores the mechanisms employed in the weakening of U.S. antitrust enforcement over the past decades. It outlines the key role played by regulators and courts in weakening enforcement.

Part IV addresses our motivating question by bringing together our theoretical framework from Part II and the data from Part III. We argue that the decline of antitrust enforcement was not the result of democratic will—rather, it (at least partially) reflects the influence of business on regulators and judicial appointments in an intellectual and economic environment that favored the interests of business. A brief conclusion follows.

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

U.S. civil antitrust enforcement has significantly weakened over the past decades. Vivek Ghosal studied Department of Justice enforcement actions (cases filed in court) between 1958 and 2002,<sup>6</sup> and identifies several structural breaks in enforcement dynamics taking place throughout the 1970s, all in the direction of weaker enforcement. Ghosal defines a structural break as the Quandt Likelihood Ratio statistic that enables the separation, with a 15% trimming threshold, between two parts of the sample with different means. The estimated breaks took place in: (i) 1972 for total civil cases; (ii) 1974 for Clayton Act Section 7 Merger cases as a proportion of total US mergers; (iii) 1981 for Sherman Act Section 1 cases; and (iv) 1972 for Sherman Act Section 2 cases. It is worth noting that these numbers likely understate the degree of changes in enforcement between the 1950s and today, as—with the exception of the analysis on mergers—they rely on the raw number of cases and not the number of cases divided by the size of the economy. Yet, during this period real gross domestic product jumped from USD 3.3 trillion in 1960 to USD 19.1 trillion in 2021.<sup>7</sup>

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<sup>6</sup> Vivek Ghosal, “Regime Shift in Antitrust Laws, Economics, and Enforcement,” *Journal of Competition Law and Economics* 7, no. 4 (2011): 733–74.

<sup>7</sup> In chained 2012 dollars - See <https://fred.stlouisfed.org/series/GDPC1>.

The exception to these findings of dwindling DOJ civil antitrust litigation is Ghosal's findings of a positive structural break towards increased enforcement in criminal cases, which takes place in 1979. Yet, while relevant, the data on civil and criminal investigations are not really comparable across time: cartelization only became a felony in 1974, with the associated creation of a corporate leniency program in 1978 (though its initial effectiveness is contestable).<sup>8</sup> While our focus in this article is on civil antitrust cases that can impact market structure, a shift in policy towards the more aggressive prosecution of price-fixing is relevant. Virtually no one defends cartelization, and so it seems natural that as other forms of antitrust enforcement diminished, enforcement resources would be shifted to criminal investigations.

Ghosal's is the most sophisticated quantitative analysis of changes in U.S. antitrust enforcement to date. Still, other studies of the DOJ and FTC caseloads come to similar conclusions. Gallo et al. find that total DOJ antitrust litigation rose from an average of 52 cases a year between 1955-1979 to an average of 77 per year between 1980 and 1997. Yet the cases' focus changes significantly. While in the first period the DOJ brought an average of 21 cases a year against Fortune 500 companies, this number drops to 6 a year after the 1980s. Similarly, the number of civil cases drops from an average of 31 a year from 1955 to 1979 to 16 between 1980 and 1997, while criminal litigation rises from an average 21 cases per year to 61 per year.<sup>9</sup> Even more noteworthy, between 1955 and 1979, the DOJ brought at least 221 cases for monopolization, exclusionary practice, and vertical restrictions, while from 1980 until 1997, this number fell to 22.<sup>10</sup> Starting in mid-1970s and early 1980s the DOJ shifted from enforcing antitrust law against large corporations to focusing on price fixing against smaller defendants. Babina et al., also use the Commerce Clearing House Trade Regulation Reports to construct a series of DOJ antitrust lawsuits beginning in the 1980s. They find that cases steadily dropped from approximately 100 per year in the early 1980s to slightly above 25 in 2018.<sup>11</sup>

There are fewer studies of FTC enforcement, possibly because of a lack of reliable data, but what is available paints a somewhat similar picture. An earlier analysis of FTC complaints by Richard Posner indicated that the FTC started an average of 15 restraint-of-trade cases per year between 1950 and 1969, a number that rises to an impressive 61 once Robinson-Patman claims are included.<sup>12</sup> Complementary data compiled by Bill Kovacic indicates that FTC enforcement actions (excluding horizontal restraints) drop significantly after the 1980s. The average number of FTC complaints falls from an average of 18 a year between 1961 and 1979 to 9 a year between 1980 and 2003.<sup>13</sup> This drop, however, masks significant heterogeneity. As is well known, FTC enforcement of Robinson-Patman cases disappears after the 1970s, decreasing from an average of 19 complaints a year between 1961 and 1980 (with the majority in the 1960s) to only 0.3 complaints a year between 1981 and 2000. A less stark but similar trend exists for vertical restraints cases, that drop from an average of 3.5 per year between 1961 and 1980 to 0.85 per year between

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<sup>8</sup> Ghosal, "Regime Shift in Antitrust Laws, Economics, and Enforcement." at 770.

<sup>9</sup> Joseph C. Gallo et al., "Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study," *Review of Industrial Organization*, 2000, 75-133. at 78-79; 90-91.

<sup>10</sup> Gallo et al. at 100.

<sup>11</sup> Tania Babina et al., "Does Antitrust Enforcement Affect Industry Dynamics? Evidence from 40 Years of U.S. Department of Justice Lawsuits," *Working Paper (Mimeo)*, 2022. at 25.

<sup>12</sup> Richard A. Posner, "A Statistical Study of Antitrust Enforcement," *The Journal of Law and Economics* 13, no. 2 (1970): 365-419. at 369-70.

<sup>13</sup> William E. Kovacic, "The Modern Evolution of US Competition Policy Enforcement Norms," *Antitrust LJ* 71 (2003): 377. at 478.

1981 and 2000.<sup>14</sup> The FTC rarely leads in challenging monopolization—the bulk of that work rests with the DOJ—still, the average number of complaints filed by the agency falls from a low 0.7 per year between 1961 and 1980 to 0.3 per year between 1981 and 2000.<sup>15</sup> The only increase in enforcement takes place against horizontal restraints among competitors, which rise from 1.9 per year from 1961-1980 to 7.1 from 1981-2000.<sup>16</sup> Again, these raw numbers mask the real decline in enforcement, given the significant expansion of U.S. GDP over the period.

More recent data further corroborate this decline in enforcement. The fraction of mergers that regulators challenge has dropped dramatically in recent years and government non-merger civil complaints are also down, even when compared to the already low standards of the 1990s.<sup>17</sup> Antitrust authorities are also facing important resource constraints. The antitrust division of the Department of Justice has approximately 25% less full-time staff today than it did a decade ago,<sup>18</sup> while the staff of the Federal Trade Commission has dropped by around 40% since a peak in the late 1970s.<sup>19</sup> U.S. GDP grew approximately 40% since 2010, but the budget of the FTC and the DOJ Antitrust Division remains roughly the same,<sup>20</sup> leading to warnings that budget shortfalls may jeopardize enforcement actions.<sup>21</sup> A comparison with activities of European antitrust regulators shows how, in the past decades, antimonopoly enforcement has significantly weakened in the U.S.<sup>22</sup>

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

This decrease in enforcement is not restricted to the public sector. The number of private antitrust claims has dropped significantly from a peak in the 1970s and early 1980s—private case filings in federal courts that reached an average of 1500 a year during that period diminished by 66%, to a little more than 500 filings a year by 2010.<sup>23</sup> This in part reflects Supreme Court decisions like the 1977 Illinois Brick ruling that limited the parties that qualify as potential plaintiffs in antitrust lawsuits.<sup>24</sup> These aggregate data also mask the real extent of the decline. First, this analysis does not consider the significant expansion of the U.S. economy over the period, if

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<sup>14</sup> Kovacic. at 460.

<sup>15</sup> Kovacic. at 449

<sup>16</sup> Kovacic. at 426. Kovacic defines horizontal restraints as “direct, formal coordination of output or other dimensions of rivalry” and “collectively or unilaterally adopted practices to facilitate coordination”.

<sup>17</sup> See Michael Kades, “The State of US Federal Antitrust Enforcement,” *Washington: Washington Center for Equitable Growth*, 2019, <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true>.

<sup>18</sup> Kades.

<sup>19</sup> Reza Rajabiun, “Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States,” *Journal of Competition Law and Economics* 8, no. 1 (2012): 187–230. at 208.

<sup>20</sup> Kades, “The State of US Federal Antitrust Enforcement.”

<sup>21</sup> Alex Kantrowitz, “‘A Breathtaking Constraint on Capacity’: Internal FTC Memo Announces Major Cuts Ahead of Tech Giant Action,” n.d., <https://bigtechnology.substack.com/p/a-breathtaking-constraint-on-capacity>.

<sup>22</sup> Germán Gutiérrez and Thomas Philippon, “How EU Markets Became More Competitive than US Markets: A Study of Institutional Drift,” 2018.

<sup>23</sup> Rajabiun, “Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States.”

<sup>24</sup> See Spencer Smith, “The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment,” *Journal of Competition Law & Economics*, 2021.

anything, cases should have risen for enforcement to remain steady. Second, it hides a similarly important shift within enforcement patterns, as cases against price-fixing arrangements, which represented only 10% of litigation early in the century, rose to almost 50% of all filings later-on.<sup>25</sup> Third, antitrust enforcement was expected to pick up the slack left by deregulation: as direct price regulation declined, government policy shifted to ensuring that markets were competitive through indirect promotion of competition. As a result, one would have expected antitrust law litigation to go up, not down.

Examining all this evidence together, it is fair to say that American non-price fixing civil antitrust enforcement is at one of the lowest, if not the lowest, points in the past 100 years, and that this trend toward weakened enforcement starts in the mid-1970s or early 1980s.<sup>26</sup>

This decline in antitrust enforcement is correlated with a steep increase in market concentration in the American economy, a fall in the labor income share, and increases in markups and corporate profits. There is growing evidence that the production and distribution of goods and services in the U.S. economy has become more concentrated in the last several decades. This trend was initially identified by Grullon et al. for American publicly traded firms,<sup>27</sup> but later confirmed for all Census firms (Autor et al.<sup>28</sup> and Covarrubias et al.<sup>29</sup>). By using U.S. NETS data, Rossi-Hansberg et al.<sup>30</sup> confirm concentration trends upwards at the national level but observed decreasing concentration at the zip code level over the same period.

As is well known, rising concentration is not necessarily an indication of growing market power: it could be the result of more efficient firms increasing their market share.<sup>31</sup> To address this complication, De Loecker et al.<sup>32</sup> document that the weighted average markup of U.S. Compustat firms has risen from 1.1 in 1980 to 1.6 in 2016. These estimates have been challenged by Basu,<sup>33</sup> who argues that they are too high. Yet Barkai<sup>34</sup> finds that the profit rate on American value-added rose from 2.2 percent in 1984 to 15.7 percent in 2014. The markup ratio associated with these estimates rises from 1.02 to 1.19 over this period. Gutiérrez and Philippon produce similar estimates,<sup>35</sup> if we adjust for the fact that they report a markup on firm sales, while Barkai reports a markup on value added.

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<sup>25</sup> Rajabiun, “Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States.” at 215-16.

<sup>26</sup> As most antitrust scholars would agree.

<sup>27</sup> Gustavo Grullon, Yelena Larkin, and Roni Michaely, “Are US Industries Becoming More Concentrated?,” *Review of Finance* 23, no. 4 (2019): 697–743.

<sup>28</sup> David Autor et al., “Concentrating on the Fall of the Labor Share,” *American Economic Review* 107, no. 5 (2017): 180–85.

<sup>29</sup> Matias Covarrubias, Germán Gutiérrez, and Thomas Philippon, “From Good to Bad Concentration? US Industries over the Past 30 Years,” *NBER Macroeconomics Annual* 34, no. 1 (2020): 1–46.

<sup>30</sup> Esteban Rossi-Hansberg, Pierre-Daniel Sarte, and Nicholas Trachter, “Diverging Trends in National and Local Concentration” (National Bureau of Economic Research, 2018).

<sup>31</sup> Harold Demsetz, “Industry Structure, Market Rivalry, and Public Policy,” *The Journal of Law and Economics* 16, no. 1 (1973): 1–9.

<sup>32</sup> Jan De Loecker, Jan Eeckhout, and Gabriel Unger, “The Rise of Market Power and the Macroeconomic Implications,” *The Quarterly Journal of Economics* 135, no. 2 (2020): 561–644.

<sup>33</sup> Susanto Basu, “Are Price-Cost Markups Rising in the United States? A Discussion of the Evidence,” *Journal of Economic Perspectives* 33, no. 3 (2019): 3–22.

<sup>34</sup> Simcha Barkai, “Declining Labor and Capital Shares,” *The Journal of Finance* 75, no. 5 (2020): 2421–63.

<sup>35</sup> Germán Gutiérrez and Thomas Philippon, “Declining Competition and Investment in the US” (National Bureau of Economic Research, 2017).



Rises in markups and concentration are correlated. Gutiérrez and Philippon<sup>36</sup> document that the aggregate Lerner index across all Compustat firms rises in sync with the Herfindahl Index. Grullon et al.<sup>37</sup> find a positive correlation between changes in concentration levels and return on assets (ROA). When they decompose ROA, they find that the biggest factor behind the higher ROA is higher markups. Barkai<sup>38</sup> finds that industries that experience a larger increase in concentration also experience a larger decline in the labor share. Industry-level evidence in the markets for beer,<sup>39</sup> kidney dialysis,<sup>40</sup> and mobile communication services<sup>41</sup> supports the causal interpretation of this correlation.

As noted earlier, rising concentration and markups are not necessarily the result of lax antitrust enforcement.<sup>42</sup> As Autor et al. note, “[i]f globalization or technological changes push sales toward the most productive firms in each industry, product market concentration will rise as industries become increasingly dominated by superstar firms, which have high markups and a low labor share of value added.”<sup>43</sup> While the ultimate origin of this increased markup is far from settled, there is growing evidence that lax antitrust enforcement is at least partially to blame, demonstrated by specific and well-identified studies of particular sectors of the US economy. For example, Wollman<sup>44</sup> finds that half of all proposed facility acquisitions in the dialysis market were not reported to the antitrust authorities, since they were part of mergers that fell short of the reduced size thresholds set forth in the 2001 Hart-Scott-Rodino Antitrust Improvements (HSR) Act. These unchallenged mergers led to higher prices and reduced availability of dialysis facilities, which caused a 3.1 percentage point higher hospitalization rate and 1.6-2.0 percentage point lower survival rate in those markets. Alviarez et al. show that forcing divestitures in beer markets where antitrust authorities did not intervene would have reduced the beer price index by 14–30%.<sup>45</sup> Cunningham et al. conservatively estimate that 5.3-7.4% of acquisitions in pharma markets are “killer acquisitions” to prevent future competition, which disproportionately occur just below merger notification thresholds.<sup>46</sup> Blonigen and Pierce study the effect of mergers on markups by using plant-level data from the U.S. Census Bureau of Manufacturing from 1997 to 2007. They find that markups increased between 15 percent to over 50 percent in acquired plants relative to

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<sup>36</sup> Gutiérrez and Philippon.

<sup>37</sup> Grullon, Larkin, and Michaely, “Are US Industries Becoming More Concentrated?”

<sup>38</sup> Barkai, “Declining Labor and Capital Shares.”

<sup>39</sup> Vanessa Alviarez, Keith Head, and Thierry Mayer, “Global Giants and Local Stars: How Changes in Brand Ownership Affect Competition,” 2020.

<sup>40</sup> Thomas G. Wollmann, “How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare” (National Bureau of Economic Research, 2020).

<sup>41</sup> Mara Faccio and Luigi Zingales, “Political Determinants of Competition in the Mobile Telecommunication Industry,” *Review of Financial Studies* (Forthcoming), 2021.

<sup>42</sup> David Autor et al., “The Fall of the Labor Share and the Rise of Superstar Firms,” *The Quarterly Journal of Economics* 135, no. 2 (2020): 645–709.

<sup>43</sup> Autor et al. at 645.

<sup>44</sup> Wollmann, “How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare.”

<sup>45</sup> Alviarez, Head, and Mayer, “Global Giants and Local Stars: How Changes in Brand Ownership Affect Competition.”

<sup>46</sup> Colleen Cunningham, Florian Ederer, and Song Ma, “Killer Acquisitions,” *Journal of Political Economy* 129, no. 3 (2021): 649–702.

non-acquired plants.<sup>47</sup> Finally, Thomas Philippon consolidates similar analyses to argue that a lack of competition is the reason for a decline in US competitiveness.<sup>48</sup>

The relationship between antitrust enforcement and distribution is a separate question. Increases in concentration have been associated with increases in profits and stock market value<sup>49</sup> as well as reductions in the labor share.<sup>50</sup> Even if a reduction in antitrust enforcement promoted economic efficiency, it is associated with increased economic inequality in the United States, where most workers make no more today in real terms than they did forty years ago.<sup>51</sup> In a democracy, public policy decisions that have important distributional consequences should be taken by democratically accountable bodies.<sup>52</sup> Therefore, the puzzle is: given that the reduction in antitrust enforcement is correlated with worsening welfare for a majority of the American people, why has this reduction in antitrust enforcement gone unchallenged until recently?

## Part II. A Theory of Regulatory Change: Direct Capture, Epistemological Capture, and the Chomsky Effect

Understanding the political economy of changes in antitrust enforcement requires identifying what is a *political decision made in a democratically accountable manner*. This task is complicated by the fact that we still lack a comprehensive political economy theory of regulation,<sup>53</sup> fifty years after George Stigler's seminal contribution.<sup>54</sup> This Part develops a simple but holistic conceptual framework that can help us analyze the available evidence.

Our starting point is the pressure group theory developed by Peltzman<sup>55</sup> and Becker.<sup>56</sup> Peltzman argues that politicians and public officials trade-off efficiency and distributional considerations when they make policy. This tradeoff is greatly affected by the initial conditions. Reducing competition in a perfectly competitive market leads to first-order profit gains and second-order consumer-surplus losses. By contrast, increasing competition in a monopolistic situation delivers first-order consumer surplus gains and second-order profit losses. Unlike Becker, however, we do not think that competition among pressure groups leads to efficient outcomes. In fact, the interest of the public is not adequately represented.<sup>57</sup> This does not mean that the public

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<sup>47</sup> Bruce A. Blonigen and Justin R. Pierce, "Evidence for the Effects of Mergers on Market Power and Efficiency" (National Bureau of Economic Research, 2016).

<sup>48</sup> Thomas Philippon, *The Great Reversal* (Harvard University Press, 2019).

<sup>49</sup> Grullon, Larkin, and Michaely, "Are US Industries Becoming More Concentrated?"

<sup>50</sup> Barkai, "Declining Labor and Capital Shares," Jan Eeckhout, *The Profit Paradox* (Princeton University Press, 2021).

<sup>51</sup> Amit Zac, "Economic Inequality and Competition Law: A Comparative Analysis of the USA Antitrust Model," *Mimeo*, 2020.; Drew Desilver, "For Most Americans, Real Wages Have Barely Budged for Decades," *Pew Research Center* (blog), August 7, 2018, <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>.

<sup>52</sup> Luigi Zingales, "The Political Limits of Economics," in *AEA Papers and Proceedings*, vol. 110, 2020, 378–82.

<sup>53</sup> Filippo Lancieri and Luigi Zingales, "Economic Regulation After George Stigler," *ProMarket* (blog), April 14, 2021, <https://promarket.org/2021/04/14/economic-regulation-after-george-stigler/>.

<sup>54</sup> George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science*, 1971, 3–21.

<sup>55</sup> Sam Peltzman, "Toward a More General Theory of Regulation," *The Journal of Law and Economics* 19, no. 2 (1976): 211–40.

<sup>56</sup> Gary S. Becker, "A Theory of Competition among Pressure Groups for Political Influence," *The Quarterly Journal of Economics* 98, no. 3 (1983): 371–400.

<sup>57</sup> See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 2nd ed. (Cambridge,

interest is always ignored. While business has always been powerful in the United States, the enforcement of antitrust law has waxed and waned at various times, likely as a result of the changing strength of the countervailing pressure groups as well as the business coalition's strength and cohesion. Some businesses (especially small or new entrants) tend to see antitrust enforcement as a net positive, while large businesses generally oppose it because it may represent an impediment to their own growth (at the very minimum). Many market characteristics impact these dynamics, such as how concentrated the industry is, how aligned are the political interests of industry players, how disperse the group paying the rent is, how opaque is the rent payment itself, the transaction costs in the political organization of dispersed agents, among others.<sup>58</sup>

Tracing legislative and enforcement changes to particular interest groups by means of a single statistical test is likely impossible. Interest groups rarely act in the open (as their very involvement may electrify the opposition), and the impact of lobbying and donations on policy outcomes can be ambiguous. For this reason, we adopt an indirect approach. When elected officials act, they usually act publicly and thus become democratically accountable. Members of Congress vote for bills; the president announces policies and issues orders. Even when these actions are not reported in the media, political opponents can bring them to light in election campaigns—every action by an elected official creates a risk of public backlash if it does not please voters. For public officials directly accountable to voters (like members of Congress and the president) we assume that a decision favors the broader public if the official openly advertises this decision in public speeches and campaign platforms than if he does not. These assumptions allow us to distinguish among specific mechanisms of action by these agents. For example, single-issue, ordinary legislation is more accountable to society and, as such, more likely to be aligned to voters' interests than changes taking place amidst large, multi-topic omnibus bills (such as general budgets) or decisions made through obscure processes in secondary Congressional Committees. In other words, the democratic legitimacy of actions by the president and Congress is tied to the specific publicity and general voter accountability of those actions—an ill-publicized and barely discussed decision made through obscure and indirect means does not qualify as so: what provides democratic legitimacy is democratic oversight.

A different rationale must be employed to assess the actions of public officials who are only indirectly accountable to voters. Regulators and federal judges usually do not fear public retaliation in the polls,<sup>59</sup> but elected officials who nominate and appoint unpopular regulators and judges do, providing some form of indirect oversight. This means that once appointed, regulators and judges are relatively more free than elected officials to follow their ideological inclinations or personal beliefs when implementing policies or even to make decisions that benefit them personally, for example, by making themselves more attractive to future employers. The degree of this relative freedom reflects the specific characteristics of each position and the stringency of political oversight.<sup>60</sup> The existence of these processes changes incentives and shapes policymaking. On the one hand, transferring the decision to a body of experts only indirectly accountable to voters could be a way to hide a decision from the public, an especially appealing move when the decision is

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MA: Harvard University Press, 1971).

<sup>58</sup> See Filippo Lancieri, "Narrowing Data Protection's Enforcement Gap," *Maine Law Review* 74, no. 1 (2022). at 32-33.

<sup>59</sup> Exceptions exist, such as when they plan to run for office in a later period.

<sup>60</sup> For example, Judges tenured for life are more independent from Governmental priorities than serving-at-will technocrats; stricter or weaker anti-corruption or anti-conflict of interest rules impact the prospects of future employment, etc.

unpopular. On the other, a decision transferred to a more technocratic body is not necessarily against the interest of the broader public—there are many efficiency and other legitimate reasons why technical decisions are delegated to experts.<sup>61</sup>

In general, interest groups can influence expert policymaking through at least three different mechanisms, which differ in how democratically accountable they are. The first, often highlighted in early public choice work, is that these groups can exploit regulators' conscious acts to maximize their prospect of obtaining a well-paying job in the private sector after they leave government. This is the traditional revolving-door/lobbying mechanism through which firms directly "acquire" regulation, as Stigler put it. It is certainly not democratically accountable and has been documented in both the popular press<sup>62</sup> and in academia more generally.<sup>63</sup>

The second, which one may call "epistemological regulatory capture,"<sup>64</sup> reflects a process through which experts enact policies after being disproportionately exposed to ideas or data that benefit interest groups at the expense of the public. Epistemological capture can take place even in a world where experts are independent and well-intentioned, as special interest groups exploit large information asymmetries between industry and regulators to push their agenda.<sup>65</sup> This theory is reminiscent of Aghion and Tirole's model of authority in principal-agent relations, in which a principal has formal authority to make a decision (the right to decide), but an agent has real authority (the effective control over the decision) because such decision requires information in the possession of the agent.<sup>66</sup> Here, the regulators are the principals and the interest groups are the agents. Regulators know about this imbalance and are often suspicious about the information provided by companies. That is why interest groups rely on indirect mechanisms such as their control over datasets and influence over academics,<sup>67</sup> financial resources and donations to NGOs

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<sup>61</sup> See Philippe Aghion and Jean Tirole, "Formal and Real Authority in Organizations," *Journal of Political Economy* 105, no. 1 (1997): 1–29. at 3 (outlining reasons why one would delegate decision-making power to a lower body if more expert/better informed); Johannes Binswanger and Jens Prüfer, "Democracy, Populism, and (Un) Bounded Rationality," *European Journal of Political Economy* 28, no. 3 (2012): 358–72. (modelling when delegation of policy decisions to experts can be optimal); Filippo Lancieri and Caio Mario Pereira Neto, "Designing Remedies for Digital Markets: The Interplay between Antitrust and Regulation," *Journal of Competition Law & Economics*, 2021. (discussing reasons why a specialized regulator may be better equipped than a general enforcer to handle certain aspects of policymaking in digital markets).

<sup>62</sup> Jesse Drucker and Danny Hakim, "How Accounting Giants Craft Favorable Tax Rules From Inside Government," *The New York Times*, September 19, 2021, sec. Business, <https://www.nytimes.com/2021/09/19/business/accounting-firms-tax-loopholes-government.html>.

<sup>63</sup> Ivana Katic and Jerry W. Kim, "Caught in the Revolving Door: Firm-Government Ties as Determinants of Regulatory Outcomes," in *Academy of Management Proceedings*, vol. 2013 (Academy of Management Briarcliff Manor, NY 10510, 2013), 12899.

<sup>64</sup> Cass R. Sunstein, "Stigler's Interest-Group Theory of Regulation: A Skeptical Note," *ProMarket* (blog), April 16, 2021, <https://promarket.org/2021/04/16/george-stigler-theory-regulation-capture-cass-sunstein/>. (explaining the term); Lancieri, "Narrowing Data Protection's Enforcement Gap." (discussing its application to data protection policy).

<sup>65</sup> Lancieri, "Narrowing Data Protection's Enforcement Gap."

<sup>66</sup> Aghion and Tirole, "Formal and Real Authority in Organizations.", at 2-3.

<sup>67</sup> Luigi Zingales, "Preventing Economists Capture," in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013).;

and think tanks,<sup>68</sup> influence on appointments to regulatory bodies,<sup>69</sup> sponsorship of training programs,<sup>70</sup> and influence on media coverage<sup>71</sup> to convince regulators that a decision that benefits the interest group is in the public's best interest. Epistemological capture is in tension with democratic principles, as it partially relies on control over information and discourse, but that is not to say that it always prevails or cannot be diluted by public debate. In addition, it is hard to detect—experts are usually acting in good faith—making it likely more pervasive but no less dangerous to general welfare than the traditional, revolving-door type of capture.

The final mechanism is what we call the Chomsky effect,<sup>72</sup> or the process through which experts are disproportionately selected from a pool of people with an ideology that benefits interest groups.<sup>73</sup> When experts in good faith disagree about an issue because of its complexity, and these disagreements harden into factions, we might expect each faction to be correct about half the time. Thus, political agents who select regulators or advisors from only one faction for ideological reasons will introduce ideological bias into the system. The democratic legitimacy of this system is tied to the legitimacy of the appointment process itself and the amount of public vetting involved: if the president or member of Congress campaigned on the topic, the expert was questioned about his or her views during the appointment process and/or was specifically appointed to implement specific policies, then this would be the type of indirect democratic accountability referenced above. The opposite happens, however, if experts are appointed without a clear mandate or much public scrutiny.

For all three mechanisms, the likelihood that special interests are successful is also tied to the institutional design of the system, which can facilitate or hinder this “policy influence” process. Capture is costly to the public—now forced to pay rents—and may lead to civil pushback. In order to overcome or prevent this, effective regulatory capture requires an investment by interest groups, who must spend money and other forms of political capital (e.g. mobilization of stakeholders, control over the media, engagement with academics, etc.) to promote their interests without raising awareness to and/or enabling such pushback.<sup>74</sup> The amount that must be spent (or the cost of this “influence”) increases when the design of the regulatory system incorporates institutional

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<sup>68</sup> Marianne Bertrand et al., “Hall of Mirrors: Corporate Philanthropy and Strategic Advocacy” (National Bureau of Economic Research, 2018).; Daisuke Wakabayashi, “Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech.,” *The New York Times*, July 24, 2020, sec. Technology, <https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html>.; Rob Davis and Toni Schick, “What Happened When a Public Institute Became a De Facto Lobbying Arm of the Timber Industry,” ProPublica, August 4, 2020, <https://www.propublica.org/article/what-happened-when-a-public-institute-became-a-de-facto-lobbying-arm-of-the-timber-industry>.

<sup>69</sup> Lancieri, “Narrowing Data Protection’s Enforcement Gap.”

<sup>70</sup> Elliott Ash, Daniel L. Chen, and Suresh Naidu, “Ideas Have Consequences: The Impact of Law and Economics on American Justice,” *Center for Law & Economics Working Paper Series 4* (2021).

<sup>71</sup> Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Random House, 2010).

<sup>72</sup> After his description of such process for the news media in Herman and Chomsky.

<sup>73</sup> As Noam Chomsky explained when asked by a BBC journalist on whether he believed the journalist was self-censoring, “I am not saying you are self-censoring, I am saying that if you did not believe in what you believe, you would not be where you are”. Noam Chomsky, *The Big Idea - Noam Chomsky Interview with Andrew Marr*, February 1996, <https://www.youtube.com/watch?v=GjENnyQupow>. at 11’

<sup>74</sup> As mentioned above, different market characteristics enable or hinder these dynamics, such as how concentrated the industry is and how aligned are the political interests of industry players, how disperse the group paying the rent is, how opaque is the rent payment itself, transaction costs in the political organization of dispersed agents, etc. See Lancieri, “Narrowing Data Protection’s Enforcement Gap.” at 32-33.

counterweights that help enable pushback.<sup>75</sup> Mechanisms vary per area and per jurisdiction, but in general one can point to the role of transparency rules (designed to promote public awareness and democratic accountability of regulatory initiatives) and the institutional capacity of the regulator (such as its ability to access independent resource sources and to maintain an independent and qualified civil servant body). The capture of transparent and accountable regulators is costlier because both processes enable opponents of interest groups to mobilize and counter their special influence.<sup>76</sup> The institutional capacity of the regulator also matters. A regulator that has independent funding sources and that can count on a well-resourced and well-compensated body of civil servants is more likely to resist interest group pressure than a weaker regulator. As we will discuss, most regulatory staff are paid less than they can receive in the private sector. This salary difference reduces regulators' tenure and gives an enormous advantage to the regulated. Lawyers, economists, and accountants who join regulators early in their career will obtain inside knowledge on the regulator's methods, priorities, and norms—all akin to trade secrets—which they can bring to private-sector employers a few years later.<sup>77</sup> Because this inside information is valuable, and is also a good selling point for clients, former high-quality regulators are in great demand and can earn high salaries if they revolve the door to the private sector—the likelihood increasing the higher the pay-differential between the public and private positions. Structural deregulation, or “the systematic undermining of an agency's ability to execute its statutory mandate” through practices such as “leaving agencies understaffed and without permanent leadership; marginalizing agency expertise; reallocating agency resources; occupying an agency with busywork; and damaging an agency's reputation” can be an effective form of capture of a regulatory policy that is usually shielded from public scrutiny and accountability.<sup>78</sup>

Importantly, the framework proposed herein does not assume that regulators and judges necessarily (or even mostly) act against the public interest, or that elected officials always act in the public interest. Nor do we assume that regulators and judges are necessarily (or even mostly) motivated to please a particular interest group. There are innumerable examples of regulatory policies that increase overall welfare, and not all bad policy is “acquired” directly by the industry: incompetence and ideology also play a major role.<sup>79</sup> What we assume is that because politicians are themselves accountable to voters, this impacts their incentives to publicize (or not) the decisions taken by these experts: politicians are more likely to openly discuss or publicize technical decisions that have positive general welfare impacts than those that do not, which are better off shielded from the public eye. Our target is to understand democratic accountability, so our focus is on democratic scrutiny, usually associated with public attention, as a proxy for welfare impacts.

Putting all these theoretical considerations together, we make the following assumptions: When a decision with important distributional consequences is made by a publicly elected

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<sup>75</sup> Lancieri. at 39.

<sup>76</sup> For example, requiring regulators to propose rules and solicit public comment before formally issuing those rules forces interest groups to submit comments and data, putting opponents on alert, and allowing them to respond by marshalling evidence and making arguments of their own.

<sup>77</sup> For example, a former PCAOB inspector hired by KPMG was able to provide the audit firm with advanced warnings of which engagements will be inspected. Securities and Exchange Commission, “Six Accountants Charged with Using Leaked Confidential PCAOB Data in Quest to Improve Inspection Results for KPMG,” sec.gov, June 2018, <https://www.sec.gov/news/press-release/2018-6>.

<sup>78</sup> See Jody Freeman and Sharon Jacobs, “Structural Deregulation,” *Harvard Law Review*, *Forthcoming*, 2021.

<sup>79</sup> See Andrei Shleifer, “George Stigler's Paper on Regulation and the Rise of Political Economy,” *ProMarket* (blog), April 28, 2021, <https://promarket.org/2021/04/28/george-stiglers-regulation-political-economy-capture/>.

representative, who publicly campaigned on it, we consider this decision to be democratically accountable and generally in the interest of the public at large. If it is made by a delegated expert (judge or regulator) whose appointment was publicly vetted, but it is claimed by the politician who appointed her as a success or is the explicit reason why the expert was appointed to begin with, we consider it less likely to be in the public interest. When a decision is made by a publicly elected representative who does not openly advocate for it in an election or the decision is shielded from public scrutiny by inclusion in general omnibus legislation or made through obscure procedural shortcuts, the decision is still less likely to be in the public interest. Finally, the decision that is least likely to be in the public's interest is one made by a non-elected expert in a non-transparent agency while no high-level elected representatives take credit for it.

## Part III. The Causes of the Decline in Antitrust Enforcement

The framework outlined in Part II will guide our empirical analysis in this section. We review the origins of weakened antitrust enforcement in the order of democratic accountability and transparency. We start from the laws that were approved (or failed to be repealed) by Congress during this period (III.A.1). Then we move to the presidential political campaign documents, speeches, and executive policies (III.A.2 to III.A.4) and Supreme Court nominations (III.A.5). After discussing the decisions made by elected representatives, we move to the decisions made by technocratic bodies appointed by elected representatives: in Parts III.B.1 to III.B.3 we examine the FTC and the DOJ (agencies whose appointees can be revoked by the President) and in Part III.B.4 we consider the federal courts, which by design are not politically accountable.

### Part III.A. Elected Bodies

#### Part III.A.1 Congress

Starting in the late nineteenth century, the United States Congress passed a series of statutes that shaped US antitrust enforcement. The most important laws include: (i) the Sherman Act (1890); (ii) the Clayton Antitrust Act (1914); (iii) the Federal Trade Commission Act (1914); (iv) the Robinson-Patman Act (1936); (v) the Celler-Kefauver Act (1950); (vi) the Antitrust Procedures and Penalties (Tunney) Act (1974); (vii) the Hart-Scott-Rodino Antitrust Improvements Act (1976); (viii) the Federal Trade Commission Improvements Act (1980); (ix) the Foreign Trade Antitrust Improvement Act (1982); (x) the International Antitrust Enforcement Assistance Act (1994); (xi) the updated amendments to the HSR of 2000 and (xii) the Antitrust Criminal Penalty Enhancement and Reform Act (2004)—which was later extended by the repeal of sunset provisions in 2020.

Virtually all these statutes expanded the scope of antitrust law and strengthened enforcement beyond the baseline antitrust regime created by the Sherman Act.<sup>80</sup> The Clayton Act blocked specific anticompetitive practices, including price discrimination, tying, and mergers, and strengthened enforcement by creating a private right of action and a remedy of treble damages. The FTC Act created the FTC, a new independent agency, and gave it authority to enforce the antitrust laws. The Robinson-Patman Act targeted price discrimination. The Celler-Kefauver Act closed gaps in the Clayton Act's restrictions on mergers. The Hart-Scott-Rodino Act strengthened

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<sup>80</sup> See Daniel A. Crane, "Antitrust Antitextualism," *Notre Dame Law Review* 96, no. 1 (2021): 1204.

merger enforcement by requiring large merging firms to give notice to the antitrust authorities and directing the antitrust authorities to review mergers ahead of their consummation. The Tunney Act strengthened judicial review of consent decrees and increased penalties for antitrust violations; the International Antitrust Enforcement Act facilitated cooperation between the U.S. and foreign antitrust authorities; and, finally, the Antitrust Criminal Penalty Enhancement and Reform Act greatly increased criminal fines for corporations and prison sentences for individuals engaged in cartels as well as strengthened leniency programs to help detect violations.

Only three of the statutes provide exceptions to the statutes' pro-antitrust enforcement pattern, and these exceptions are limited.<sup>81</sup> The Federal Trade Commission Improvements Act of 1982 trimmed the FTC's rulemaking power and clarified exemptions for insurance markets and agricultural cooperatives that had been enacted by the McCarran-Ferguson Act and the Capper-Volstead Act respectively. However, the bulk of the Act was targeted at the FTC's consumer protection division, which earned expanded powers as a result of the Magnuson-Moss Warranty Act of 1975 (and a topic we do not study)—as a result the changes that impacted antitrust were narrow and targeted at very specific sectors. As commentators at the time described “[t]he Commission's basic enforcement powers remain unchanged [after the Act].”<sup>82</sup> The Foreign Trade Antitrust Improvement Act limited the rights of foreign victims of anticompetitive behavior to challenge that behavior in U.S. courts. But while the law allowed American companies to engage in anticompetitive behavior overseas, Congress contemplated that this behavior would remain subject to the domestic law of the affected foreign states.<sup>83</sup> Moreover, Congress made clear in the FTAIA that foreign-oriented behavior that caused harm to American markets remained subject to U.S. antitrust enforcement—that is, it did not envision a weakening of U.S. antitrust laws in the domestic market.<sup>84</sup> The last exception is the 2000 amendment to the Hart-Scott-Rodino Act, which marginally raised the threshold for reporting mergers to the government. Yet, many public officials and commentators at the time justified the amendments as helping increase enforcement by relieving the FTC and the DOJ from dedicating an “ever-expanding portion of their resources to the [merger review] program”.<sup>85</sup> Moreover, the 2000 HSR amendment passed in the twilight of the Clinton Presidency (on December 21), as four pages buried within the 320-page omnibus bill for the Fiscal Year 2001 Commerce-Justice-State Appropriations Bill.<sup>86</sup> It is hard to see this law as an important, publicly transparent effort by Congress to weaken antitrust enforcement.

During this period Congress also rejected attempts to weaken enforcement through new legislation, as in the case for the Robinson-Patman Act. Approved in 1936, the Act aimed to “[protect] small business firms from competitive displacement by mass distributors at a time of

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<sup>81</sup> A possibly more important exception to this pattern of increasing antitrust liability and enforcement was a series of early New Deal statutes, including the National Industrial Recovery Act of 1933, which gave the federal government power to authorize and regulate cartels. But this short-lived experiment was a response to an economic emergency, and placed cartelization under the authority of the government, and so was not really an exception to the overall trend toward limiting the power of private corporations to collude or monopolized markets on their own.

<sup>82</sup> Earl W. Kintner, Christopher Smith, and David B. Goldston, “The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority,” *Wash. ULQ* 58 (1980): 847. at 847.

<sup>83</sup> See 15 U.S. Code § 6a.

<sup>84</sup> *Op. cit.*

<sup>85</sup> Andrew G. Howell, “Why Premerger Review Needed Reform-and Still Does,” *Wm. & Mary L. Rev.* 43 (2001): 1703. at 1703-04.

<sup>86</sup> Howell. at 1704.



general economic distress”.<sup>87</sup> Its repeal or substantial overhaul has been recommended at least four times, in 1955, 1969, 1977, and 2005.<sup>88</sup> In spite of all these attempts, the Robinson-Patman Act is still on the books. Interestingly, it is not enforced: public litigation fell from a peak of 758 cease-and-desist orders between 1960-1972 to all but zero in modern times.<sup>89</sup> This seems to be an example of experts overruling the political will expressed by elected representatives, resulting in diminished enforcement.<sup>90</sup>

Finally, while the focus of this paper is federal antitrust enforcement, we should comment on state law. In the wake of the *Illinois Brick* decision, numerous state legislatures enacted so-called Illinois Brick repealer statutes, which created state law causes of action for the indirect purchasers whose claims were barred under the Supreme Court decision.<sup>91</sup> Otherwise, state courts tend to interpret longstanding antitrust statutes consistently with the interpretations of federal laws by federal courts. As a practical matter, this means that a state pattern of greater legislative but weaker judicial support for antitrust enforcement mirrors federal experience. However, a more detailed analysis of state antitrust enforcement is beyond the scope of this paper.

While the pattern of antitrust legislation in the United States is overwhelmingly in the direction of greater liability and enforcement, this trend peters out in the 1970s. All of the statutes after HSR were minor. Congress’ and (as we posit) the public’s attitude toward antitrust enforcement shifted from its post-Depression enthusiasm to something like indifference or neglect in the 1980s. However, we find no direct evidence by way of new legislation of congressional or public hostility to antitrust enforcement during the post-war period.<sup>92</sup>

### Part III.A.2 Presidential Actions

Statutes are not the sole source of direct democratically legitimate changes in policy. The president is an elected official with an independent source of power—the power to execute or enforce the laws. Virtually all candidates for the presidency make promises about how they will use this power by announcing their enforcement priorities, which they typically refer back to in speeches and orders after being elected. Accordingly, we ask whether the public endorsed the decline of antitrust enforcement by voting for presidential candidates who promised to reduce antitrust enforcement (or endorsed enhanced antitrust enforcement by voting for candidates who promised to increase prosecution). To answer this question, we collected and analyzed, for the period from 1932 to the present: (i) all the presidential campaign platforms of Democratic and

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<sup>87</sup> Frederick M. Rowe, “Political Objectives and Economic Effects of the Robinson-Patman Act: A Conspicuous US Antitrust Policy Failure,” *Zeitschrift Für Die Gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics*, no. H. 3 (1980): 499–509. at 500.

<sup>88</sup> “Antitrust Commission Recommends Repeal of Robinson-Patman Act,” *NAW - National Association of Wholesale Distributors* (blog), December 2007, <https://www.naw.org/advisory/antitrust-commission-recommends-repeal-robinson-patman-act/>.

<sup>89</sup> Roger D. Blair and Christina DePasquale, “‘Antitrust’s Least Glorious Hour’: The Robinson-Patman Act,” *The Journal of Law and Economics* 57, no. S3 (2014): S201–15. at S212.

<sup>90</sup> Luigi Zingales “The Political Limits of Economics” *American Economic Review*, Vol. 110, May 2020, 378-82.

<sup>91</sup> Currently, half of US States have such Statutes. See Smith, “The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment.” at 652.

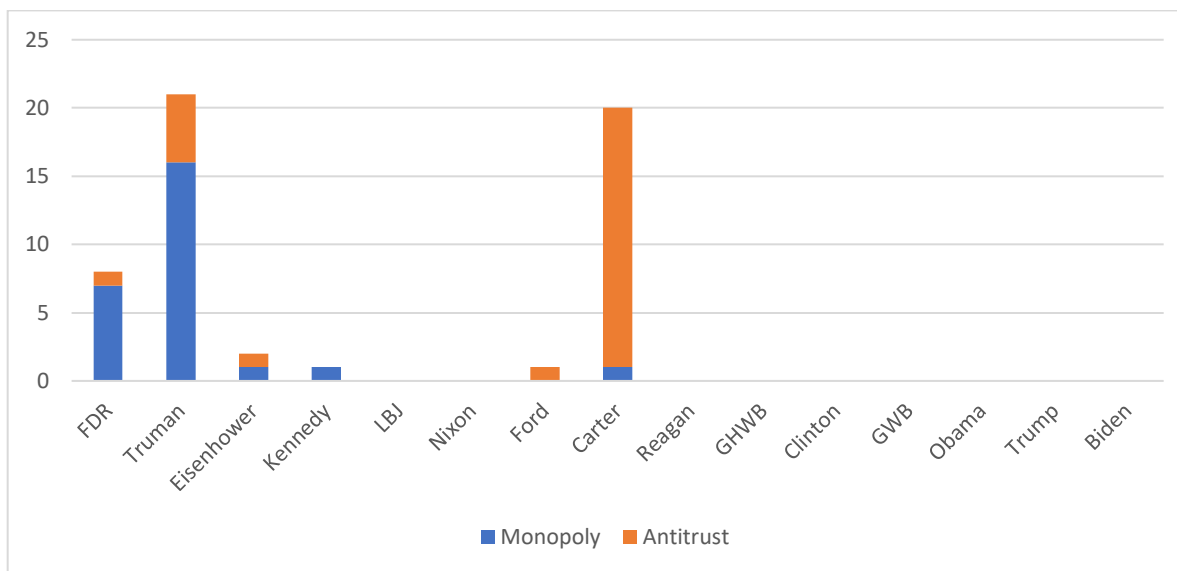
<sup>92</sup> As this paper goes to press, Congress is considering a budget that greatly expands resources for antitrust enforcement. Consistent with our findings elsewhere, the pro-antitrust legislation is publicly salient and democratically supported; the Biden campaign touted its support for stronger antitrust law. <https://www.washingtonpost.com/us-policy/2021/09/09/democrats-tech-reconciliation/>.

Republican presidential nominees; (ii) all presidential inaugural addresses; (iii) all State of the Union speeches and Congressional messages; and (iv) all presidential executive orders and proclamations.

The figure below displays the frequency of appearance of two key terms that are associated with antitrust enforcement: “antitrust” and “monopoly”.<sup>93</sup> Our goal is to understand whether this was a politically salient topic that would trigger a democratically-backed, major policy shift even in the absence of explicit changes to antitrust statutes.

An analysis of presidential inaugural and State of the Union speeches reveals a pattern: antitrust and the fight against monopolies were politically salient topics until the Carter presidency in the late 1970s (the exception being Presidents Lyndon Johnson and Nixon). However, both topics disappear from public addresses from the 1980s onwards, when most of the weakening of antitrust enforcement takes place.

Figure I: References to monopoly and antitrust in inaugural and State of the Union speeches - per president (1932-today)



**Note:** Based on data from Inaugural speeches and State of the Union Addresses and Messages to Congress as compiled by The American Presidency Project of The University of California Santa Barbara (<https://www.presidency.ucsb.edu>)

A more in-depth analysis of these references shows widespread bipartisan support for strong enforcement while antitrust was salient. For example, in his 1944 State of the Union Address, FDR promoted “[t]he right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad.”<sup>94</sup> In his 1948 State of

<sup>93</sup> Antitrust includes both “antitrust” and “anti-trust”. Monopoly includes “monopoly”, “monopolies” and “monopolistic”. Some mentions to monopoly were removed when they did not relate to economic policies, such as “monopoly over violence”, etc. In addition, we ran also collected and analyzed the term “competition” and variants, but decided not to include it because it yields largely similar but noisier results, as many mentions to competition are unrelated to antitrust (international competition with the USSR, fair competition in international trade, etc.). Each time the term is mentioned we count as one.

<sup>94</sup> Franklin Roosevelt, “State of the Union Message to Congress,” January 1944,

the Union Address, President Truman affirmed that “[c]ompetition is seriously limited today in many industries by the concentration of economic power and other elements of monopoly. The appropriation of sufficient funds to permit proper enforcement of the present antitrust laws is essential. Beyond that we should go on to strengthen our legislation to protect competition.”<sup>95</sup> In 1961, President Eisenhower boasted how a “major factor in strengthening our competitive enterprise system, and promoting economic growth, has been the vigorous enforcement of antitrust laws over the last eight years and a continuing effort to reduce artificial restraints on competition and trade and enhance our economic liberties.”<sup>96</sup> In 1962, President Kennedy stated that “[t]his administration has helped keep our economy competitive by widening the access of small business to credit and Government contracts, and by stepping up the drive against monopoly, price-fixing, and racketeering.”<sup>97</sup> In 1976, President Ford would stress the need to foster competition and lower prices in sectors such as airlines, trucking, railroad and financial institutions, affirming that “[t]his administration, in addition, will strictly enforce the Federal antitrust laws for the very same purposes.”<sup>98</sup> Finally, President Carter, already responding to changes in Supreme Court doctrine starting to weaken enforcement, would affirm in 1978 that “[o]ur Nation's anti-trust laws must be vigorously enforced”,<sup>99</sup> and again in 1979 that “[f]ree enterprise and competition, protected by the antitrust laws, are the central organizing principles of our economic system. (...) These [historical] fines and sentences [of the past year] are significantly larger than in past years, and are consistent with my strong commitment to vigorous antitrust enforcement. (...) Under the Supreme Court's decision in the Illinois Brick Case only direct purchasers may recover, even though they may have passed on the injury to consumers, who are prevented from suing. This decision undercuts state and private enforcement of the antitrust laws, reduces their deterrent effect, may contribute to higher prices, and often allows the violator to keep his gain at the expense of the injured consumer.”<sup>100</sup>

Accordingly, there is no evidence that the decline in the enforcement of antitrust law, starting in the 1970s was the result of public opinion, public debate, or democratic politics. That decline would take place in the absence of public support.

### Part III.A.3 Party Platforms

Not all presidential priorities are included in inaugural and State of the Union speeches. Presidential priorities may also be placed the pre-election party platforms. These documents reinforce our findings for presidential speeches: antitrust enforcement was salient until the Carter

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<https://www.presidency.ucsb.edu/documents/state-the-union-message-congress>.

<sup>95</sup> Harry Truman, “Annual Message to the Congress on the State of the Union,” January 1948,

<https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-14>.

<sup>96</sup> Dwight Eisenhower, “Annual Message to the Congress on the State of the Union,” January 1961,

<https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-7>.

<sup>97</sup> John F. Kennedy, “Annual Message to the Congress on the State of the Union,” January 1962,

<https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-4>.

<sup>98</sup> Gerald Ford, “Address Before a Joint Session of the Congress Reporting on the State of the Union,” January 1976,

<https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-reporting-the-state-the-union>.

<sup>99</sup> Jimmy Carter, “The State of the Union Annual Message to the Congress,” January 1978,

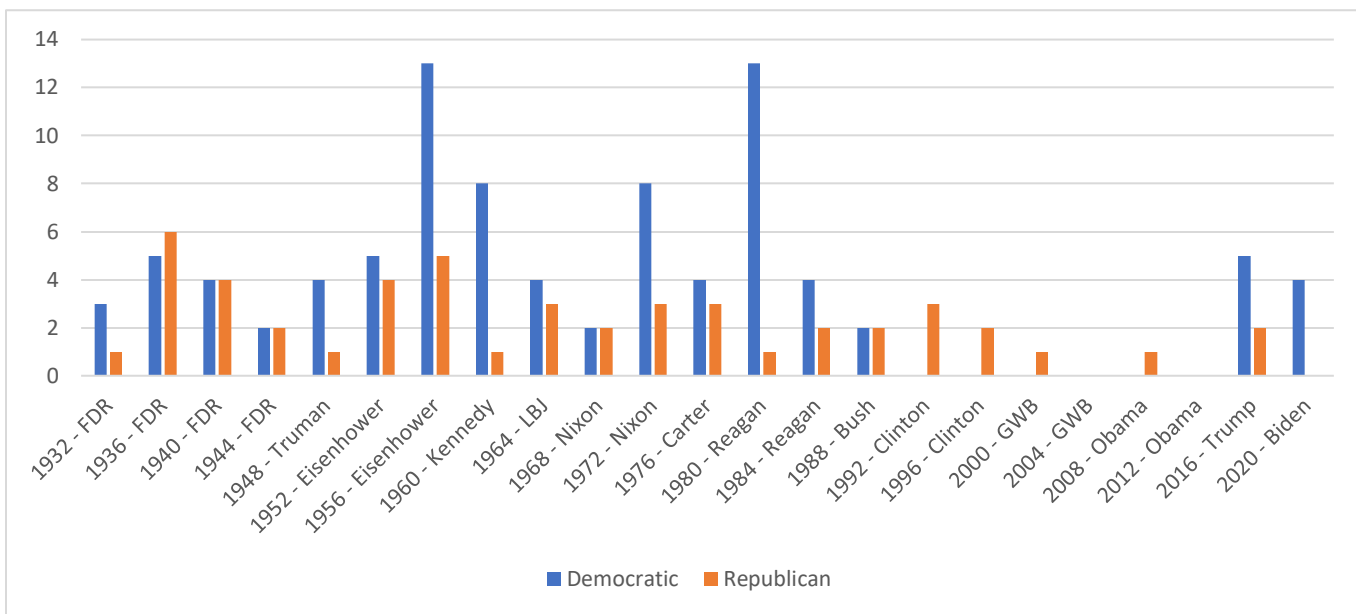
<https://www.presidency.ucsb.edu/documents/the-state-the-union-annual-message-the-congress-2>.

<sup>100</sup> Jimmy Carter, “The State of the Union Annual Message to the Congress,” January 1979,

<https://www.presidency.ucsb.edu/documents/the-state-the-union-annual-message-the-congress-1>.

Administration, but almost disappears afterward.<sup>101</sup> From FDR until Carter, the winning platform mentioned antitrust and monopoly an average of 3.7 times; after 1980, this number falls to an average 0.8 mentions. In all cases except two (discussed below), the reference to antitrust was positive, that is, pro-enforcement.

Figure II: References to monopoly and antitrust - party platforms per election (1932-today)



**Note:** Based on data from Presidential Party Platforms as compiled by The American Presidency Project of The University of California Santa Barbara (<https://www.presidency.ucsb.edu>)

For example, the 1964 Democratic Platform stressed how during LBJ’s presidency “[t]he Federal Trade Commission has stepped up its activities to promote free and fair competition in business, and to safeguard the consuming public against both monopolistic and deceptive practices. The reorganized Antitrust Division of the Department of Justice has directed special emphasis to price fixing, particularly on consumer products, by large companies who distribute through small companies. These include eyeglasses, salad oil, flour, cosmetics, swimsuits, bread, milk, and even sneakers.”<sup>102</sup> Both the 1968 and the 1972 Republican Presidential Platforms promised vigorous antitrust enforcement, with the 1972 platform stressing that: “[w]e will press on for greater competition in our economy. The energetic antitrust program of the past four years demonstrates our commitment to free competition as our basic policy. The Antitrust Division has moved decisively to invalidate those ‘conglomerate’ mergers which stifle competition and discourage economic concentration. The 87 antitrust cases filed in fiscal year 1972 broke the previous one-year record of more than a decade ago, during another Republican Administration.”<sup>103</sup>

<sup>101</sup> We employed the same methodology as described in footnote 93 above.

<sup>102</sup> Democratic party, “1964 Democratic Party Platform,” August 1964, <https://www.presidency.ucsb.edu/documents/1964-democratic-party-platform>.

<sup>103</sup> See Republican Party, “Republican Party Platform of 1972,” August 1972,

This pattern of positive mentions to antitrust and negative mentions to monopoly continues even after the 1980s. An interesting and rather unique case took place in 1980. Faced with rising inflation and a stagnant economy, Carter's losing agenda focused on economic fairness, with strong antitrust enforcement earning a dedicated page in his 126-page program. Yet, while Reagan ran on a small government platform, one of his priorities was the promotion of small businesses. The Republican platform did not attack antitrust enforcement; on the contrary, the platform stressed how the deregulation of sectors such as transportation would require strengthened enforcement of antitrust laws: "[c]onsequently, the role of government in transportation must be redefined. The forces of the free market must be brought to bear to promote competition, reduce costs, and improve the return on investment to stimulate capital formation in the private sector. The role of government must change from one of overbearing regulation to one of providing incentives for technological and innovative developments, while assuring through anti-trust enforcement that neither predatory competitive pricing nor price gouging of captive customers will occur;"<sup>104</sup> Later, the 1988 platform of George H.W. Bush stressed how "[w]e have been tough on white-collar crime, too. We have filed more criminal anti-trust cases than the previous Administration."<sup>105</sup> Indeed, since 1932 the only negative mentions to antitrust take place during the 1992 and 1996 Republican party platforms, both of which promise to repeal "outdated antitrust laws" which prevented mergers and cooperation in healthcare markets, something that would help bring costs down.<sup>106</sup> Yet both elections were won by the Democratic candidate, Bill Clinton, running on a Democratic platform that did not mention antitrust or monopoly.

#### Part III.A.4 Presidential Executive Orders

The same pattern of across-the-board encouragement to strong antitrust enforcement is present once one expands the analysis to consider Presidential Orders and Proclamations. Only a handful directly address antitrust enforcement, but they are important. In 1957 and 1959, Eisenhower's Executive Orders 10712 and 10855 allowed the Senate Committee on the Judiciary to access data on income and profits in their investigation on whether antitrust laws were being adequately enforced;<sup>107</sup> in 1961, Kennedy's Executive Order 10936 commanded federal agencies

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

<sup>104</sup> Republican Party, "Republican Party Platform of 1980," July 1980, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980>.

<sup>105</sup> Republican Party, "Republican Party Platform of 1988," August 1988, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1988>.

<sup>106</sup> The 1992 Republican Party Platform stated that "We will modify outdated antitrust rules that prohibit hospitals from merging their resources to provide improved, cost-effective health care."; the 1996 promised to "change anti-trust laws to let health care providers cooperate in holding down charges." See Republican Party, "Republican Party Platform of 1992," August 1992, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1992>. and Republican Party, "Republican Party Platform of 1996," August 1996, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1996>.

<sup>107</sup> See Dwight Eisenhower, "Executive Order 10712—Inspection of Income, Excess-Profits, Declared-Value Excess-

to share public bidding data to increase the enforcement of antitrust laws against bid rigging;<sup>108</sup> in 1977, Carter’s Executive Order 12022 created a “National Commission for the Review of Antitrust Laws and Procedures”, imbuing it with the mission of drafting recommendations on how to expedite the enforcement of antitrust laws in complex cases and increase the effectiveness of antitrust remedies;<sup>109</sup> in 2016, Obama’s Executive Order 13725 required executive agencies to “identify specific actions that they can take in their areas of responsibility to build upon efforts to detect abuses such as price fixing, anticompetitive behavior in labor and other input markets, exclusionary conduct, and blocking access to critical resources that are needed for competitive entry;”<sup>110</sup> finally, Biden’s Executive Order 14036 “affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.”<sup>111</sup> While after Eisenhower, no Republican president issued a pro-antitrust executive order, no Republican president issued an executive order cutting back on antitrust enforcement either (with two minor exceptions).<sup>112</sup>

In sum, the analysis of the public platforms and official acts of all presidents since 1932 reinforces our finding that a popular mandate never formed to reduce antitrust enforcement. On the contrary, throughout the past ninety years, all but a handful of mentions to antitrust are always in the direction of protecting consumer and small businesses as well as ensuring the strong enforcement of the antitrust laws.

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

<sup>108</sup> John F. Kennedy, “Executive Order 10936—Reports of Identical Bids,” 1961, <https://www.presidency.ucsb.edu/documents/executive-order-10936-reports-identical-bids>.

<sup>109</sup> Jimmy Carter, “Executive Order 12022—National Commission for the Review of Antitrust Laws and Procedures,” 1977, <https://www.presidency.ucsb.edu/documents/executive-order-12022-national-commission-for-the-review-antitrust-laws-and-procedures>.

<sup>110</sup> Barack Obama, “Executive Order 13725—Steps To Increase Competition and Better Inform Consumers and Workers To Support Continued Growth of the American Economy,” 2016, <https://www.presidency.ucsb.edu/documents/executive-order-13725-steps-increase-competition-and-better-inform-consumers-and-workers>.

<sup>111</sup> Joseph Biden, “Executive Order 14036—Promoting Competition in the American Economy,” 2021, <https://www.presidency.ucsb.edu/documents/executive-order-14036-promoting-competition-the-american-economy>.

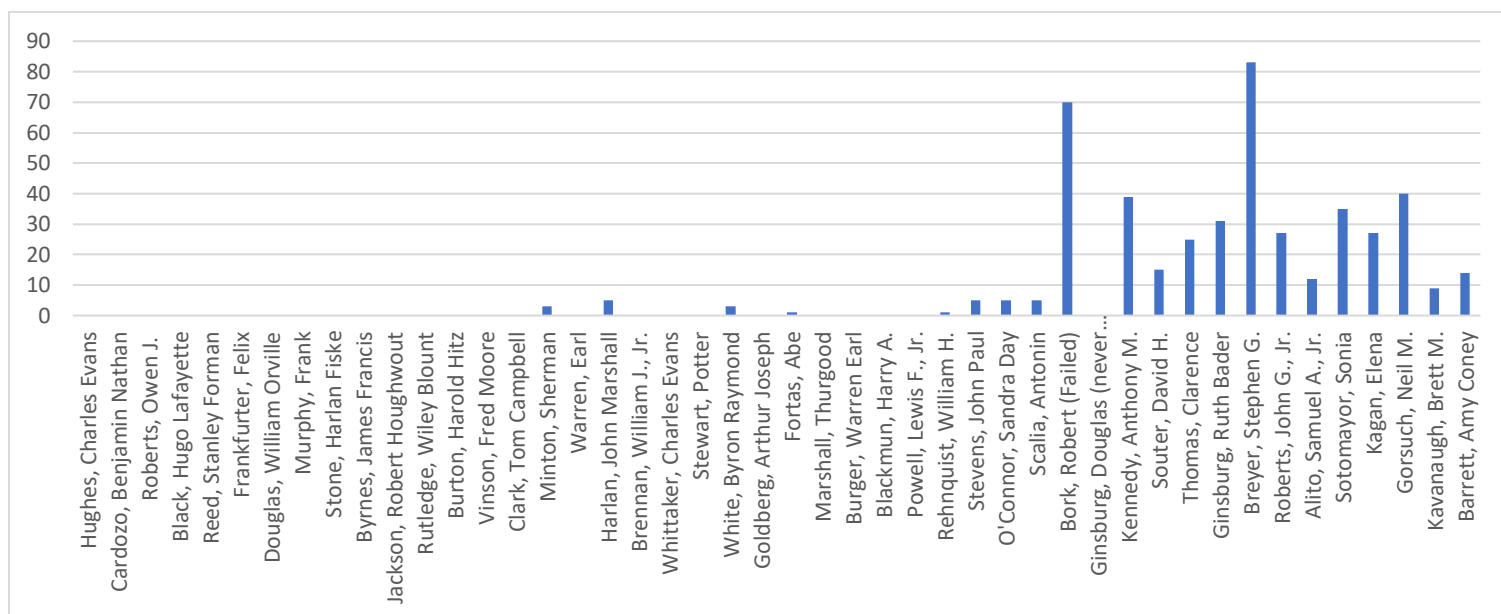
<sup>112</sup> Two minor exceptions are Reagan’s Executive Order 12430, which revoked Kennedy’s order on information sharing among agencies because it proved ineffective and consumed resources “that could be employed in a more effective manner to prevent antitrust violations” and Executive order 12661, which among others instructed a new National Commission on Superconductivity to assess whether the United States should grant semi-conductor companies a partial exemption to antitrust laws to increase research and development and improve competitiveness. See Ronald Reagan, “Executive Order 12430—Reports of Identical Bids,” 1983, <https://www.presidency.ucsb.edu/documents/executive-order-12430-reports-identical-bids>. and Ronald Reagan, “Executive Order 12661—Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related International Trade Matters,” 1988, <https://www.presidency.ucsb.edu/documents/executive-order-12661-implementing-the-omnibus-trade-and-competitiveness-act-1988-and>.

### Part III.A.5 Supreme Court Nominations

Presidents (with the support of the Senate) can influence policy by appointing Supreme Court justices with a particular ideological bent. Most presidential candidates promise, in more or less veiled terms, to nominate jurists who share their ideological agenda. Senators who vote on nominations may or may not share that agenda. We ask here whether the antitrust views of Supreme Court nominees have ever played a role in their confirmation.

To answer this question we analyzed all the public records of nomination hearings for Supreme Court justices starting with the nomination of Chief Justice Charles Hughes in the 1930s until 2020. We wanted to determine antitrust law’s degree of saliency in the nomination process, and whether nominees were questioned on their views about the goals of antitrust and the importance of strong enforcement. Figure III below depicts the frequency of mentions to “antitrust” and “monopoly”<sup>113</sup> during the direct Q&A session with nominees to the U.S. Supreme Court for the past 90 years.

Figure III: Total references to antitrust/monopoly in direct Q&A sessions, per Supreme Court nominee – 1930 -2020



Note. Based on Congressional Records of Supreme Court confirmation hearings

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

<sup>113</sup> Including “anti-trust” and variations of the root “monopol” such as of the monopolies, monopolize, etc. as per the methodology explained in footnote 93 above.

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

Bork also received strong pushback from Republican Senator Specter from Pennsylvania for his apparent disregard of Congressional intent to ensure strong enforcement of the antitrust laws. Bork was ultimately rejected by a bipartisan majority. While antitrust was not the main reason for his rejection—his participation in the Watergate investigation and his views on abortion played a more important role<sup>114</sup>—antitrust was covered at length and contributed to his depiction as an ideological extremist. It is telling that senators picked antitrust as one of the leading topics to challenge Bork’s nomination, suggesting that even during the height of the Reagan presidency, greatly weakening antitrust enforcement was not popular.

After Bork, antitrust enforcement was a (minor) topic in all judicial nominations. The same pattern found in presidential and Congressional documents, however, appears: whenever antitrust enforcement was mentioned, the reference was positive, and mentions to monopoly were always negative. With few exceptions, most nominees affirmed that they have never carefully analyzed antitrust law nor hold strong opinions on it, evading most direct questions. A good example is Justice Scalia’s answer to a question by Senator Thurmond of South Carolina on whether courts were correctly considering economic analysis in antitrust law:

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

Yet whenever nominees expressed an opinion, it was generally in favor of stronger enforcement and the protection of small businesses. For example, Justice Sandra O’Connor recognized the key role antitrust plays in eliminating monopolies and protecting small businesses;<sup>115</sup> so did Justice David Souter, who further affirmed antitrust law’s key role in

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<sup>114</sup> Jonathan Fuerbringer, “Byrd Says Bork Nomination Would Face Senate Trouble,” *The New York Times*, June 30, 1987, sec. U.S., <https://www.nytimes.com/1987/06/30/us/byrd-says-bork-nomination-would-face-senate-trouble.html>.

<sup>115</sup> O’CONNOR: “Certainly I recognize that the object of the Sherman Act was to reduce or eliminate monopolies. To that extent, of course it has the effect of encouraging competition and encouraging smaller units to be in operation.”.



preventing the consolidation of economic power;<sup>116</sup> which was echoed by Justice Thomas;<sup>117</sup> Justice Ginsburg;<sup>118</sup> and Justice Kagan.<sup>119</sup> Justice Roberts also defended the importance of strong antitrust enforcement, including private enforcement.<sup>120</sup> There were two exceptions. Justice Breyer affirmed that while strong enforcement is important, antitrust is all about getting lower prices for

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<sup>116</sup> SOUTER: “I also have been well educated by Senator Rudman over the years in the value of small business. Small business has no better friend than he has, and I think one of the lessons that I have absorbed from a long period of my professional lifetime with him, if I needed to absorb that from anyone else, is the importance of a degree of competition which will allow small business to emerge and allow for diversity in the American economy, which it is the object of the antitrust laws to secure, as much as that is possible.

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

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

<sup>117</sup> “Judge THOMAS. Senator, I think that all of our efforts, including the antitrust laws, to keep a free and open economy, one in which there is competitiveness, where the smaller businesses can have an opportunity to compete, and where consumers can benefit from that—those efforts, including the antitrust laws, have been beneficial to our country from my standpoint.

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

Judge THOMAS. Yes, Senator.”

<sup>118</sup> GINSBURG: “Senator Metzenbaum, I think your recitation of the purposes of the antitrust law—to protect consumers, to protect the independent decision making of entrepreneurs—is entirely correct. I am pleased that you like my opinion in the *Michigan Citizens* (1989) case. It is a decision that I wrote. I think it gives the best picture of my views in this area. (...) You asked me if the only purpose of the antitrust law is efficiency. The cases indicate that the antitrust laws are focused on the interests of the consumer. There is also an interest in preserving the independence of entrepreneurs. I don't think the antitrust laws call into play only one particular economic theory. The Supreme Court made that clear in the *Kodak* (1992) case. But out of the context of a specific case, I can't say much more. No, I don't think efficiency is the sole drive.”

<sup>119</sup> KAGAN: “[I] think on the one hand it is clear that antitrust law needs to take account of economic theory and economic understandings, but it needs to do so in a careful way and to make sure that it does so in a way that is consistent with the purposes of the antitrust laws, which is to ensure competition, which is, as you say, to be a real charter of economic liberty.”

<sup>120</sup> “Senator Kohl: Do you agree that government enforcement of antitrust law is crucial to ensuring that consumers are protected from anticompetitive practices, such as price fixing and illegal maintenance of monopolies?

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

consumers;<sup>121</sup> while Justice Gorsuch discussed the role of economics in helping antitrust prevent deadweight loss.<sup>122</sup> Even they, though, praise strong antitrust enforcement.

In sum, in the confirmation hearings, nearly all antitrust-related questions sought assurances from the nominee that he or she would respect the enforcement of the antitrust laws, and in all cases (except Bork) the nominee granted those assurances.

### Part III.B. Regulatory Institutions: the FTC and DOJ

In Part I we documented the decline in antitrust cases brought by the FTC and the DOJ. The FTC and the DOJ also have significant authority to make antitrust policy through guidelines and enforcement priorities. The most prominent and important set of guidelines have been the merger guidelines, which were first issued in 1968, and subsequently updated in 1982, 1992, and 2010. The 1968 guidelines, following contemporaneous Supreme Court precedent, imposed strict standards on mergers, prohibiting firms with at least 15 percent of the market to acquire firms with at least 1 percent of the market where the 4-firm concentration was at least 75%. The 1982 guidelines, issued during the Reagan administration, weakened the standards but also introduced a higher level of economic sophistication. The 1992 and 2010 regulations, issued under Democratic administrations, somewhat liberalized the agencies' approach. In general, agencies significantly impacted antitrust policy: Carl Shapiro, writing in 2010, observed that “[o]ne cannot marvel at how far merger enforcement has moved over the past forty years, with no change in the substantive provisions of the Clayton Act and very little new guidance on horizontal mergers from the Supreme Court.”<sup>123</sup> His comment emphasizes the great power of regulators to determine antitrust policy. Yet, as data from Ghosal and Kades show, merger cases adjusted for the size of the economy have dropped significantly since the 1970s.<sup>124</sup> The regulator's impact has been increasingly prominent for enforcement priorities. As discussed in Part I above, Section 2 and other monopolization cases have significantly declined since the 1970s—and in the most recent decades have all but disappeared, making space for criminal prosecution. Agency leadership also

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<sup>121</sup> BREYER: “The point that I would frequently make in those conversations is that if you are going to have a free enterprise economy, if you are not going to have the Government running everything, then you must have a strong and effective antitrust law. If you are not going to regulate airlines, you must have a strong antitrust law for airlines. The reason is that antitrust law is the policeman. Antitrust law aims, through the competitive process, at bringing about low prices for consumers, better products, and more efficient methods of production. (...) Those three things, in my mind, are the key to antitrust law and really a strong justification for an economy in which there are winners and losers, and some people get rich and others do not. The justification lies in the fact that that kind of economy is better for almost everyone, and it will not be better for almost everyone unless the gains of productivity are spread. And the gains of productivity are spread through competition. That brings about low prices, better products, and more efficient methods of production. And that is what I think antitrust law is about, and that is what I think that policeman of the free enterprise system has to do. It is called protect the consumer.”

<sup>122</sup> GORSUCH: “Well, the real problem at the end of the day, I mean, you have a problem of lack of competition between competitors, and then of course that filters down to the consumer level. And what that yields are higher prices, and lower output, the dead weight loss to the economy, loss of production, and those are real harms. And the antitrust laws, as you know, were the original Federal regulatory regime. That was it for the national economy for a long time, and they are still vital and brilliant in their simplicity and design.”

<sup>123</sup> Carl Shapiro, “The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,” *Antitrust LJ* 77 (2010): 49, at 51.

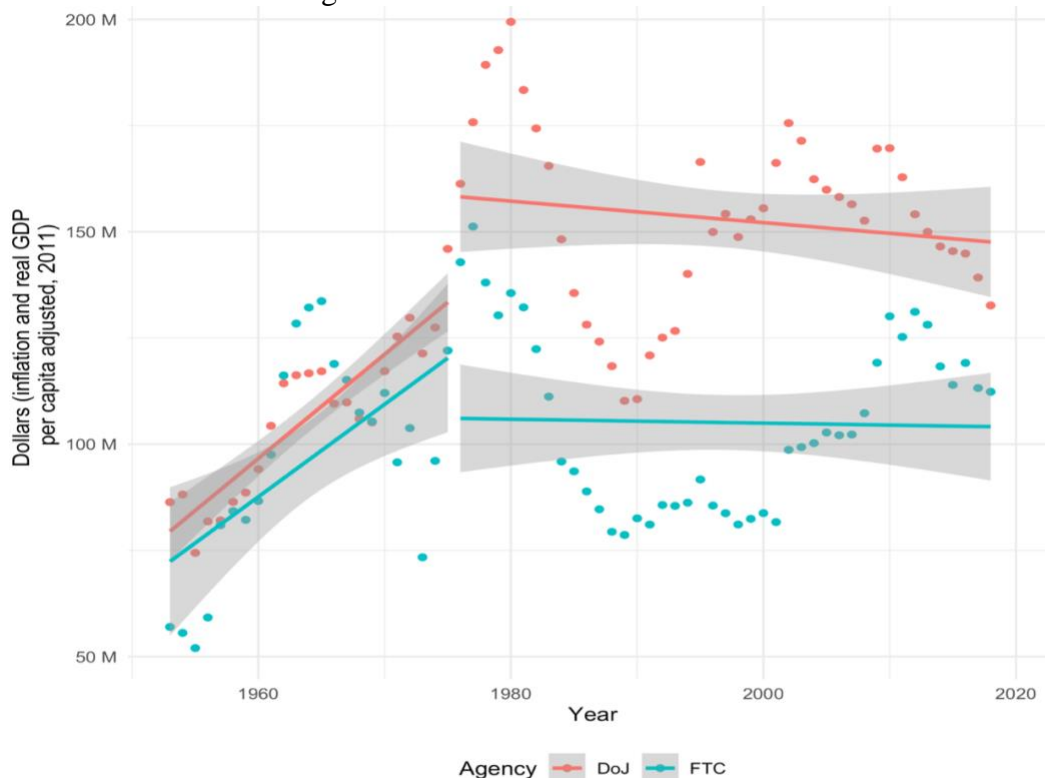
<sup>124</sup> Ghosal, “Regime Shift in Antitrust Laws, Economics, and Enforcement.” And Kades, “The State of US Federal Antitrust Enforcement.”

allocates staff among different divisions, something that will have an impact (as we will see below). There is no denying that civil, anti-monopoly enforcement has declined, thanks in part to choices made by those running the FTC and the DOJ. Since these regulators were appointed by presidents without any popular mandate to reduce antitrust enforcement, we need to understand why they did so.

### Part III.B.1. Budgets

The budgets of the DOJ and FTC for antitrust enforcement follow the familiar pattern of the rise and fall of antitrust enforcement. Even adjusting for inflation and GDP growth, the budgets of both the DOJ and the FTC competition section rose sharply from 1955 to 1980. As Figure IV shows, a structural break takes place in the late 1970's and early 1980s. From 1975 to 2020, the budget has remained roughly constant in GDP terms. During this latter period, however, antitrust enforcement has become significantly more expensive as a result of the rise in cases tried under the rule of reason and increasing reliance on economic modeling and rigorous data analysis.<sup>125</sup> This means that agencies could bring much fewer cases.

Figure IV: Budgets of the FTC and the DOJ adjusted for inflation and GDP per capita growth – in constant 2011 dollars



Source: Annual Reports of the FTC, the FTC's annual Congressional budget request, and DOJ website

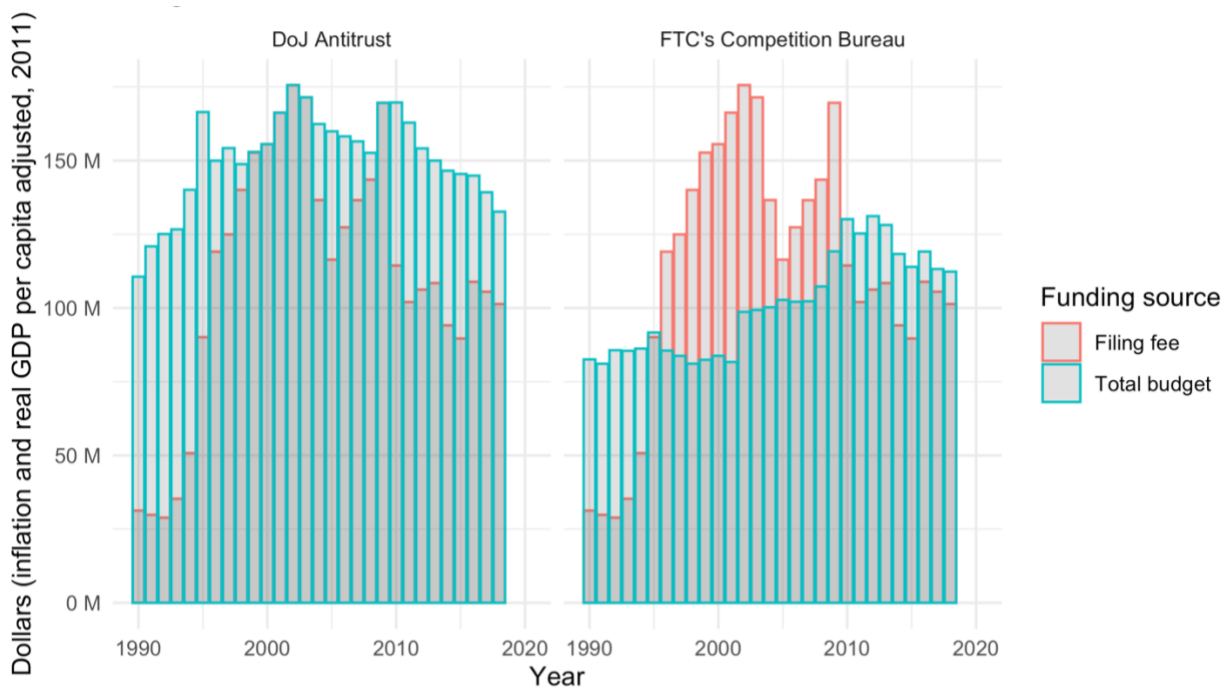
Note: Based on FTC/DOJ Annual Reports

<sup>125</sup> Ramsi Woodcock, "The Hidden Rules of a Modest Antitrust," *Forthcoming, Minn. L. Rev.*, 2021.; Paul A. Pautler, "A History of the FTC's Bureau of Economics," in *Healthcare Antitrust, Settlements, and the Federal Trade Commission* (Emerald Publishing Limited, 2018).

Congress sets the agencies' budgets, of course, and so this pattern may be taken as prima facie evidence of democratic support for reduced antitrust enforcement. But the story is more complex than that. In 1989, Congress enacted the Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Bill for Fiscal 1990, which introduced a new source of revenue in the form of merger filing fees that businesses are required to pay when they file premerger notification with the agencies.<sup>126</sup> One might have expected the merger filing fees to cover the FTC and DOJ's merger review program, while Congressional appropriations covered the rest (anti-monopolization, criminal prosecution, consumer protection, etc.).

Figure V below, however, tells a different story. As can be seen, Congress drastically reduced appropriations for the agencies, and instead required them to depend on the filing fees as a source of funding. During the 2000s, these fees accounted for the entirety of the DOJ antitrust division budget, and for more than the total budget of the FTC antitrust activities, meaning that despite the heavy workload in merger review, the antitrust program was subsidizing the FTC's consumer protection division.

Figure V: Composition of the FTC and DOJ budgets— in constant 2011 dollars



Source: FTC Annual Reports and Congressional Budget Justification Summary

Note: Based on FTC and DOJ Annual Reports and Congressional Budget Justification Summary

The budget limitations resulted in a dramatic reduction of staff. Data compiled by Paul Pautler indicates that from 1940 to 1980 each FTC full-time employee (FTE) was responsible for overseeing approximately 3 to 4 billion of USD real GDP. By 1990, this number was almost one FTC FTE for \$9 billion. By 2013 it had risen to \$12 billion.<sup>127</sup>

<sup>126</sup> See [https://www.ftc.gov/sites/default/files/documents/hsr\\_statements/54-fr-48726/891124-54fr48726.pdf](https://www.ftc.gov/sites/default/files/documents/hsr_statements/54-fr-48726/891124-54fr48726.pdf)

<sup>127</sup> Pautler, "A History of the FTC's Bureau of Economics."

Some have raised the possibility that this cut in staff was the result of the rise of computers and the layoff of redundant staff.<sup>128</sup> Yet publicly available data shows how this substitution process only accounts for part of the story. Most cuts take place in the early 1980's, before the widespread availability of computing power. Pautler describes how the FTC's Bureau of Economics lost approximately 115 FTEs in the 1980s, half of which were attributed to the decision to cut down the agency's economic research department—in particular its independent data collection activities for sector-wide studies.<sup>129</sup> While Pautler also documents that the decrease in supporting staff is partially associated with increases in computing power, he stresses how the reassignment of FTC obligations and budget cuts played a more significant role.<sup>130</sup> Interestingly, he also stresses how the FTC Bureau of Economics was understaffed (also in relation to supporting staff), given that by 1992 it had less Research Assistants than even the least RA-intensive private economics consulting firm.<sup>131</sup> Surprisingly, the steep cuts in the economics division come exactly when scholars and courts are requiring increased economic sophistication from antitrust enforcers. With fewer employees, the remaining personnel had to be almost all allocated to the increasing workload of economics analysis in merger review and litigation support.

Figure VI below depicts the drop in FTC FTE staff separating the antitrust and consumer protection missions. As can be seen, the drop not only impacts the antitrust division at a steeper rate than its consumer protection counterpart, but it mostly occurs at the beginning of the 1980s, before the expansion in computing power. It is hard to look at this data and claim that it simply represents the FTC with the same enforcement capacity despite fewer personnel (as the view of substitution of clerks by computers would imply).

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<sup>128</sup> We thank Marc Winerman for spurring us to look into this.

<sup>129</sup> Pautler, "A History of the FTC's Bureau of Economics." At 296.

<sup>130</sup> Pautler. at 232-233; 297, 314-315; 318-320.

<sup>131</sup> Pautler. at 320.

Figure VI: FTC’s Mission FTEs separated between antitrust and consumer protection – 1975 to present



FTC’s Annual Reports and Congressional Budget Justifications

**Note:** Based on FTC’s Annual Reports and Congressional Budget Justifications.

The limitation in the number of FTEs also contributed to the elimination of the FTC Bureau of Economics’ so-called 6(b) studies, where the agency requested information from private parties and issued comprehensive reports on the competitive status of many sectors of the U.S. economy.<sup>132</sup> Another major cause of the 6(b) studies is the Paperwork Reduction Act of 1980. This statute requires most Federal agencies to obtain special authorization from the Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget (OMB), whenever they request information from a large number of private parties. The approval process is so burdensome that the government estimates it takes between six to nine months per request.<sup>133</sup>

### Part III.B.2. The Relation Between Government and Private-Sector Compensation

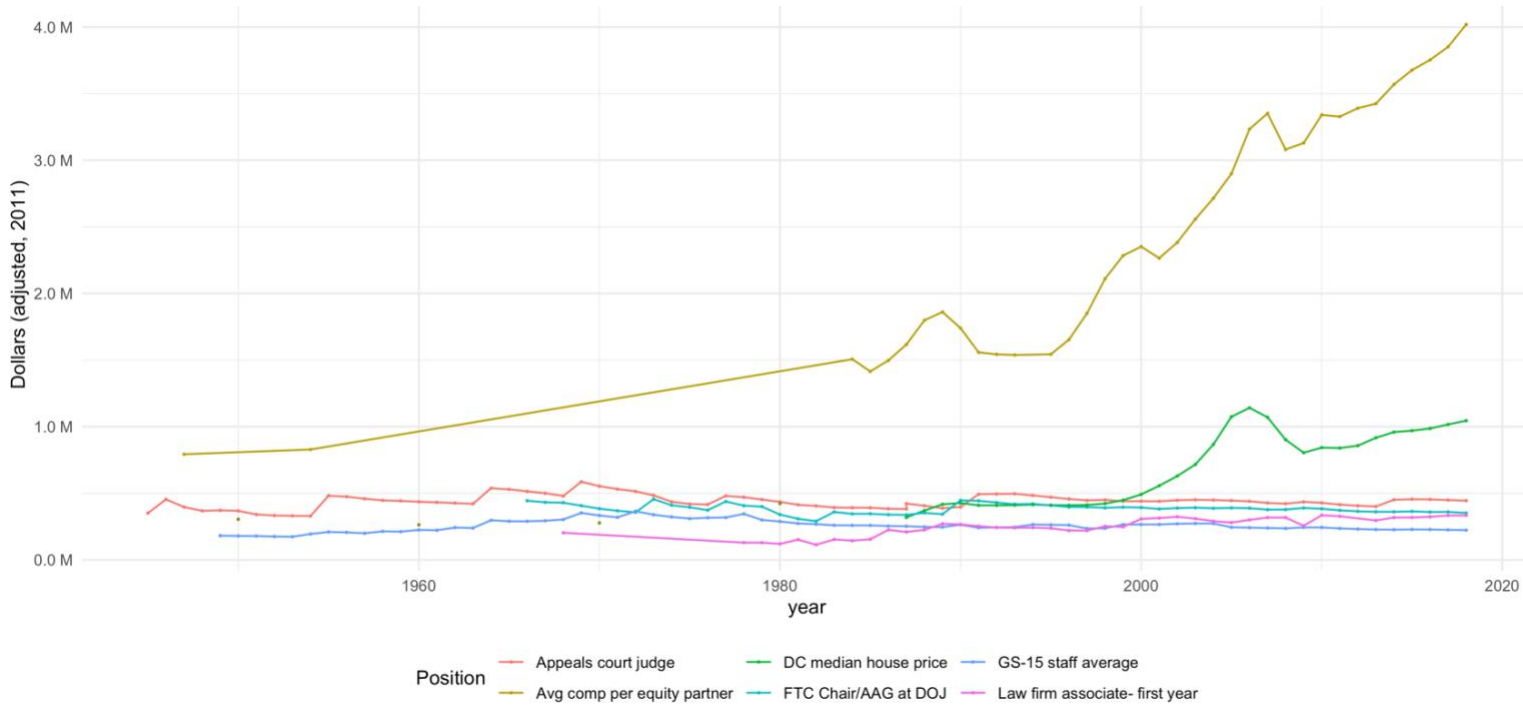
Private-sector compensation for lawyers has far outstripped that of government lawyers over the last several decades. Figure VII compares the compensation of FTC and DOJ personnel with the average compensation per equity partner of the top-100 US law firms and the median cost of houses sold in the Washington D.C. area, where most staffers reside. We report the

<sup>132</sup> Pautler. at 164-67. some reporting in particularly sensitive areas such as hospitals, oil and credit industries continued, but it mostly used publicly available data.

<sup>133</sup> See United States Government, “PRA Approval Process | A Guide to the Paperwork Reduction Act,” January 2022, <https://pra.digital.gov/clearance-process/>.

compensation of the FTC Chair, the DOJ AAG, and the GS-15 staff (the pay for senior FTC/DOJ staff), as well as for US Circuit Court Judges (in constant 2011 dollars).

Figure VII: Real salary and housing prices in constant 2011 USD for lawyers in the public and private sector – 1945 to 2018



Note. Based on governmental records, census data, St. Louis FED, AL 100 database and others.

In the last forty years, the compensation of the average equity partner in a top law firm and the compensation of top government officials has diverged significantly. In the 1960s a partner at a top law firm was earning roughly twice as much as an FTC chair. In the 1980s, this number rose to 5 times. Today, it is 10 times. Senior FTC and DOJ civil servants earn about 1/20 of the compensation of the average equity partner of a top law firm. The gap is equally impressive when compared to the median cost of houses sold in the D.C. area, which skyrocketed after the 2000s, significantly increasing the cost of living for public servants in this area. Even the gap between official compensation and that of first-year associates has risen significantly over this period. In the past, a high-level, experienced governmental employee earned almost twice as much as junior lawyers; today, the government lawyer earns half as much. The gap between government salaries and D.C. house prices is also at one of its highest levels in history, even after adjusting for the 30% FEPCA correction.<sup>134</sup>

<sup>134</sup> The Federal Employees Pay Comparability Act of 1990 (FEPCA) introduced a Locality Pay Area Adjustment for certain geographic regions with a high cost of living, one of them being the Washington-Baltimore-Arlington region. This increases salaries in roughly 30%. Both figures present the base GS-15 schedule average, without the pay adjustment, as the data for partners is nation-wide. The main conclusions that salary differentials greatly increased in the period hold even with the linear increase introduced by the FEPCA.

It is hard to precisely quantify what the widening of this public employment premium means for the quality of work as well as the strength and type of enforcement actions pursued by the FTC and the DOJ. That said, it seems plausible that the growing salary differential makes private sector jobs more attractive, thus accelerating the revolving door. We now move to analyze this phenomenon.

### Part III.B.3. FTC/ DOJ – Revolving Doors

The FTC and the Antitrust Division of the DOJ have different structures: while the DOJ is led by a single Assistant Attorney General for Antitrust that serves under the discretion of the Attorney General (and hence the president), the FTC is headed by five Commissioners appointed for seven-year terms, with a bipartisan requirement. Both the DOJ AAG and the FTC Commissioners are appointed by the President and confirmed by the Senate.

To understand who these people are and what their incentives might be, we collected and hand-coded information on all FTC commissioners and DOJ AAGs since the creation of the FTC in 1915,<sup>135</sup> including their term in office, education, position before appointment, and immediate employment in the 3-years after leaving the agency.

It is interesting to notice that the profile and, in particular, the subsequent career of FTC commissioners and DOJ AAGs changed significantly around the late 1970s. As Figure VIII below shows, before an estimated 1975 breakpoint in enforcement,<sup>136</sup> most FTC commissioners and DOJ AAGs occupied government positions before their appointment and then after mostly returned to government, died in office, or retired from antitrust litigation (with some of them opening small law firm practices in their home states). However, after 1975 and coinciding with weaker agency enforcement of antitrust laws, significantly more appointees were drawn from law firms, and almost two-thirds left their enforcer positions and immediately started working either for industries they previously regulated or major law firms typically associated with the defendants' bar. In short, a strong revolving door between the government and private sector develops in the 1970s and continues today.

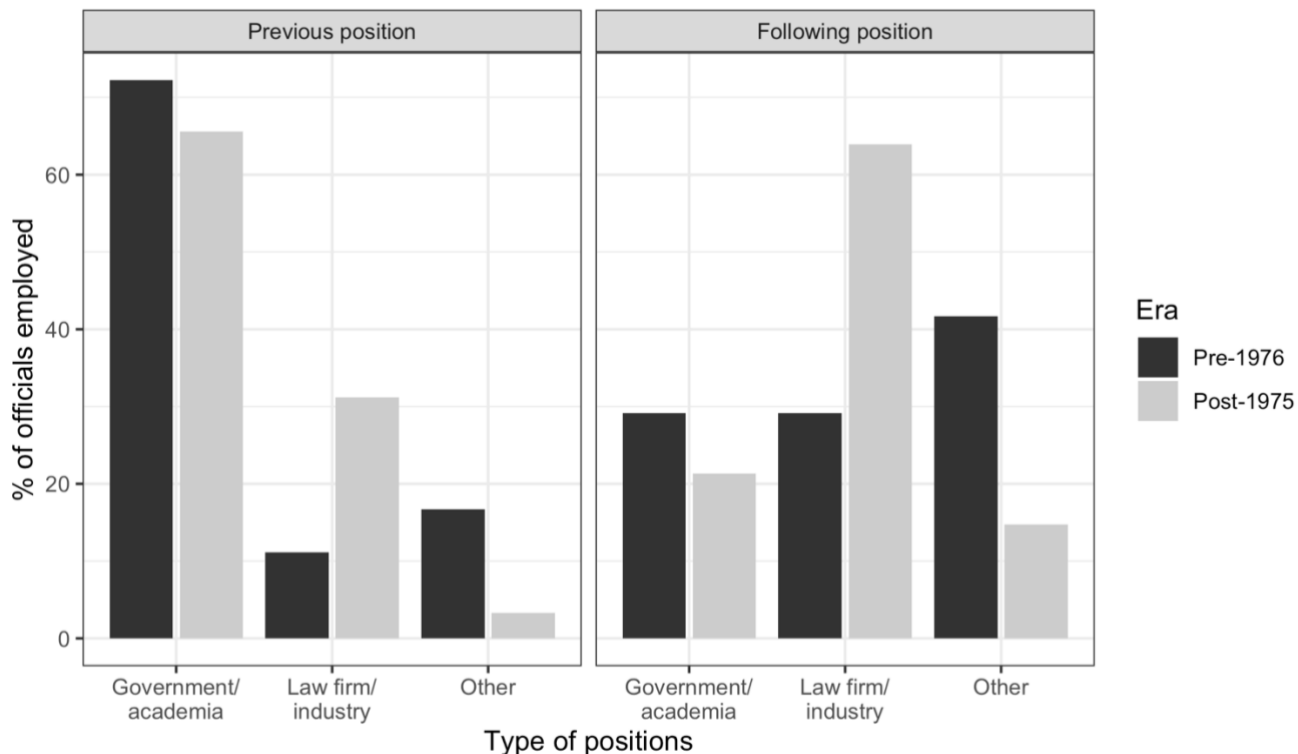
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<sup>135</sup> For two we could not find reliable information: Newell Clapp and Mayo Thompson.

<sup>136</sup> The graphic below reports a 1975 breakpoint that is aligned with the estimations of structural breaks in enforcement described in Part I. However, the overall trends and levels are consistent with a 1980's breakpoint.



Figure VIII – From where FTC Commissioners and DOJ AAG come from before government and to where they go: 1915 to present separated by enforcement period



**Note:** Based on multiple varied sources, such as newspaper articles, publicly available professional profiles, agency and Congressional bios and others.

Other includes everything not represented in the other categories, including retirement, death, work as a journalist and others (such as cases where we cannot confirm which specific law firm the person came from/joined after leaving government).

It is worth stressing that these numbers are conservative, as we only consider primary employment. Our impression is that today it is far more common for academics to rotate in and out of government and take paid consulting positions while maintaining their primary employment in academia than it was in the past.<sup>137</sup>

In summary, different data sources show that the weakening of FTC and DOJ-led antitrust enforcement which starts after the second half of the 1970s takes place at the same time as: (i) a significant but low-profile reduction in the amount of resources available for both agencies, (ii) a major increase in the salary differential between private and public employees, leading to (iii) an increase in the revolving door between agency leadership and the companies they are supposed to

<sup>137</sup> While we do not have a time series data, the involvement of academics in consulting for antitrust defendants has received attention in recent years. Eisinger Jesse and Elliot Justin, “These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers,” ProPublica, November 16, 2016, <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers?token=66qLWQOC8-aKmhZ5ZMZX7A6VtNhdKyrS>. (Describing the impact and prevalence of economics professors doing consulting in antitrust litigation.); Rick Claypool, “75% of FTC Officials Have Revolving Door Conflicts With Tech Corporations and Other Industries,” Public Citizen, May 23, 2019, <https://www.citizen.org/article/ftc-big-tech-revolving-door-problem-report/>. (also describing a growing revolving door at the FTC).

oversee and (iv) the imposition of non-antitrust related legal and other restrictions that limited the agencies' ability to properly perform their work.

### Part III.B.4 Supreme Court

As has been widely documented by scholars, the courts have relentlessly narrowed the scope of the antitrust statutes from the very beginning.<sup>138</sup> Early Supreme Court cases in the late nineteenth and early twentieth century all but killed the Sherman Act as a weapon against monopolies.<sup>139</sup> Prodded by aggressive antitrust enforcement by Roosevelt, Taft, and Wilson, the Supreme Court relented to a degree, while nonetheless continuing to graft exceptions and defenses onto the statutes.<sup>140</sup> As we saw earlier, legislative reform during the twentieth century helped revive antitrust enforcement.

But the anti-antitrust jurisprudence of the Supreme Court (and lower courts as well) accelerated in the 1970s. The cases are too numerous to mention here, but in broad outline, the Supreme Court limited antitrust enforcement in the following ways. The Court imposed standing requirements on private plaintiffs that eliminate cases brought by people who are harmed by antitrust violators but are not in privity with them (“indirect purchasers”) or whose injuries do not follow a direct causal pathway from the violations.<sup>141</sup> It imposed pleading requirements that block antitrust actions where much of the evidence is not already public—contrary to the practice in other areas of the law.<sup>142</sup> These requirements limited the ability of plaintiffs to obtain needed evidence through discovery, which has further harmed antitrust enforcement as the Court has also imposed a higher threshold for proving agreement among cartel members.<sup>143</sup> The Court eliminated or weakened the per se rule for a range of conduct, including most vertical arrangements, leaving plaintiffs to the mercy of the rule of reason, which enables defendants to escape liability by asserting (often dubious) business justifications.<sup>144</sup> The Court weakened the Robinson-Patman Act as a freestanding source of law,<sup>145</sup> and imposed extremely high thresholds of liability for predatory pricing.<sup>146</sup> By requiring plaintiffs to allege anticompetitive harm on both sides of two-sided markets, it helped platform monopolists immunize themselves from liability—in a departure from

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<sup>138</sup> See, for example, Crane, “Antitrust Antitextualism.” at 1207.

<sup>139</sup> See, for example, *United States v. EC Knight Co.*, 156 US 1 (1895). And Laura Phillips Sawyer, “US Antitrust Law and Policy in Historical Perspective,” in *Oxford Research Encyclopedia of American History*, 2019. at 7.

<sup>140</sup> Crane, “Antitrust Antitextualism.”

<sup>141</sup> *Illinois Brick Co. v. Illinois*, 431 US 720 (1977); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 US 519 (1983). *Illinois Brick*; AGC. See also Smith, “The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment.”

<sup>142</sup> *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007).

<sup>143</sup> *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986).

<sup>144</sup> *T. V. Continental, Inc. v. GTE Sylvania (Inc)*, 1977; *Leegin Creative Leather Products v. PSKS, Inc.* (2007); *Jefferson Parish Hospital Dist. No. 2 v. Hyde* (1984). *State Oil Co. v. Khan*, 522 S.Ct 3 (Supreme Court 1997). and many others. It is worth stressing the long-lasting impacts of these shifts to antitrust enforcement. Michael Carrier reviewed 222 cases where Federal Courts applied the rule of reason in antitrust cases and concluded that plaintiffs lost in 221 of them. 97% of the cases are dismissed in the first stage because plaintiffs fail to show anticompetitive effects. Michael A. Carrier, “Rule of Reason: An Empirical Update for the 21st Century,” *Geo. Mason L. Rev.* 16 (2008): 827. at 829-830.

<sup>145</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* (1993); *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 US 164 (2006).

<sup>146</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509.

international case law on the same topic.<sup>147</sup> Finally, the Court allowed companies to protect themselves from antitrust liability to consumers and workers by requiring them to sign arbitration clauses that block class actions, undermining the incentive to sue.<sup>148</sup> In many cases, lower courts, following the lead of the Supreme Court, have further weakened antitrust enforcement.<sup>149</sup>

To be sure, this pattern was not entirely uniform. The restriction on indirect purchasers followed an earlier case that expanded the incentives of direct purchasers to sue by depriving defendants of the pass-through defense, though the ultimate impact was to reduce liability.<sup>150</sup> The Court expanded liability for refusals to deal before changing course and diminishing it.<sup>151</sup> And, in a recent case, the Court tried to limit certain forms of manipulation that platforms have used to assign antitrust claims to those least likely to sue them.<sup>152</sup> But the overall trajectory in the direction of more limited antitrust liability and weaker enforcement is unmistakable, as virtually every commentator agrees.<sup>153</sup>

The goal of this article, however, is not to describe these shifts, already discussed by many, but to understand the political economy behind these processes. We have already seen that the justices were not appointed with an understanding that they would cut back on antitrust liability. Nevertheless, we want to study how the voting pattern of each individual justice changed the decisions of the Court. We collected and analyzed all Supreme Court antitrust decisions that mentioned the Sherman Act over the past 70 years, and matched it to data on how individual justices voted in each case.<sup>154</sup> This yielded 227 cases<sup>155</sup> where the Court directly dealt with antitrust enforcement (from *Besser* in 1952 to *NCAA* in 2021<sup>156</sup>). We then hand-coded two dummy variables of interest: whether the decision was pro or against antitrust-enforcement;<sup>157</sup> and whether

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<sup>147</sup> *Ohio et al vs. American Express Co et al*, No. 585 (June 25, 2018).. For in-depth analysis of the merits and problems with the decision, see Caio Mario Pereira Neto and Filippo Lancieri, “Towards a Layered Approach to Relevant Markets in Multi-Sided Transaction Platforms,” *Antitrust Law Journal* 83, no. 2 (2020): 701.

<sup>148</sup> *American Exp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

<sup>149</sup> See, for example, recent decisions such as *FTC v. Qualcomm Inc.*, 969 F. 3d 974 (2020); *US v. AT&T, INC.*, 916 F. 3d 1029 (2019), and many other decisions that make it harder to challenge mergers in general.

<sup>150</sup> See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 US 481 (1968). And Smith, “The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment.” (analyzing the impact of the changes introduced by *Hanover Shoe* and *Illinois Brick* and the subsequent weakening of enforcement).

<sup>151</sup> Compare *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985); *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992). and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (2004)..

<sup>152</sup> *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

<sup>153</sup> See, for example, Crane, “Antitrust Antitextualism.”, Khan, “Amazon’s Antitrust Paradox.”

<sup>154</sup> Our sample starts in the 1951-1952 term (capturing the beginning of the Warren Court which starts in 1953) and goes until the 2021 term. The individual justice vote data comes from Washington University Supreme Court database: Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2020 Supreme Court Database, Version 2021 Release 01. URL: <http://Supremecourtdatabase.org> .

<sup>155</sup> The initial search for all decisions mentioning the Sherman Act yielded 411 cases. We then read all of them to remove cases where antitrust was not the main topic under discussion (for example, many decisions in which the Sherman Act was only mentioned in a footnote). The clean database resulted in a total of 227 cases.

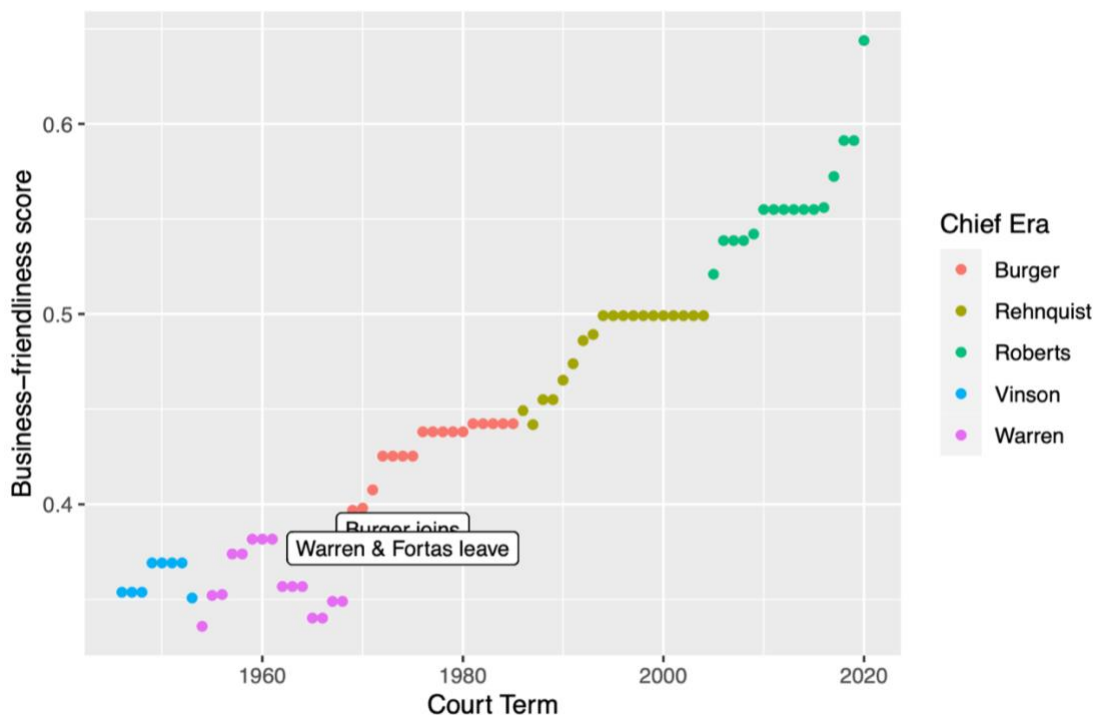
<sup>156</sup> *Besser Mfg. Co. v. United States*, 343 US 444 (1952). and *National Collegiate Athletic Assn. v. Alston*, 141 S. Ct. 2141 (2021).

<sup>157</sup> The Anti-Enforcement variable generally took the value of 0 if the initial plaintiff won the antitrust litigation and 1 otherwise. More precisely, the variable took the value of 0 if: (i) the decision was in favor of the government against a private party (generally); and (ii) the decision was in favor of a smaller business/individual/class action against a larger business (in general); with the exceptions of: (iii) if a private party or Federal Government won a case challenging State Regulation (State Action) case; (iv) the FTC/DOJ or a private party won a case challenging regulations that fixed prices or other competitive conditions (ICC, shipping or insurance cases, for example); (v) a

the decision was pro or against a large company.<sup>158</sup> Finally, we combined this database with information on the Supreme Court business-friendly decisions as coded by Epstein, Landes and Posner.<sup>159</sup> This is likely the most-comprehensive database of Supreme Court antitrust decisions to date.

Epstein, Landes and Posner find an increase in the Supreme Court’s friendliness to business over time. Figure IX below depicts the evolution of the average of business-friendliness scores in a given term since 1946, separating it by Chief Justice Term.<sup>160</sup> As can be seen, the Supreme Court starts a constant path towards more conservative, business-friendly decisions the moment Chief Justice Burger joins the Court in 1969.

Figure IX: The evolution of the Supreme Court’s business-friendliness, from 1946 to today



**Note:** Based on data from Lee Epstein, William M. Landes, and Richard A. Posner, “How Business Fares in the Supreme Court,” *Minn. L. Rev.* 97 (2012): 1431., as updated by Lee Epstein until 2020

private party lost a case affirming Noerr-Pennington or other antitrust exemptions; and (iv) a plaintiff lost a case challenging a Union contract and the Union claimed a labor exemption.

<sup>158</sup> The Pro-Large Company variable also generally took the variable of 0 if the initial plaintiff (a smaller company or an individual/class action plaintiff) won the litigation, and 1 otherwise. We analyzed all cases to consider the relative sizes of the parties involved and hand-coded them. In two cases we could not easily determine relative sizes, so we remove the cases from the sample. These were *Tampa Electric Co. v. Nashville Co.*, 365 US 320 (1961); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 US 1 (1979).

<sup>159</sup> Lee Epstein, William M. Landes, and Richard A. Posner, “How Business Fares in the Supreme Court,” *Minn. L. Rev.* 97 (2012): 1431. The original Epstein, Landes and Posner’s analysis cover the period from 1946 to 2011. However, Lee Epstein was very kind to provide us access to an updated dataset that covers the 2020 Supreme Court term. We are very thankful to her for making the data available.

<sup>160</sup> For example, if a term had two cases involving a business interest and in one 6 Justices voted in favor of business and 3 against and in the other 5 Justices voted in favor of business and 4 against, the average business-friendly score for the year is 0.58 (11/18 votes in favor of business)

If we take the year 1975 as the approximate dividing point of antitrust enforcement, one can notice how the average of pro-business votes in the pre-1975 high antitrust enforcement era was around 39%, rising to 48% in the post-1975, low enforcement era. While the profile of the Court certainly shifted given the higher number of Republican appointees,<sup>161</sup> it is noteworthy that this pattern holds for both Democratic and Republican nominees, albeit in different magnitudes: Democratic nominees' mean votes in favor of business grow from 35% to 38% before and after 1975, while Republican nominees' pro-business votes increase from 43% to 52% between both periods. The figures are even more stark for the subset of cases coded as important based on their appearance in a New York Times article.<sup>162</sup> The mean scores rise from 38% to 53% between high and low-enforcement periods; with the difference between Democratic nominees growing from 33% to 43%, and Republican nominees from 42% to 57% before and after 1975.

Table I: Supreme Court Business-Friendly Profile (1946-2011)

<b>Era</b>	<b>Mean of business-friendliness score</b>	<b>Mean of business-friendliness score on NYT cases</b>
High enforcement (pre-1975)	0.39	0.38
Low enforcement (post-1975)	0.48	0.53

<b>Era/party</b>	<b>Mean of business-friendliness</b>	<b>Mean of business-friendliness score on NYT cases</b>
Democrat – high enforcement (pre-1975)	0.35	0.33
Democrat – low enforcement (post-1975)	0.38	0.43
Republican – high enforcement (pre-1975)	0.43	0.42
Republican – low enforcement (post-1975)	0.52	0.57

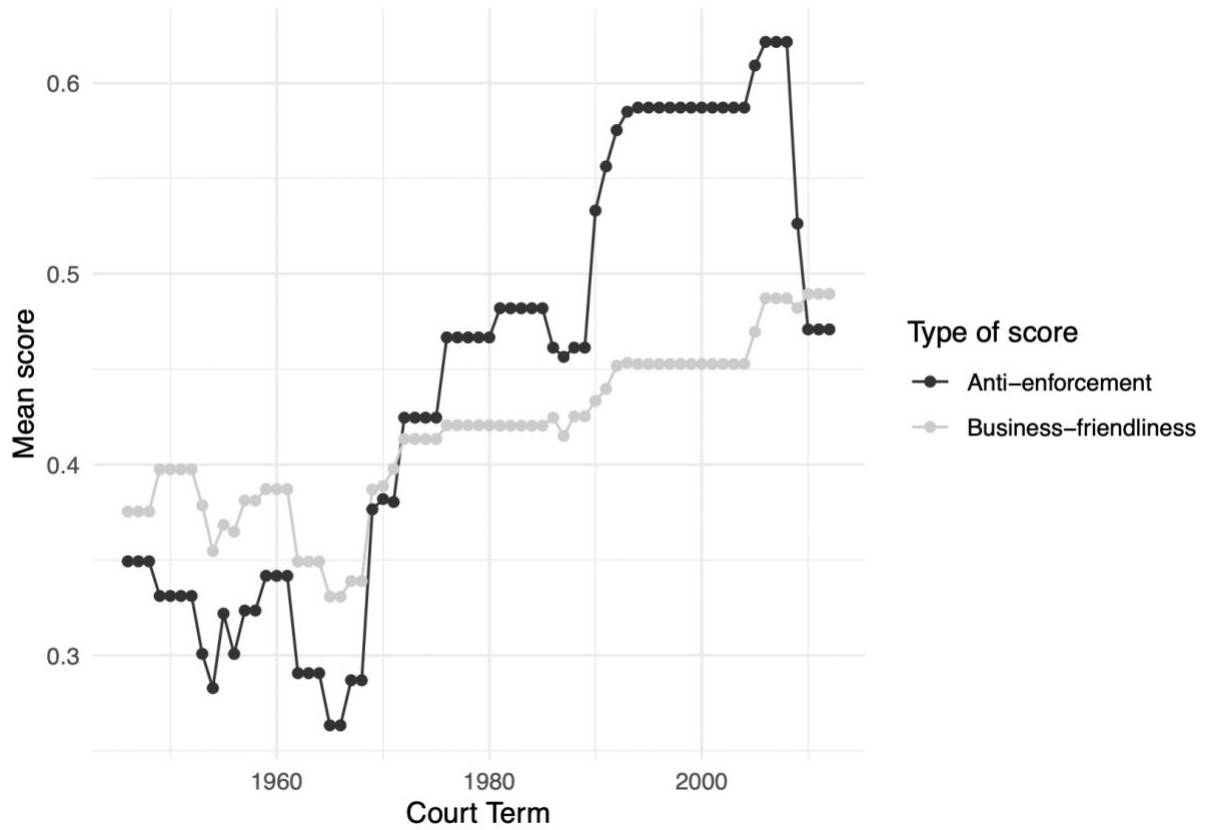
**Source:** Based on data from Epstein, Landes, and Posner., as updated by Lee Epstein until 2020

A further striking pattern is that justices favored businesses to a greater degree when those businesses were defendants in antitrust cases than when they were subject to other areas of the law. Figure X below plots the evolution of the average score of the Supreme Court business friendliness (or general business friendliness) and anti-enforcement (or antitrust business friendliness) scores per Supreme Court term. The figure shows that the justices became increasingly hostile to antitrust law relative to other areas of the law when businesses were a party.

<sup>161</sup> Epstein, Landes, and Posner, "How Business Fares in the Supreme Court." at 1453.

<sup>162</sup> These are cases that featured in the front-page of the NYTimes, which the authors use as a proxy for important cases.

Figure X: Average business-friendliness and anti-enforcement score per Supreme Court term – from 1952 to today

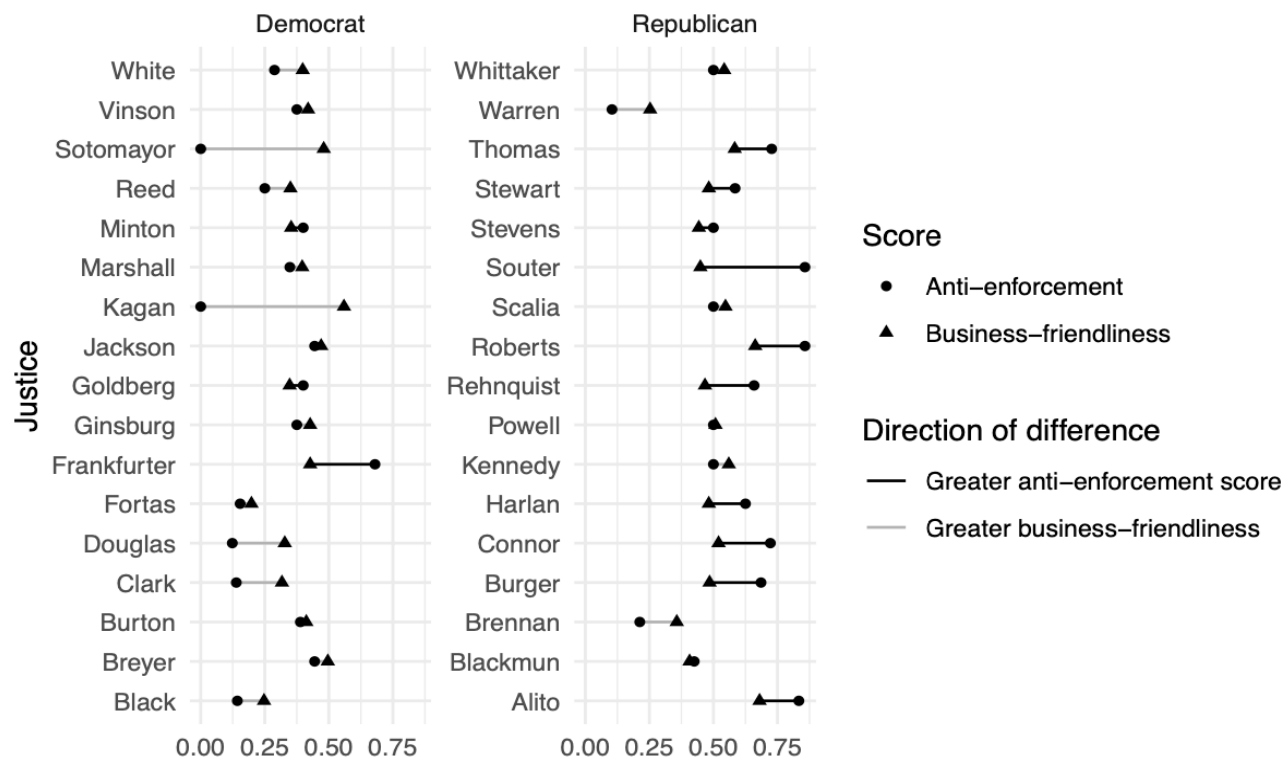


**Note:** Based on Justices votes on antitrust cases mentioning the Sherman Act and data from Epstein, Landes, and Posner., as updated by Lee Epstein until 2020.

Figure XI expands this analysis, depicting the comparison between the mean business-friendliness and anti-enforcement for Democrat and Republican Supreme Court nominees since the 1950s.<sup>163</sup> As the figure illustrates, strong-enforcement justices are usually associated with a pro-enforcement position that is slightly more pronounced than their pro-business profile. However, and in particular starting with justices appointed after the 1980s, their anti-antitrust enforcement stance is much more pronounced than their pro-business views. (We excluded Gorsuch, Kavanaugh and Barrett from our analysis of the individual behavior of justices because they voted in too few cases).

<sup>163</sup> The closer to 1, the more business-friendly and the more anti-antitrust enforcement the Justice is.

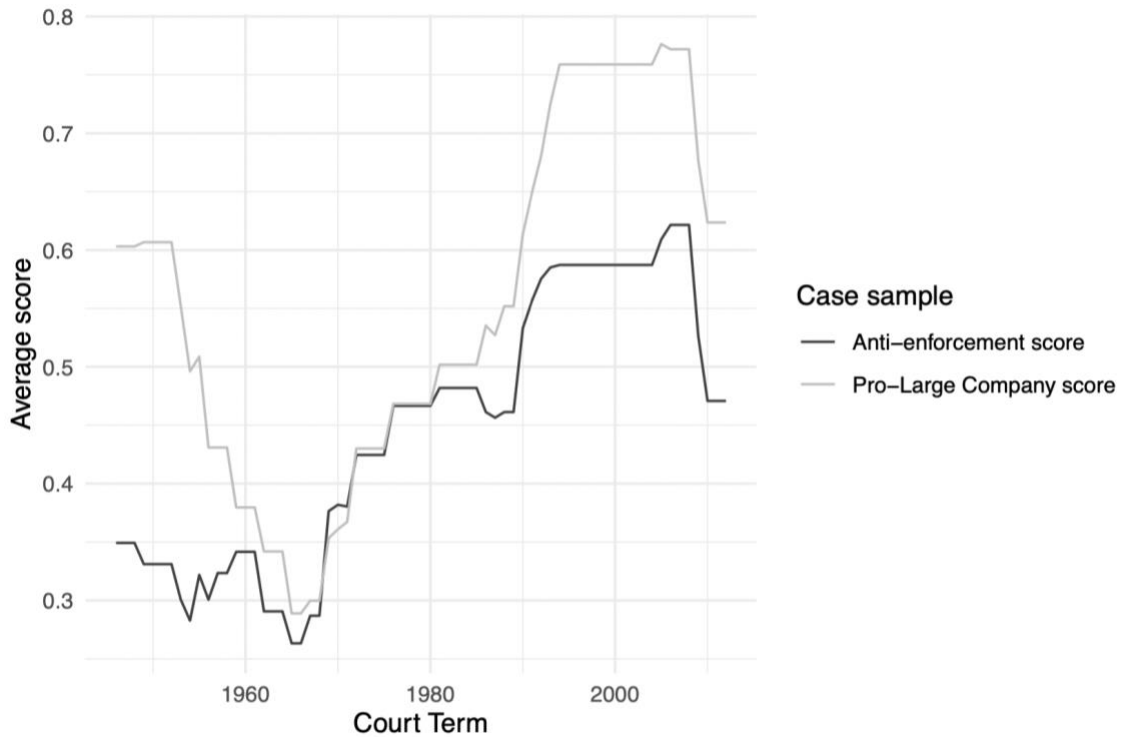
Figure XI: Average business-friendliness and anti-enforcement score per justice – from 1952 to today



**Note:** Based on Justices votes on antitrust cases mentioning the Sherman Act and data from Epstein, Landes, and Posner., as updated by Lee Epstein until 2020.

Perhaps more surprising, starting in the 1980s, the Court becomes even more favorable to large companies when they are challenged by a small company or class action plaintiff than to antitrust defendants in general.

Figure XII: Average measure of anti-enforcement and pro-large company score per Supreme Court term - from 1952 to today

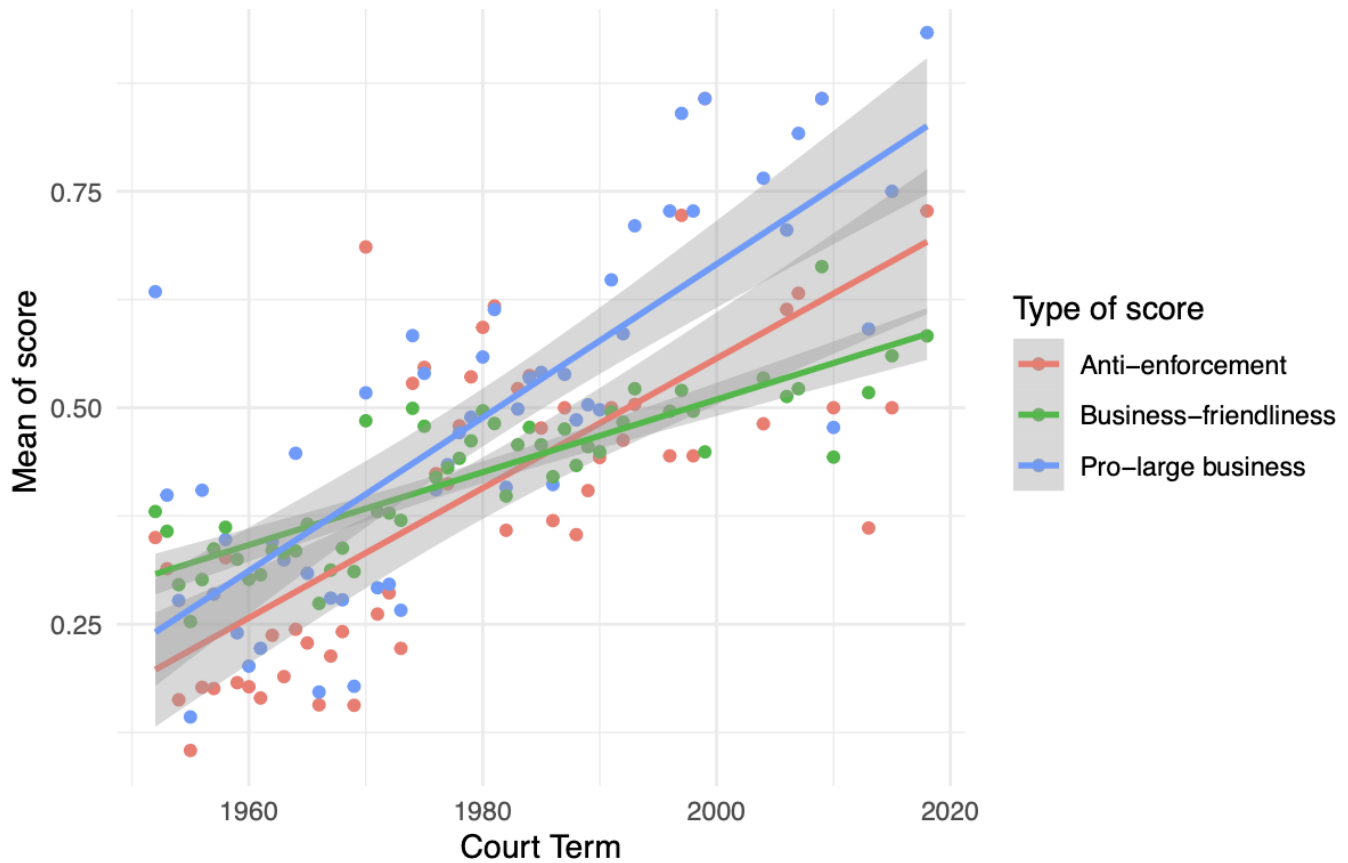


**Note:** Based on Justices votes on antitrust cases mentioning the Sherman Act.

This pattern is also illustrated by analyzing which justices drafted majority opinions for the cases in our database. The opinion authors are on average significantly more anti-enforcement and pro-large businesses than the Court is business friendly.



Figure XIII: Average mean score of Supreme Court opinion authors per Supreme Court term - from 1952 to today



**Note:** Based on justices' votes on antitrust cases mentioning the Sherman Act and data from Epstein, Landes, and Posner., as updated by Lee Epstein until 2020.

As we posited in our theoretical framework from Part II, policy changes made by technocrats can be democratically legitimate if there is at least some form of direct or indirect endorsement either by politicians taking credit for the changes in policy or by strict scrutiny during the nomination process (technocrats were appointed for this specific reason). Yet, neither takes place in the case of the Supreme Court-sponsored diminishment of antitrust enforcement. As we have seen in Part III.A., the weakened enforcement takes place despite the expressed will of Congress and public statements by presidents (either in speeches or in party platforms) that favor strong enforcement (or, alternatively, ignore it).

Many justices acted inconsistently with the commitments to antitrust enforcement that they made in their nomination hearings. Justices Sandra O'Connor, David Souter, Clarence Thomas and Ruth Bader Ginsburg all affirmed the importance of antitrust law for protecting small businesses and eliminating monopolies. Yet in their rulings, O'Connor, Souter and Thomas displayed little sympathy for antitrust enforcement and a great deal of sympathy for large businesses. They are among the most anti-antitrust justices ever sat in the Supreme Court. Their record in defense of small businesses is also dismal: O'Connor voted for large companies in 84% of her rulings, Souter in 86% of his, and Thomas in 93% of his. Similarly, Justice Ginsburg was among the most anti-antitrust enforcement of the Democratic appointed Supreme Court justices.

She voted against antitrust enforcement in 38% of the cases she participated in, compared to a party average of 29%. More impressively, 73% of her votes were against small businesses. Justice Roberts is another good example of these contradictions. While he has acknowledged the importance of strong antitrust enforcement in general and of private antitrust enforcement in particular, he leads all justices in his antagonism to enforcement (86% of his votes in both general and private enforcement cases).

These justices were also in the majority in landmark antitrust cases that greatly and negatively impacted enforcement during the 1990s and 2000s. Justice Ginsburg authored the decision in *Volvo Trucks* that puts the final nail in the coffin of the Robinson-Patman Act as a source of enforcement. Roberts, Souter, and Thomas joined the majority in *Twombly* (which greatly restricted private enforcement), together with Breyer—a Clinton nominee. Roberts and Thomas joined the majority in *Italian Colors*, which further restricted private enforcement of antitrust laws. O'Connor, Souter, Thomas, and Ginsburg all joined the unanimous court in *State Oil v. Khan* (which changed the law with regards to maximum Resale Price Maintenance) and Roberts and Thomas joined the majority in *Leegin*, which the antitrust restrictions on resale price maintenance.

The Court's increasing business-friendliness, anti-antitrust enforcement and pro-large businesses stance occurred concurrently with, and likely as a result of, increased business attention and influence over the appointments and performance of the US judiciary. Starting in the 1970s, business groups poured money into law and economics research and conservative legal networks like the Federalist Society (founded in 1982), with the goal of amplifying business influence and impact on the judiciary as well as the larger intellectual culture.<sup>164</sup> As Lewis Powell, then a corporate lawyer, wrote in a Memorandum to the American Chamber of Commerce,

“American business ‘plainly is in trouble’; the response to the wide range of critics has been ineffective, and has included appeasement; the time has come—indeed, it is long overdue—for the wisdom, ingenuity and resource of American business to be marshaled against those who would destroy it.”<sup>165</sup>

While Powell urged businesses to act through the democratic process by participating in public argument, he also argued that businesses should also try to influence universities and the courts. As to the latter point, he noted that “the judiciary may be the most important instrument for social, economic and political change,” and urged the Chamber of Commerce to model itself on the American Civil Liberties Union and other organizations that used the courts to advance their goals. “This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.”<sup>166</sup> Two months later Powell was appointed to the Supreme Court by President Nixon—a President who publicly campaigned on his support for strong enforcement of the antitrust laws. His nomination

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<sup>164</sup> See Steven M. Teles, *The Rise of the Conservative Legal Movement* (Princeton University Press, 2012).; Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (Studies in Postwar American Po, 2015).; and Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (Simon & Schuster, 2019)..

<sup>165</sup> Lewis F. Powell, “Powell Memorandum: Attack on American Free Enterprise System,” *Washington, DC: US Chamber of Commerce*, 1971. at 9.

<sup>166</sup> *Id.*

did not feature any mention of antitrust enforcement, but Powell would solidify a majority against strong antitrust enforcement on the Court.

The Chamber of Commerce, which is funded by American businesses, now plays a role in advancing business interests through lobbying and litigation. The Chamber of Commerce has, for example, expressed opposition to the major recent bills that seek to strengthen antitrust law and to increase funding for antitrust enforcement by the FTC.<sup>167</sup> Through its litigation arm, it has filed numerous amicus briefs urging courts to weaken antitrust enforcement,<sup>168</sup> although its influence has been limited because it does not file an amicus brief when the opposing parties are both businesses.<sup>169</sup> Still, research has shown that the International Chamber of Commerce's (ICC) amicus briefs have been extremely successful over the last several decades: a majority of the Court has agreed with them more than the amicus briefs of any other party except the U.S. government. In the area of antitrust, the ICC has scored notable victories for business interests, including *Twombly*.

Business groups have attempted to influence judges in other ways. They have financially supported Chicago school economics and judicial training programs that sought to inculcate judges with Chicago school tenets.<sup>170</sup> A paper by Ash et al. documents the role of various judicial training programs that promoted Chicago school ideas on antitrust law. The paper provides evidence that appeals court judges who attended a business-sponsored, stylized "law and economics" training (the Manne Program) that mostly included lessons based on Chicago school theories became significantly more likely to vote in favor of lax antitrust enforcement, though a small sample prevents the authors from having clear identification for all samples and specifications.<sup>171</sup> These findings, however, do not include Supreme Court justices, as only Justice Ruth Bader Ginsburg attended the program. In a separate analysis, Syng Cao finds a statistically significant and economically meaningful relationship between district judges' economic sophistication (measured by the use of economic terms in decisions and previous economics education) and pro-business rulings (a major portion being antitrust cases).<sup>172</sup> However, her analysis does not find a statistically significant impact for the Manne program in addition to judges' previous knowledge and exposure to law and economics more generally. Cao attributes the conflicting results to either a selection effect of district judges who attended the program in the first place (versus circuit court judges in

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<sup>167</sup> For some examples, see <https://www.uschamber.com/technology/us-chamber-calls-more-resources-antitrust-agencies>; <https://www.uschamber.com/technology/us-chamber-letter-antitrust-legislation>; <https://thehill.com/business-a-lobbying/business-a-lobbying/586148-business-lobby-targets-ftc-enforcement-measures-in-2t>.

<sup>168</sup> See <https://www.chamberlitigation.com/cases/issue/antitrust-competition-law>.

<sup>169</sup> See Study of the Success and Influence of Amicus Curiae Briefs Filed by the US Chamber of Commerce During the 2014-2017 Terms of the US Supreme Court; RB Emmert - U. Cin. L. Rev., 2018; What Kind of Business-Friendly Court-Explaining the Chamber of Commerce's Success at the Roberts Court; DL Franklin - Santa Clara L. Rev., 2009; Do the justices vote like policy makers? Evidence from scaling the Supreme Court with interest groups; JB Fischman - The Journal of Legal Studies, 2015; The Influence Machine: The U.S. Chamber of Commerce and the Corporate / Alyssa Katz

<sup>170</sup> As Justice Powell himself recognized, Universities and academic campuses represented "the single most dynamic source" of opposition to businesses' interests, so that a priority would be helping staff and promote scholars and ideas that supported business interests. Powell, "Powell Memorandum: Attack on American Free Enterprise System." at 12; 15-20.

<sup>171</sup> Ash, Chen, and Naidu, "Ideas Have Consequences: The Impact of Law and Economics on American Justice." at 30.

<sup>172</sup> Siying Cao, "Quantifying Economic Reasoning in Court: Judge Economics Sophistication and Pro-Business Orientation," 2021, <https://drive.google.com/file/d/1U5tFHxqrcmNbCWOW5t7MqAcZ8BDMlMIN/view>. at 45-46.

Ash et al.) or to sample restrictions that make the articles somewhat hard to directly compare (Cao lacks specific attendance data for judges for a pivotal period between 1976 and 1986).<sup>173</sup>

To summarize, the data presented and other scholarship on the evolution of the Supreme Court antitrust jurisprudence suggest three things. First, the nomination hearings indicate that there was no public support for a reduction of antitrust enforcement. Whatever the real views of the nominees, they clearly learned a lesson from the Bork nomination, which is that opposition to antitrust enforcement is politically unpopular. Second, there also was no publicly expressed, democratically tinged endorsement by the nominees, the president, or the Senate that the Supreme Court would or should use its power to weaken antitrust laws. Third, once in office, these justices greatly weakened antitrust law. This all takes place while antitrust is a non-politically salient topic to the public, but a pressing topic to the large business community that directly promoted, and benefited from, the lax enforcement of the antitrust laws.

#### Part IV. Taking stock: a death by a thousand cuts

We have shown that the decline in antitrust enforcement since the mid-1970s was not the result of a popular mandate, but the outcome of decisions by regulators and judges who were largely acting on their own rather than at the direction of elected officials, and behind-the-scenes budget cuts in Congress. Under our theoretical framework, a policy decision with important policy consequences that is made by an elected official, who campaigned on it, is democratically sanctioned and presumptively in the interest of the public. A decision made by a delegated expert (judge or regulator) whose appointment was publicly vetted and whose views were endorsed by elected officials is also democratically sanctioned albeit less so. When a decision is made by an elected official who does not openly advocate for it in an election or is shielded from public scrutiny by inclusion in general omnibus legislation or made through obscure procedural shortcuts, the decision receives a weaker democratic sanction. And when an appointed official makes policy decisions, and does so in the absence of public attention, that decision receives a still lower level of democratic sanction. At the lowest level, federal judges whose views on antitrust law were unknown at the time of their appointment (or misleadingly expressed by the nominee during the confirmation process) and who votes to make policy changes to antitrust law receive the lowest level of democratic sanction.

Table II summarizes our analysis. Our evidence shows that the three lowest categories of democratically sanctioned behavior played the exclusive role in the decline of antitrust enforcement. While larger forces were at work—from intellectual trends in Chicago to housing prices in Washington, DC—the major culprit appears to have been big business, which through both direct and indirect methods kept up pressure against antitrust enforcement for nearly half a century.

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<sup>173</sup> Cao, at 51-53.

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

<b>Level of public visibility / democratic legitimacy</b>	<b>Role of Agents</b>	<b>Evidence from period of decline (mid-1970s to present)</b>
Highest	Elected officials run on policy or publicly endorse it	No clear congressional or presidential authority to reduce antitrust enforcement
High	Elected officials appoint regulators or judges who promote policy	No clear statement by nominees in hearings that they intended to reduce antitrust enforcement (except Bork who was rejected)
Low	Elected officials implement policy in low-visibility way	Budgetary reductions for regulators buried in appropriation bills
Lower still	Regulators implement policy without endorsement from public officials, including legislative guidance	Regulators adopt stricter antitrust enforcement guidelines
Minimal/none	Courts change law based on policy considerations	Courts erode antitrust doctrine by overturning precedents

An alternative narrative is that decisions made by technocrats are good rather than bad.<sup>174</sup> According to this view, Congress is captured by the lobby of small inefficient producers, who want protection against large and efficient firms. Left to themselves the politicians would produce laws like the Robinson-Patman Act, which generate inefficient outcomes.<sup>175</sup> As the right monetary policy requires independent central bankers, the right antitrust policy requires independent judges, shielded from electoral pressure. Monetarism took over the Federal Reserve in the early 1980s not because it was the result of business pressure, but because it was the right response to the inflationary 1970s. In the same vein, the Chicago School’s views on antitrust flourished on the Supreme Court not because of business pressure, but because it was the right response to the excesses of antitrust enforcement in the 1960s and 1970s.<sup>176</sup>

This sunny narrative, however, is unable to explain why, as economic theory moved past the traditional Chicago approach, the Supreme Court and the various agencies did not follow suit.<sup>177</sup> It also cannot explain the rise in the revolving door and other phenomena that we have identified.

Another hypothesis is that interest groups pressured Congress, but behind the scenes. Afraid of a frontal assault on antitrust law, which could have riled the public, interest groups exerted influence through the budgetary process by persuading Congress to starve the antitrust agencies. While this influence survived democratic pressures—budgets are approved by Congress—the general public has never taken much interest in the budgetary allocation decisions to the FTC and the DOJ, so this is a very weak form of accountability. The enactment of mandatory merger filings fees in 1989 was supposed to be a mechanism to ensure an independent, reliable source of funding for the FTC and the DOJ that corresponded with their workload—and it was used as such during

<sup>174</sup> Blinder, Alan, 1997, “Is Government Too Political?” *Foreign Affairs*. 76:6.

<sup>175</sup> See Crane, “Antitrust Antitextualism.”, Nicolas Petit, “A Theory of Antitrust Limits,” *George Mason Law Review* 28, no. 1939 (2021).

<sup>176</sup> See Carl Shapiro, “Antitrust in a Time of Populism,” *International Journal of Industrial Organization* 61 (2018): 714–48.

<sup>177</sup> Hovenkamp and Morton, “Framing the Chicago School of Antitrust Analysis.”

the early 1990s. However, the extra funding was offset by declining appropriations. At the end of the Clinton presidency, Congress then further limited merger review by increasing the HSR merger notification thresholds, resulting in “stealth consolidations” just below the now-higher threshold.<sup>178</sup> These budget cuts hit the agencies just as they were required to dedicate a growing share of their scarce resources to maintain the same levels of litigation, as the Supreme Court repeatedly raised the doctrinal burdens of proving an antitrust case in court.<sup>179</sup>

A third hypothesis is that the regulatory agencies lost their best people to the industries they were trying to regulate, losing experience and expertise in the process, and putting them at the mercy of better-funded businesses fortified by cutting edge legal expertise on the regulator’s inner workings. This would be a process similar to what has been documented for the prosecution of white-collar financial crime by the Justice Department, which underwent a constant process of institutional weakening and of potential conflicts of interest that tamed much of its enforcement and prosecutorial capacity.<sup>180</sup> As regulators lost experience and expertise, they relied more heavily on outside expertise, and became vulnerable to epistemological capture by interests groups who funded and promoted economic theories that opposed antitrust, while ideas in economics more favorable to antitrust enforcement languished in obscurity. While it is hard to document such a complex process of epistemological capture, we have shown how senior FTC and DOJ personnel now make less than a first-year lawyer at the top law firms that they routinely face, and are significantly less likely to be able to afford a house in Washington D.C. than in the past. It is hard not to imagine that this process impacted agency expertise and enforcement capacity.

The political economy story for the judiciary is more complex. While judges were likely influenced by intellectual developments in Chicago and other academic centers, a simple technocratic story of academic influence cannot account for the much weaker influence of the post-Chicago backlash among economists and many law professors. While post-Chicago ideas that mostly urged stronger antitrust enforcement would play a role in some cases, they have not had the impact that one would expect if the judiciary was merely responding to the best academic work—some form of post-Chicago School would have had to strongly permeate, and it did not.<sup>181</sup>

A more credible account is a combination of the technocratic triumph of the Chicago School, combined with both epistemological capture and the Chomsky effect. It starts with the growing tendency of Republican presidents (starting with Nixon) and conservative-leaning Democrats (like Clinton) to nominate judges (and especially Supreme Court justices) sympathetic to business. As of 2011, five sitting justices (Alito, Roberts, Thomas, Kennedy, and Scalia) were in the top ten of the most pro-business justices since 1946.

These justices knew little about antitrust, but found that the Chicago School ideas gave a sheen of legitimacy to their pro-business instincts. Thanks in part to the funding and other promotional efforts of businesses, and the compatible views of regulators, opposing ideas developed after 1980 made little headway against the Chicago School juggernaut.<sup>182</sup> The

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<sup>178</sup> Wollmann, “How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare.”

<sup>179</sup> Woodcock, “The Hidden Rules of a Modest Antitrust.”

<sup>180</sup> Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (Simon and Schuster, 2017).

<sup>181</sup> Hovenkamp and Morton, “Framing the Chicago School of Antitrust Analysis.”

<sup>182</sup> It is beyond the goal of this article to assess how much corporate interests influenced the Law and Economics movement. We note that the Olin foundation did extend grants to the Chicago Law School and the Law and Economic programs. Yet these grants pale in comparison to the millions of dollars granted by liberal foundations to other

movement began during the Nixon presidency, at a time when Nixon boasted of his administration's strong and unparalleled antitrust enforcement as well as the need to protect small businesses and consumers against corporate power and abuse.<sup>183</sup> But it has continued ever since. Antitrust scholarship has made significant advances since the Chicago School, generally pointing towards increased enforcement. Still, Thomas, Souter, Roberts, Alito and O'Connor are the five Justices with the highest percentage of votes against antitrust enforcement in our database—they voted against overall enforcement more than 72% of the time. Kennedy, Scalia, Thomas, Souter, Roberts, Alito, O'Connor and even Democrats such as Ginsburg and Breyer are 9 of the 14 justices since the 1950s who consistently oppose private antitrust enforcement—voting against it more than 70% of the time. The judiciary, and in particular the Supreme Court, chose to ignore the post-Chicago literature. Given that these justices were not appointed for nor scrutinized on their views on antitrust (many would vote actually in opposition to their nomination statements), this appears to be another possible manifestation of the Chomsky effect.

There remains a final question, which is why anti-monopoly sentiment dissipated in the 1970s in both political parties and in the public at large. While this is outside of the scope of this article, we see two possible (and non-mutually exclusive) explanations. The first is that antitrust had been a victim of its own success: thanks to antitrust enforcement, business was significantly less concentrated in the 1960s. Large companies were also subject to regulation. So people may have lost their fear of concentrated economic power because concentrated economic power was indeed less significant. Second, following the decline in economic growth experienced during the 1970s, the public's support for pro-growth policies increased, and so support for antitrust law collapsed. But this second theory strikes an odd note. The public did support deregulation for pro-growth reasons, but stronger, not weaker, antitrust was thought to be necessary to enhance competition as the regulatory shackles were removed. As we have seen, no president, not even Reagan, reached office by campaigning against antitrust law; nor have regulators or judges achieved office based on their public positions on antitrust—not until Lina Khan was appointed chair of the FTC by President Biden in 2021.

Regardless of the cause, the dissipation of public attention to antitrust led to a kind of regulatory entropy: without continuing public pressure, regulators became cautious and increasingly susceptible to the blandishments of business. But the public's lack of attention to antitrust did not amount to a mandate to reduce enforcement of antitrust law. That lack of attention caused politicians to ignore antitrust law, not to campaign against it. It also meant there was no basis in democratic politics for elected officials to push back against business groups that challenged antitrust law and against the regulators and judges who acted in their interest.

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institutions (like the Ford foundation, the Sloan foundation, the MacArthur Foundation, or – more recently—the Gates foundation). A more powerful incentive might have come from the lucrative consulting opportunities the application of law and economics to legal cases started to provide to economists. With the foundation of Lexecon in 1977, law and economic experts, critical to the traditional way antitrust was conducted, became in high demand. Demand generated its own supply. The peer-review process and control of the editorship of the main field journals would have done the rest to entrench this perspective in the field.

<sup>183</sup> As Nixon's 1972 party platforms stated: We will press on for greater competition in our economy. The energetic antitrust program of the past four years demonstrates our commitment to free competition as our basic policy. The Antitrust Division has moved decisively to invalidate those "conglomerate" mergers which stifle competition and discourage economic concentration. The 87 antitrust cases filed in fiscal year 1972 broke the previous one-year record of more than a decade ago, during another Republican Administration". Republican Party, "Republican Party Platform of 1972."

## Conclusion

The demise of antitrust enforcement is a story of death by a thousand cuts inflicted in the dark. Who inflicted those cuts? The circumstantial evidence is most consistent with businesses using lobbying and litigation to influence regulators and judges, and to push Congress to cut the budgets of regulators. Business interests were able to take advantage of, or benefited from, a number of external trends, including diminishing public attention to antitrust, the widening gap between government and private-sector compensation, and the new economic thinking that percolated up from academia. As for the last factor, the Chicago School antitrust theory never obtained a public following (unlike, for example, academic arguments for deregulation), but it did influence lawyers and economists who obtained positions of authority. Business interests prevailed by maintaining pressure over half a century and by fighting across multiple fronts. They also benefited from their common interest in avoiding federal oversight, which allowed them to consolidate their efforts in the Chamber of Commerce and other organizations, as well as the absence of a natural concentrated constituency in favor of antitrust enforcement.

The story could be generalized as one of political mobilization that leads to enactment of laws that institutionalize a popular policy, followed by attrition at the hands of interest groups that oppose the policy. Antitrust law is not the only policy that has undergone this process, but it presents an unusually clear example.