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# ANTITRUST'S "CURSE OF BIGNESS" PROBLEM

D. Daniel Sokol\*

THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE. By Tim Wu. New York: Columbia Global Reports. 2018. Pp. 14, 139. \$14.99.

## INTRODUCTION

Tim Wu<sup>1</sup> is the most important academic popularizer of law and technology debates<sup>2</sup> and is the intellectual leader of the neo-Brandeisian antitrust movement. He has brought antitrust from a technical subject of interest only to antitrust practitioners and academics to the forefront of policy discussions around the world. His ability to help shape policy is impressive. He is smart and a beautiful writer—an effective combination. Merely for making antitrust relevant to the general population, Wu deserves credit.

Wu's most recent book, *The Curse of Bigness: Antitrust in the Gilded Age*, is an attempt to reframe contemporary antitrust debates by returning antitrust to its more populist roots. Given the global implications of his ideas and policy proposals (including breakup of tech platforms) for many of the large corporations that he takes on, *The Curse of Bigness* offers profound insights for how society and business should be organized.

Antitrust and scrutiny of large tech platforms like Amazon and Facebook are hot issues in policy circles. For critics like Wu, the growing concentration of American power and the rise of tech platforms are nothing less than a threat to American democracy (pp. 16, 55). Wu sees the current growth of large tech companies as the result of a generation of antitrust legal misapplication and harks back to an earlier era of significant antitrust enforcement (pp. 17–21).

Wu's work is powerful and provocative. He makes several important points about how to think about the body of antitrust law. Wu would abandon the current legal framework of antitrust. However, although antitrust has made some tactical mistakes over forty years, the antitrust enterprise is not broken in need of total retrofit. Moreover, Wu's policy prescriptions are not sensitive to administrability concerns. Antitrust law is akin to common

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1. Julius Silver Professor of Law, Science and Technology, Columbia Law School.

2. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? (2006); TIM WU, THE ATTENTION MERCHANTS (2016); TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2010) [hereinafter WU, THE MASTER SWITCH]; Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

law.<sup>3</sup> Congress has purposely chosen not to make significant changes in anti-trust's fundamental structure but has left it to the courts to fill in the gaps. Given this reality, more constructive criticisms would go to how to shift doctrine in ways that might promote some of the changes that Wu seeks.<sup>4</sup>

The first part of this Review summarizes Wu's major claims. It then highlights some of his critiques as to "bigness," the multiple goals of anti-trust, and the missed opportunities as to cases that should have been or need to be brought, such as against tech companies. Some of Wu's critiques are spot on in identifying missed opportunities, like a number of horizontal mergers that should have been challenged. Where Wu's book suffers is where he undervalues the institutional structure of antitrust law, underplays what antitrust does well as a substantive matter, and misanalyzes antitrust and tech platforms.

### I. POLITICAL ANTITRUST?

*The Curse of Bigness* is a fundamental challenge to the "Chicago School" and its approach to the analysis of antitrust law that has dominated the United States since the 1970s. Robert Pitofsky wrote an important article in 1979 that guides Wu's analysis. Published in the famous symposium issue of the *University of Pennsylvania Law Review*, the article signaled the end not merely of populism but of the structure-conduct-performance paradigm.<sup>5</sup> Pitofsky chastised antitrust scholars for "persuading the courts to adopt an exclusively economic approach to antitrust questions."<sup>6</sup> He argued that "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."<sup>7</sup> Pitofsky explained political values in a populist manner by noting,

if the free-market sector of the economy is allowed to develop under anti-trust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.<sup>8</sup>

Wu's book is part of this legacy. Wu is a powerful writer and explores similar themes with great passion and resolve. For example, he writes, "[antitrust] does strike at the root cause of private political power—the economic concentration that facilitates political action" (p. 23). Elsewhere, in describing

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3. See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 666 (1982).

4. See, e.g., C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

5. See p. 17; Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

6. Pitofsky, *supra* note 5, at 1051.

7. *Id.*

8. *Id.*

the neo-Brandeisian agenda he explains, "these suggestions would help us return to an economic vision that prizes dynamism and possibility, and ultimately attunes economic structure to a democratic society" (p. 138).

Wu's major insight is to suggest that there needs to be a broader set of goals for antitrust beyond consumer welfare to address this populist impulse.<sup>9</sup> What this looks like in practice is not something that Wu spends much time developing.

Injecting political trade-offs into antitrust can have negative repercussions. In a world of multiple goals, government may pick winners and losers and may do so with something other than the public interest in mind.<sup>10</sup> Wu would replace antitrust as we know it with a regulatory system akin to what one finds in other administrative agencies (a public interest standard with some "fairness" element, industry comments on mergers, banning mergers of a certain size, among others features) (pp. 127–39). This solution is subject to the same capture concerns one finds in other agencies and would not adequately address Wu's concerns. Wu does not provide a mechanism to prevent special interests from lobbying to promote their interests over consumers' with a veneer of "fairness." Indeed, Wu's previous writing in the telecom context suggests that capture is a significant risk.<sup>11</sup> The Robinson-Patman Act, discussed in Section V, illustrates the folly of a public interest-based antitrust.

Academics often change their approach following a stint in practice. Wu had short stints in government during the Obama Administration but not in a senior leadership role with managerial oversight in helping to run an agency. Such a position might have made Wu focus more on administrability concerns. When Pitofsky chaired the FTC in the 1990s, he did not adopt a populist agenda or embrace multiple goals as in his earlier writing. Rather, he continued with the economic framework that was established by prior Republican and Democratic administrations, and his tenure is seen as a "golden age" of antitrust.<sup>12</sup> Nor is Pitofsky alone in reworking his criticisms

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9. See pp. 53–58, 135–39.

10. Pp. 127–39; Steven Croley, *Interest Groups and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 49, 72 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."); D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029 (2011) (reviewing MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009)).

11. WU, THE MASTER SWITCH, *supra* note 2, at 307–08 ("Again and again in the histories I have recounted, the state has shown itself an inferior arbiter of what is good for the information industries. The federal government's role in radio and television from the 1920s through the 1960s, for instance, was nothing short of a disgrace.").

12. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1. However, Pitofsky had some missteps such as allowing consolidation in some industries where there may have been anticompetitive effects.

within an economics framework and abandoning a more populist approach to antitrust. Indeed, Wu's other antitrust works embrace economic analysis to guide antitrust and do not suggest the need for noneconomic values.<sup>13</sup> This suggests the difference between making academic pronouncements and having to create real change given institutional constraints when handed power.

Wu shows nuance with two sets of critiques. One is a populist critique that Wu calls "neo-Brandeisian," which questions the singular efficiency-based goal expressed explicitly and repeatedly in the Supreme Court's antitrust jurisprudence and practiced by the two antitrust agencies (pp. 78–92). The second critique is within a law and economics tradition but suggests modifications to doctrine based on flaws in Chicago School assumptions (pp. 106–07).

Wu makes an important contribution, namely that some basic assumptions made by the Chicago School were crude or simply wrong and that improved economic analysis based on more precise models and more informed empirical work offers some alternative approaches for moving antitrust forward. He properly articulates that some Chicago assumptions, based on overly simplistic economics, may lead to bad results (pp. 102–09).

But Wu underestimates the current institutional setup of antitrust, in which a bad doctrine could be reshaped into something less harmful. As a result of the current institutional setup, antitrust addresses pure antitrust issues relatively well but other issues like privacy<sup>14</sup> or traditional regulation<sup>15</sup> less well. After suggesting that antitrust should be about such trade-offs, Wu does not offer insights into how to address the trade-off of efficiency and fairness inherent in a public interest standard.<sup>16</sup> What would an administrable set of cases to guide future business behavior look like? What would the workable legal rule be? What would be the burdens of proofs and the presumptions? On these issues, Wu does not offer detailed insights. But if the claim is that antitrust must change because of new realities in concentration and tech, it is incumbent on those proposing changes to offer a workable system. The strength of the current approach is how it marries economic analysis with legal administrability.<sup>17</sup>

Wu's conception of competition would be a broader "protection of competition" approach that focuses on the competitive process and looks beyond price effects (p. 136). But a broader competitive process has a popu-

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13. C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013).

14. Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and The Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121 (2015).

15. See Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation*, in ECONOMIC REGULATION AND ITS REFORM 25 (Nancy L. Rose ed., 2014).

16. Perhaps this is because implicitly Wu understands that fairness is indeterminate. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 969–70 (2001).

17. See Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, J. CORP. L. (forthcoming) (manuscript at 35) (on file with the *Michigan Law Review*).

list element to it because it supports inefficient competitors,<sup>18</sup> and populism does not work within antitrust's institutional structure. Understanding economic analysis and antitrust's institutional structure of judge-made law explains why antitrust has evolved and why a populist embrace, short of new legislation, is unlikely to succeed. Antitrust is primarily federal law. But antitrust "common law" functions somewhat differently than other fields. Antitrust's enabling legislation allows for common law-like development.<sup>19</sup> In practice, statutes such as the Sherman Act enjoy a certain rank akin to constitutional common law.<sup>20</sup>

The Supreme Court offered an early articulation of this constitution-like principle to the Sherman Act in *Appalachian Coals, Inc. v. United States*.<sup>21</sup> There, the Court stated, "As a charter of [economic] freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."<sup>22</sup> This framework changes how the Supreme Court views antitrust jurisprudence. Traditional *stare decisis* typically means that the Supreme Court is reluctant to overrule its precedent.<sup>23</sup> Antitrust works differently.

Unlike other areas of law, economic advances shape the rethinking of antitrust rules. Since the 1970s, the Supreme Court has stepped in to revise antitrust law, narrowing or overruling precedents based on the current understanding of economics.<sup>24</sup> As such, *stare decisis* does not have the same meaning in antitrust as it does in other fields, as precedent matters less than changes in economic thinking.

18. Compare Wu's account on this point with Daniel A. Crane, *Antitrust and Democracy: A Case Study from German Fascism* 19 (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 18-009, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3164467](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164467) (on file with the *Michigan Law Review*) ("[W]hat is good for consumers is good for democracy.").

19. See HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY* 228–29 (1954) ("[I]n adopting the standard of the common law Congress expected the courts not only to apply a set of somewhat vague doctrines but also in doing so to make use of that 'certain technique of judicial reasoning' characteristic of common law courts.").

20. Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1473 (2000).

21. 288 U.S. 344 (1933).

22. *Appalachian Coals*, 288 U.S. at 359–60. *But see* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 292–328 (1986) (criticizing this conceptualization).

23. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is not . . . [an] inexorable command. . . . *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . even where the error is a matter of serious concern, *provided* correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." (third emphasis added) (internal citations omitted)).

24. Barak Orbach, *Antitrust Stare Decisis*, ANTITRUST SOURCE, Oct. 2015, at 1, 1–3 (citing *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015)).

The Supreme Court has explained that antitrust precedent is less important than precedent in other fields. For example, in *State Oil Co. v. Khan*, a case that removed the per se designation for maximum resale price maintenance, the Court explained:

[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.” . . . [The] Court . . . reconsider[s] its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.<sup>25</sup>

This view of antitrust as a variation of common law has taken hold even in recent cases. As the Court stated in 2015 in *Kimble v. Marvel Entertainment, LLC*, “[w]e have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice’s competitive consequences.”<sup>26</sup> This explicit incorporation of economic analysis—and the resulting limitation of traditional stare decisis in antitrust common law—makes antitrust unique among substantive areas of law.<sup>27</sup>

Since 1950, the basic statutory scheme of antitrust has remained constant, though it has been tweaked with the introduction of premerger notification<sup>28</sup> and increased penalties for antitrust violations.<sup>29</sup> To understand what antitrust can and cannot do, it is important to understand how the broader political economy of antitrust has shaped antitrust jurisprudence. Fundamentally, antitrust changes gradually rather than through seismic shifts. Thus, only by looking at the long term can one understand trends that shape cases that can be successfully brought in court. Even if Wu were correct that antitrust enforcement has not been aggressive enough, short of legislative change, antitrust is not capable of the type of enforcement profile that he ascribes to it. Antitrust’s institutional attempt at a legislative solution to address “fairness” is the Robinson-Patman Act.<sup>30</sup> Its case law evolution shows that even a protectionist statute can be reinterpreted to have a goal

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25. *State Oil Co. v. Khan*, 522 U.S. 3, 20–21 (1997) (quoting Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978)).

26. 135 S. Ct. 2401, 2412–13 (2015).

27. D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, 95 NOTRE DAME L. REV. (forthcoming 2020) (on file with the *Michigan Law Review*).

28. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (current version at 15 U.S.C. § 18a (2012)).

29. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, 665–69; Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134, *reenacted in* Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, 101 Stat. 1279 (codified as amended at 18 U.S.C. § 3571(d) (2000)); Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 5, 88 Stat. 1706, 1709 (1974).

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

based on economic effects, even when such a reformulation is in sharp contrast to the intent and actual language of the statute.<sup>31</sup>

## II. MACROECONOMIC CHANGES TO THE U.S. ECONOMY HELP EXPLAIN ANTITRUST'S POLITICAL ECONOMY

Antitrust law and policy in part has responded to broader political economy concerns. These concerns support Wu's unease with the direction of the U.S. economy.<sup>32</sup> He notes the growing concentration in U.S. markets and suggests that concentration has led to a number of ills (p. 22). Wu's concerns about economic concentration should be taken very seriously as there have been growing disparities in wealth, health outcomes, and education, and a growing cultural divide. Changes in antitrust law and policy may have played some role in this. But neither Wu's work nor that of other neo-Brandeisians has clearly established antitrust as the cause of these broader policy shifts.<sup>33</sup> Wu's story should consider other factors—like employment and income—that implicate competition law and policy but have a benign or even positive impact on U.S. economic performance, innovation, and other measures of daily life for U.S. consumers.<sup>34</sup>

To provide a broader context of larger political economy shifts, this Review examines four instances of the vital intersections among macroeconomic factors, the industrial organization of the modern U.S. economy, and judicial and policy responses. There is a counterstory that antitrust populists ignore about U.S. growth—the effects of antitrust populism until the rise of Chicago School antitrust coincided with American economic decline. As antitrust rules changed to be more market oriented and where the outcome was improved economic efficiency, U.S. economic growth improved. Since the start of the Great Recession, however, a number of measures indicate that the U.S. economy is approaching the sickly economics of the stagnation period of the 1970s.<sup>35</sup> Now, the efficiency-based assumptions of modern antitrust are being questioned, and policy may respond as a result. But the circumstances between the 1970s and 2010s are distinct in terms of the shift within the Supreme Court and the antitrust agencies. Whereas the executive

31. D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2065–69 (2015).

32. Pp. 19–23. I want to thank Dale Collins for bringing the issue of broader political economy shifts to my attention and providing my initial data and sources (since revised) for the first three periods.

33. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 716–17, 721–37 (2018) (exploring the data and critiquing populist attacks).

34. See, e.g., Jonathan B. Baker, *The Case for Antitrust Enforcement*, J. ECON. PERSP., Fall 2003, at 27; Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J.L. & ECON. S101 (2014); Lawrence J. White & Jasper Yang, *What Has Been Happening to Aggregate Concentration in the U.S. Economy in the 21st Century?*, SSRN (Mar. 30, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2953984](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953984) (on file with the *Michigan Law Review*).

35. 2 ALLAN H. MELTZER, *A HISTORY OF THE FEDERAL RESERVE* chs. 4–7 (2009).



and legislative branches sat out of antitrust's shift to an efficiency-based goal for the most part (other than by appointing agency leadership that believed in economic effects),<sup>36</sup> change today focuses on these two branches in terms of possible legislative reform to antitrust law and candidates who would appoint antitrust leadership that would fundamentally transform antitrust.

We can divide shifts in antitrust based on four different time periods: Period 1: good times (1950–1972); Period 2: stagnation (1973–1982); Period 3: the modern era (1982–2006); and Period 4: the “Great Recession” and beyond (2007–2017). Table I summarizes these results.

TABLE I

U.S. Macroeconomic Indicators				
Indicator	1950–1972	1973–1982	1983–2006	2007–2017
Real GDP (average annual growth) <sup>37</sup>	4.20%	2.40%	3.46%	1.52%
Nonfarm business productivity (average annual rate) <sup>38</sup>	2.79%	1.14%	2.30%	1.33%
Inflation (average annual change December to December) <sup>39</sup>	2.79% <b>MAX:</b> 6.00%	8.20% <b>MAX:</b> 13.30%	3.10% <b>MAX:</b> 6.30%	1.60% <b>MAX:</b> 4.10%
Bank prime loan rate (annual, beginning in 1956) <sup>40</sup>	5.10% <b>MAX:</b> 8.50%	11.10% <b>MAX:</b> 21.50%	8.00% <b>MAX:</b> 13.00%	4.00% <b>MAX:</b> 8.25%
Unemployment (average monthly rate) <sup>41</sup>	4.80% <b>MAX:</b> 6.80%	7.00% <b>MAX:</b> 9.70%	5.90% <b>MAX:</b> 9.60%	6.80% <b>MAX:</b> 9.60%
Median real family income (average annual change) <sup>42</sup>	3.28%	-0.16%	0.92%	0.62%

36. Sokol, *supra* note 27 (manuscript at 30–42).

37. See Table 1.1.1 Percent Change from Preceding Period in Real Gross Domestic Product, BUREAU ECON. ANALYSIS (Apr. 26, 2019), [https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&select\\_all\\_years=0&nipa\\_table\\_list=1&series=a&first\\_year=1950&scale=-99&last\\_year=2017&thetable=x](https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&select_all_years=0&nipa_table_list=1&series=a&first_year=1950&scale=-99&last_year=2017&thetable=x) [<https://perma.cc/YK2X-H6UX>].

38. See *Nonfarm Business Labor Productivity (Output Per Hour), Series ID PRS85006092*, BUREAU LAB. STAT. (May 14, 2019), <https://data.bls.gov/timeseries/PRS85006092> [<https://perma.cc/5QYD-KSL6>].

39. See *Consumer Price Index for All Urban Consumers: All Items*, FRED ECON. DATA (May 10, 2019), <https://fred.stlouisfed.org/graph/?g=nV5V> [<https://perma.cc/6LAV-PK5Y>].

40. See *Bank Prime Loan Rate*, FRED ECON. DATA (May 13, 2019), <https://fred.stlouisfed.org/graph/?g=nV8j> [<https://perma.cc/72RQ-FUQ5>].

41. See *Unemployment Rate (16 Years and Over), Series ID PRS85006092*, BUREAU LAB. STAT. (May 14, 2019), <https://data.bls.gov/timeseries/LNS14000000> [<https://perma.cc/X836-XV9Y>].

Table I shows that the good times of Period 1 have not been replicated in any subsequent period and that the economic stagnation of Period 2 looks similar to Period 4 of the Great Recession and beyond. Real GDP averaged 4.20% in Period 1, 2.40% in Period 2, 3.46% in Period 3, and 1.52% in Period 4. U.S. nonfarm business productivity shows swings of 2.79% in Period 1, 1.14% in Period 2, 2.30% in Period 3, and 1.33% in Period 4. With the exception of Period 2 (average of 8.20% with a maximum of 13.30%), inflation has been relatively low in the other periods, with averages of 2.70%, 3.10% and 1.60% in Periods 1, 3, and 4, respectively. Unemployment averaged 4.80% in Period 1, 7.0% in Period 2, 5.90% in Period 3, and 6.80% in Period 4. Finally, median real family income (which tells us about total income growth and not distribution) averaged 3.28% in Period 1, -0.16% in Period 2, 0.92% in Period 3, and 0.62% in Period 4.

The overall trend is a function of many factors. Babies were not the only thing booming in Period 1. Rather, the entire economy boomed, and U.S. competitiveness did not really matter when the rest of the world was still in recovery mode post WWII.<sup>43</sup> This boom period weakened as a costly international war (Vietnam) and increased domestic spending (Great Society) meant that the economy struggled due to significant government spending and lower productivity.<sup>44</sup> In Period 2, academics, the antitrust agencies, and ultimately the Supreme Court questioned the basis for the existing multiple-goal antitrust regime<sup>45</sup> as U.S. competitiveness declined. Period 3 led to a loosening of antitrust rules and a larger liberalization of the economy. This led to more efficient business practices, such as improved vertical integration and economies of scale due to increased horizontal consolidation from mergers.<sup>46</sup> In Period 4, another set of international military commitments (Iraq and Afghanistan) and increased domestic spending with resulting economic hardship (Great Recession)<sup>47</sup> led people to question the antitrust regime.<sup>48</sup> If

42. See U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES: FAMILIES tbl.F-7, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html> [<https://perma.cc/QU2T-6WV7>].

43. Dale W. Jorgenson, *Productivity and Postwar U.S. Economic Growth*, J. ECON. PERSP., Fall 1988, at 23.

44. EDWARD F. DENISON, TRENDS IN AMERICAN ECONOMIC GROWTH, 1929–1982 (1985).

45. Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1911–13 (2009) (reviewing ROBERT PITOFSKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK (2008)).

46. Shantanu Dutta et al., *Vertical Territorial Restrictions and Public Policy: Theories and Industry Evidence*, J. MARKETING, Oct. 1999, at 121; Peltzman, *supra* note 34.

47. Ryan D. Edwards, *U.S. War Costs: Two Parts Temporary, One Part Permanent*, 113 J. PUB. ECON. 54 (2014); John B. Taylor, *The Role of Policy in the Great Recession and the Weak Recovery*, 104 AM. ECON. REV. (PAPERS & PROC.) 61 (2014).

48. E.g., ALAN B. KRUEGER & ERIC A. POSNER, THE HAMILTON PROJECT, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 4 (2018), [http://www.hamiltonproject.org/assets/files/protecting\\_low\\_income\\_workers\\_from\\_monopso](http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopso)

market competition no longer delivered in Period 4 in terms of macroeconomic gains, it is perhaps not surprising that we have witnessed the rise of antitrust populism to match the rise of overall populism.

From the antitrust perspective, these four periods identify several important procedural and substantive shifts. These political changes are linked to the types of cases that parties (government or private plaintiffs) were willing to bring before the courts. Ultimately it is the courts that shape antitrust policy, as business practices occur in the shadow of antitrust rulings. Understanding the larger political economy also explains why populism has reemerged—the current group of populists do not like the court outcomes on either substantive or procedural antitrust and believe that the current economic disruption will not be solved by the courts.<sup>49</sup> This meta-analysis also explains the impact of antitrust's institutional structure. Courts constrain agencies in the types of cases that can be brought and won.

Period 1 identifies a time in case law with rigid antitrust rules making much behavior *per se* illegal or *de facto per se* illegal. This period included cases in which the Supreme Court pushed case law that restricted horizontal mergers,<sup>50</sup> vertical mergers,<sup>51</sup> and conglomerate mergers,<sup>52</sup> doubted efficiencies;<sup>53</sup> showed concern about dominant firms;<sup>54</sup> and especially restricted vertical restraints<sup>55</sup> and joint ventures.<sup>56</sup> On procedural issues, the

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ny\_collusion\_krueger\_posner\_pp.pdf [https://perma.cc/KU67-BDBW]; A BETTER DEAL: CRACKING DOWN ON CORPORATE MONOPOLIES AND THE ABUSE OF ECONOMIC AND POLITICAL POWER 1, <http://abetterdeal.democraticleader.gov/wp-content/uploads/2017/10/A-Better-Deal-on-Competition-and-Costs.pdf> [https://perma.cc/5GYY-YVLN]; Sebastian Payne, Opinion, *Time to Rethink Antitrust?*, FIN. TIMES (June 25, 2018), <https://www.ft.com/content/72d9a1e0-7824-11e8-bc55-50daf11b720d> [https://perma.cc/QZ3L-CX2L].

49. Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & BUS. 1 (2017).

50. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 275, 277 (1966) (“[T]he basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business . . . by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies.”); *United States v. Phil. Nat'l Bank*, 374 U.S. 321 (1963).

51. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”).

52. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1967); *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651 (1964).

53. See, e.g., *Procter & Gamble*, 386 U.S. at 580.

54. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (grappling with the implications of dominant and monopolizing firms but finding that defendant’s domination of the cellophane market was not a violation of the Sherman Act).

55. See *Albrecht v. Herald Co.*, 390 U.S. 145, 151–54 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 377–78 (1967); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 7–8 (1958).

Court provided a permissive view of government timing of enforcement.<sup>57</sup> This period, from an antitrust jurisprudential perspective, reflected concern regarding political and economic power. For example, in *Alcoa*, dicta included the assertion that "great industrial consolidations are inherently undesirable, regardless of their economic results."<sup>58</sup> Similarly, in *Procter & Gamble*, the Court identified that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."<sup>59</sup> To a certain extent, size and concentration were to be feared. For example, a combined grocery store market share of 7.5% in *Von's Grocery* resulted in the Supreme Court blocking the merger because the market was "characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress . . . declared must be arrested."<sup>60</sup> Such jurisprudence was possible during a time when the macroeconomic factors were such that efficiency was less important because the economy was doing so well overall.

By the time we reach Period 2, the U.S. economy was in relative decline.<sup>61</sup> Antitrust jurisprudence began to shift during this period, in part because of new economic learning but in part because there was less slack in an economy in which the United States was less competitive globally. The loosening occurs in several areas: mergers,<sup>62</sup> vertical restraints,<sup>63</sup> standing,<sup>64</sup> specific-intent requirements in criminal antitrust cases,<sup>65</sup> and the abandonment of several cases where economic learning suggested that the cases were mistaken.<sup>66</sup>

Period 3 and a Reagan Administration–led "Chicago" revolution gave an intellectual basis for courts to loosen antitrust rules significantly. Instead, they promoted antitrust intellectual "goals" and ideological stability based on

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56. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606–12 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 352–58 (1967).

57. See *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 703 (1967); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590 (1957); *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948).

58. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

59. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).

60. *United States v. Von's Grocery Co.*, 384 U.S. 270, 278 (1966).

61. See Richard R. Nelson & Gavin Wright, *The Rise and Fall of American Technological Leadership: The Postwar Era in Historical Perspective*, 30 J. ECON. LITERATURE 1931, 1955–60 (1992).

62. See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 494–504 (1974).

63. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 16–24 (1979); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 42–47 (1977).

64. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 447, 484–89 (1977).

65. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436–443 (1978).

66. William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1136–41 (1989).

a consumer welfare standard resolved from the Bush I to Bush II period.<sup>67</sup> This period also included significant U.S. growth in productivity.<sup>68</sup> In terms of antitrust law developments, during this period, enforcement by courts and antitrust agencies increased the difficulty of finding concerted action,<sup>69</sup> heightened procedural hurdles,<sup>70</sup> focused horizontal mergers on finding anticompetitive effect,<sup>71</sup> and validated merger efficiencies.<sup>72</sup> This period also saw a shift to relaxed restrictions on dominant firm conduct.<sup>73</sup> Vertical restraints were also relaxed.<sup>74</sup> Finally, antitrust and IP were no longer at odds.<sup>75</sup>

In Period 4, the pendulum began to swing back in some areas, but the loosening of antitrust restrictions continued overall. Procedural shifts made it harder for plaintiffs to bring class actions.<sup>76</sup> In terms of substance, the burden shift became harder for plaintiffs in some rule of reason cases<sup>77</sup> and where the Court imposed new limits to state action.<sup>78</sup> But in other areas there was pushback against big tech companies,<sup>79</sup> more aggressiveness in terms of cases in reverse payments,<sup>80</sup> and a number of lower court wins to

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67. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSP., Winter 2000, at 43, 43–60.

68. Dale W. Jorgenson et al., *A Retrospective Look at the U.S. Productivity Growth Re-surgence*, J. ECON. PERSP., Winter 2008, at 3, 3.

69. See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195–96 (2010); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723–31 (1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–93 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771–74 (1984).

70. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–63 (2007); *Matsushita*, 475 U.S. at 585–88.

71. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990).

72. See *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–21 (D.C. Cir. 2001); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991).

73. See *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 446–47 (2009); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–11 (2004); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 458 (1993); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600–05 (1985).

74. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897–99 (2007); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175–82 (2006); *Brooke Grp.*, 509 U.S. at 222–24; *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984); *Mon-santo Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 760–64 (1984).

75. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 44–46 (2006).

76. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011); see also *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 231–39 (2013).

77. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284, 2288 (2018).

78. See *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 230–32 (2013).

79. See *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

80. See *FTC v. Actavis, Inc.*, 570 U.S. 136, 141 (2013).

limit anticompetitive vertical restraints in the new economy<sup>81</sup> and in healthcare mergers.<sup>82</sup>

### III. THE POPULIST ATTACK ON CONSUMER WELFARE IS MISGUIDED

Wu is hostile to the consumer welfare standard used in antitrust, concluding that the multiple-goals approach to "antitrust law, which dared dictate what the economy should look like, needed to be put into hibernation—perhaps forever" (p. 92). Yet, the consumer welfare standard that Wu attacks is not the actual consumer welfare standard articulated by Bork and the Chicago School. Bork's consumer welfare was actually total welfare; Bork cleverly called it consumer welfare likely in part because it was a better slogan.<sup>83</sup> The difference between the two, put simply, is that total welfare is the aggregate welfare of both producers and consumers, whereas consumer welfare focuses only on the welfare consequences of consumers.<sup>84</sup> Though at first the Supreme Court understood consumer welfare the way that Bork did,<sup>85</sup> today when the Court refers to consumer welfare it really means consumer welfare.<sup>86</sup> Most of the time, consumer welfare and total welfare yield the same result.

Consumer welfare does not really mean consumer welfare for Wu either. Wu's real concern is that antitrust has been guided by industrial organization economics and how economic evidence must match up with theories of harm. He would broaden antitrust to go beyond economic analysis and include a wider range of criteria that would be more democratic (p. 135). For example, Wu proposes public filing of industry comments on major mergers and of consent agreement remedies put up for public comment (p. 130). Wu claims that "big mergers *are* political, and the idea that the public or its representatives be kept in the dark is hard to support" (p. 130), thereby politicizing the merger review process. Such an approach is contrary to the Supreme Court's implicit warning in *Trinko* that antitrust courts are ill-suited "to act

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81. See *United States v. Apple, Inc.*, 791 F.3d 290, 324–25 (2d Cir. 2015).

82. See *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347–51 (3d Cir. 2016); *Saint Alphonsus Med. Ctr.—Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 791 (9th Cir. 2015); *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 571–72 (6th Cir. 2014).

83. See Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012) (stating that Bork "[used] the term 'consumer welfare' when he meant total welfare"). Some commentators find a more sinister view of Bork's purposeful confusion. See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 199–200 (2008). In fact, total welfare had its origins with the Harvard School a decade before Bork. See Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 692–93 (2010).

84. Blair & Sokol, *supra* note 83, at 473.

85. See, e.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

86. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 902 (2007).

as central planners, identifying the proper price, quantity, and other terms of dealing.”<sup>87</sup>

Such an outcome would be “results” oriented because broader concepts like “fairness” would by definition be fair in the eye of the beholder, and certain outcomes would be reverse engineered via case law because they were “fair.” It is for this reason that Phillip Areeda and Herbert Hovenkamp are wary about the use of fairness in antitrust, noting that fairness is “a vagrant claim applied to any value that one happens to favor.”<sup>88</sup> Similarly, Donald Turner cautions that populism “would broaden antitrust’s proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved.”<sup>89</sup>

The notion of what consumer welfare means has shifted as economic learning has shifted. These shifts become embraced in case law. An example in this shift involves healthcare mergers and market definition. After losing healthcare mergers, the FTC undertook a merger retrospective to understand hospital markets better.<sup>90</sup> Taking in more recent economic advances,<sup>91</sup> the FTC uncovered that the Elzinga–Hogarty market definition test<sup>92</sup> was flawed and overinclusive.<sup>93</sup> By using case law to rework theory, better empirical tools, and more data, the FTC won in *Evanston* to undo a consummated hospital merger.<sup>94</sup> Since that case, the FTC has had a much stronger track record of winning hospital merger cases because of the courts’ embrace of more sophisticated economic models.<sup>95</sup>

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87. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

88. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 109–10 (4th ed. 2013).

89. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987).

90. See Timothy J. Muris, Chairman, Fed. Trade Comm’n, *Everything Old Is New Again: Health Care and Competition in the 21st Century*, Speech at the 7th Annual Competition in Health Care Forum (Nov. 7, 2002), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/everything-old-new-again-health-care-and-competition-21st-century/murishealthcarespeech0211.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/everything-old-new-again-health-care-and-competition-21st-century/murishealthcarespeech0211.pdf) [<https://perma.cc/A98W-4BEF>].

91. Corey S. Capps, *From Rockford to Joplin and Back Again: The Impact of Economics on Hospital Merger Enforcement*, 59 ANTITRUST BULL. 443 (2014) (reviewing the shift).

92. Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45 (1973).

93. David T. Scheffman & Pablo T. Spiller, *Geographic Market Definition Under the U.S. Department of Justice Merger Guidelines*, 30 J.L. & ECON. 123 (1987).

94. *In re Evanston Nw. Healthcare Corp.*, No. 9315, 2007 WL 2286195, at \*3 (F.T.C. Aug. 6, 2007).

95. See HEALTH CARE DIV., BUREAU OF COMPETITION, FED. TRADE COMM’N, *OVERVIEW OF FTC ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS 50–82* (2018), [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview\\_health\\_care\\_august\\_2018.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_health_care_august_2018.pdf) [<https://perma.cc/DEH5-WXBV>].

Overall, economic analysis allows for a truly fair system—one that is decided by facts and real economic effects—not merely one side complaining more loudly than the other as to what is fair.<sup>96</sup> Professor Froeb and his coauthors summarize the shift and why technocracy is better as follows:

Forty years ago . . . inference was primitive, drawn mainly from the Structure-Conduct-Performance paradigm, and supported mainly by cross-industry regressions of price or profit on industry concentration. In antitrust trials, it was not uncommon for opposing experts to opine about the effects of a merger based on little in the way of economic theory or empirical evidence, and without offering any mapping from either to their opinions. Economic analysis now occupies a central role in antitrust enforcement and credible expert opinions are derived from theoretical and empirical models.<sup>97</sup>

This insight explains that it is consumer welfare that offers democratic legitimacy. Cases come down to facts—and analysis to explain these facts—rather than to a popularity contest. The transition to greater economic analysis in cases was a result of an organizational shift that gave equal weight to economists in U.S. antitrust agencies as to the lawyers.<sup>98</sup> When the economists have a say in working through cases, they can rethink economic models based on facts to better represent reality, whether using static or dynamic models.<sup>99</sup>

One reason for Wu's hostility to economic analysis is his concern that the consumer welfare standard fails to take non-price issues into consideration (p. 135). Yet consumer welfare can address non-price issues. In fact, it does so regularly. Wu cannot really believe that non-price antitrust analysis is a problem with antitrust. Many of the important conduct cases of the Chicago School era that Wu studies address non-price competition (p. 131).

Both at the Supreme Court level and at the lower court level, antitrust courts have dealt with non-price issues (often with price elements as well) on a regular basis.<sup>100</sup> Non-price factors are not new to antitrust.<sup>101</sup> Moreover, the Supreme Court expressly acknowledges that it can deal with dynamic is-

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96. As the father of three wonderful children, I have learned that fairness means "fair is if I benefit but not if I don't," followed by name-calling across children, shouting, and hurt feelings. When more money is at stake like in antitrust, the name-calling and screaming are worse.

97. Luke M. Froeb et al., *Economics at the Antitrust Division: 2017–2018*, 53 REV. INDUS. ORG. 637, 638 (2018).

98. See Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569, 575–77 (2009).

99. See generally THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., 2015).

100. See Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 44–45 (2006); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483–85 (1992); United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 150, 166–70 (D.D.C. 1982).

101. See United States v. Am. Can Co., 230 F. 859, 901–04 (D. Md. 1916).



sues in antitrust.<sup>102</sup> Indeed, history has shown that antitrust is focused not merely on short-term effects but also on long-run effects. For example, Learned Hand wrote in 1916, “the consumer’s interest in the long run is quite different from an immediate fall in prices.”<sup>103</sup> Thus, economic learning helps shapes how agencies and courts view antitrust.<sup>104</sup>

Given the significant case law on non-price-related antitrust, Wu is unwilling to express what the attack on the consumer welfare standard is really about for him: the creation of an antitrust regulatory regime rather than an antitrust enforcement regime. That is, Wu implicitly wants to turn the antitrust agencies into a regulatory body with multiple goals and prospective oversight—akin to the FCC, an agency he has studied extensively. Yet, administrative agencies are rife with capture concerns.<sup>105</sup> Further, the FCC’s record on mergers that Wu decries on the antitrust side is not strong. The FCC, using the public interest standard to review the same mergers as the antitrust agencies, also allowed for significant consolidation.<sup>106</sup> This is true for the FAA in airline industries, too. And various financial regulators (such as the OCC, Federal Reserve Board, and FDIC) that allowed financial services consolidation also have multiple goals. A public-interest-standard approach also assumes that government has the public interest in mind such that it responds to preferences by consumers and does not try to shape them.<sup>107</sup>

#### IV. WHAT WE KNOW ABOUT PLATFORM TECH AND INNOVATION

Large tech companies should be feared, Wu suggests (pp. 21–22). Wu connects big tech’s “ubiquity” to a nondescript “sense of concern” about their power, which he describes as a “kingly prerogative” (p. 21). Focusing on a handful of companies, Wu explains that “[t]here stopped being a next new thing, or at least, a new thing that was a serious challenge to the old thing” (p. 121). Broad-brushed critiques do not fully appreciate different business models and competition concerns that may arise with different

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102. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”).

103. *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 1012 (S.D.N.Y. 1916).

104. See Kovacic & Shapiro, *supra* note 67, at 43.

105. See Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 99 (2016); Stigler, *supra* note 10; see also Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President’s Office of Management and Budget*, 109 AM. POL. SCI. REV. 507 (2015) (observing regulatory capture by interest groups in the Office of Management and Budget review process); Sokol, *supra* note 10, at 1037, 1039.

106. See Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 372–73 (2006).

107. See Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 501 (2000) (“There is a large difference between the public interest and what interests the public.”).

types of technology platforms. For example, e-commerce platforms have a different model than cloud computing, social networks, fintech platforms, P2P platforms, and various types of search-related platforms, even though all compete on some level for advertising and users. Further, Wu ignores the rise of Chinese tech platforms as such Alibaba, Tencent, Baidu, DiDi, Xiaomi, and Ctrip, which create global competition for Western firms both directly and in the market for vertical acquisitions.<sup>108</sup>

While such broad-brushed critiques may score political points with populists on both the left and the right, antitrust analysis requires an inquiry that marries economic theory to evidence. In practice, working through an analysis of tech platforms, which includes elements such as market definition and the substantive analysis of economic effects, is complex.<sup>109</sup>

Since Wu does not make a specific claim as to the evidence of the monopolization case that would require antitrust intervention and the extreme remedy of structural breakup, he focuses instead on the issue of nascent technology-related acquisitions by tech companies. Wu is concerned that acquisitions involving nascent technology and potential nascent competitors might have negative competitive effects if established tech platforms acquire smaller firms (p. 123).

Predicting future champions among tech companies is not easy. If it were, law and entrepreneurship would not be defined as a distinct field because of the inherent uncertainty of such investments. Entrepreneurship is complicated and exit strategies vary.<sup>110</sup> But a structural fix like Wu recommends would hurt innovation.

What makes entrepreneurship unique is that it involves high risk.<sup>111</sup> Venture capitalists (VCs) have a portfolio of investments to reduce risk because any one investment is not likely to yield big returns.<sup>112</sup> This is important given the limited time frame (typically ten years) in which the capital needs to be returned at the end of the fund.<sup>113</sup> As such, VCs do not make

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108. See, e.g., Hasan Chowdhury, *China's Tech Giants Have Conquered the East, Now for the West*, TELEGRAPH (Sept. 23, 2018, 3:30 PM), <https://www.telegraph.co.uk/technology/2018/09/23/chinas-tech-giants-have-conquered-east-now-west/> [<https://perma.cc/9FQF-HBW8>].

109. See, e.g., *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). See generally David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, in 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 99, at 404; Thomas Eisenmann et al., *Platform Envelopment*, 32 STRATEGIC MGMT. J. 1270 (2011); Feng Zhu & Marco Iansiti, *Entry into Platform-Based Markets*, 33 STRATEGIC MGMT. J. 88 (2012).

110. Dawn R. DeTienne et al., *Making Sense of Entrepreneurial Exit Strategies: A Typology and Test*, 30 J. BUS. VENTURING 255, 256 (2015).

111. William R. Kerr et al., *Entrepreneurship as Experimentation*, J. ECON. PERSP., Summer 2014, at 25, 25–26.

112. See *id.* at 26.

113. GEOFFREY GREGSON, FINANCING NEW VENTURES: AN ENTREPRENEUR'S GUIDE TO BUSINESS ANGEL INVESTMENT 31 (2014).

money on over half of their investments.<sup>114</sup> Corporate venture capital (CVC) invests in a portfolio of companies for similar reasons.<sup>115</sup> To protect themselves from entrepreneurial holdup, VCs create a series of legal mechanisms (negative covenants) to ensure some control even when they lack voting control.<sup>116</sup>

It would be a mistake to assume that antitrust enforcers could easily figure out which nascent firms might be competitors, let alone which firms might develop new markets. Wu understates how difficult it is to figure out the next sets of winners and losers. With significantly more information than an outsider (such as an antitrust agency reviewing a deal), even the best VCs and CVCs have trouble picking winners and losers. Just because a larger firm acquires a start-up does not mean that the best technologies, people, and ideas can be implemented to capture value from the acquisition.<sup>117</sup> Though it is possible that a particular transaction might create competition problems, the solution is to address specific deals with a sufficient factual record. To wholesale attack an entire business model that has been the primary form of exit for entrepreneurs not merely in platform-based tech but in biotech<sup>118</sup> would create economy-wide problems. When certain avenues for firm exit, such as vertical acquisition by larger firms, are closed off via limits to acquisition because of an overly stringent antitrust regime, it hurts the entrepreneurial ecosystem. Entrepreneurs would be chilled from creating start-ups if they could not easily create a liquidity event to extract financial rewards from their investment.<sup>119</sup>

#### V. ROBINSON-PATMAN ENFORCEMENT IS THE ULTIMATE EXPRESSION OF NEO-BRANDEISIAN ANTITRUST

There is a natural experiment that tests the Wu hypothesis of what anti-trust would look like with a different set of goals, which until relatively recently diverged fundamentally from the Chicago School approach found in Sherman and Clayton Act jurisprudence—the Robinson-Patman Act. Rob-

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114. Michael Ewens et al., *Cost of Experimentation and the Evolution of Venture Capital*, 128 J. FIN. ECON. 422, 423 (2018) (describing this as a “spray and pray” strategy).

115. See Will Drover et al., *A Review and Road Map of Entrepreneurial Equity Financing Research: Venture Capital, Corporate Venture Capital, Angel Investment, Crowdfunding, and Accelerators*, 43 J. MGMT. 1820, 1835 (2017).

116. D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 319–20 (2005).

117. See Russell W. Coff, *How Buyers Cope with Uncertainty when Acquiring Firms in Knowledge-Intensive Industries: Caveat Emptor*, 10 ORG. SCI. 144, 144 (1999).

118. Patricia M. Danzon et al., *Mergers and Acquisitions in the Pharmaceutical and Biotech Industries*, 28 MANAGERIAL & DECISION ECON. 307, 325 (2007); see also Nils Behnke & Norbert Hültenschmidt, *New Path to Profits in Biotech: Taking the Acquisition Exit*, 78 J. COM. BIOTECH 78, 78 (2007).

119. D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357, 1377 (2018).

inson-Patman enforcement can teach us about what a more populist anti-trust would entail.

If Wu wants a return to Brandeisian-style populism in antitrust, this requires a change in antitrust law given the current development of judge-made antitrust case law. But Wu's neo-Brandeisian critique and his push for new law should be informed by the negative experience of the interpretation and enforcement of the Robinson-Patman Act.<sup>120</sup>

Unlike the other antitrust statutes, the Robinson-Patman Act was expressly protectionist in its drafting.<sup>121</sup> Further, its negative economic effect on efficiency is unambiguous.<sup>122</sup> A review of Robinson-Patman doctrinal shifts and scholarship suggests what Chicago did well in shifting an inefficient rule that hurt consumers, particularly poor ones. A review of Robinson-Patman and its decline also reflects the limitations of Chicago School economic analysis: what worked with regard to the analytical shift to Robinson-Patman was a function of economic consensus, as opposed to a number of areas of antitrust analysis where the economic literature suggests that Chicago-based antitrust analysis is coarse or potentially outdated.<sup>123</sup>

Academics have attacked the Robinson-Patman Act for decades because of the unambiguous harm to consumers that its enforcement has created.<sup>124</sup> Thus, on consumer welfare grounds the Act is an abomination. In this sense, both antitrust enforcers on the left and the right had a shared vision of the Act—the economics were disastrous.<sup>125</sup> Nevertheless, the Robinson-Patman Act has been shrouded in “democratic” values.

The origin of the Robinson-Patman Act<sup>126</sup> was based on protection of small retailers from larger, more efficient competitors (large buyers).<sup>127</sup> Originally titled the “Wholesale Grocer’s Protection Act,” there were no multiple purposes to the Act akin to the Sherman Act, such that one could reasonably claim any sort of efficiency rationale for Robinson-Patman.<sup>128</sup> Rather, the Act was protectionism of a special interest under the guise of “fairness.”

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120. See Sokol, *supra* note 31.

121. *Id.* at 2069.

122. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 312–25 (2007), [https://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) [<http://perma.cc/EAB5-VXL8>].

123. Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257.

124. ROBERT H. BORK, *THE ANTITRUST PARADOX* 384 (1978); RICHARD A. POSNER, *THE ROBINSON-PATMAN ACT* (1976); Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & ECON. 427 (1978); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 125 (2000); Sokol, *supra* note 31.

125. ANTITRUST MODERNIZATION COMM'N, *supra* note 122, at i, iii.

126. 15 U.S.C. §§ 13–13a (2012).

127. Sokol, *supra* note 31, at 2069.

128. See D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 128 (2009).

Thus, whereas the Supreme Court explained that “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise,”<sup>129</sup> the Robinson-Patman Act has been called the “Magna Carta of Small Business.”<sup>130</sup> The Supreme Court articulated how the Robinson-Patman Act embraces fairness over other goals:

The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer’s quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages . . . .<sup>131</sup>

In fact, size (and potential scale-related efficiencies) is what drives down prices for consumers. Thus, to protect inefficient competitors, Robinson-Patman required a trade-off that hurt end consumers.<sup>132</sup> Because Robinson-Patman originally served to stymie the growth of the largest supermarket, the result is that the trade-off was regressive—those vulnerable consumers who needed lower prices were the ones most hurt by choosing a “fair” approach to antitrust to protect small stores.

This anti-bigness bias was pronounced in decades of Robinson-Patman jurisprudence in which large companies were punished merely for using buyer size to offer price reductions.<sup>133</sup> Thus, Robinson-Patman enforcement was a response to fears of size.<sup>134</sup> As Chief Judge Diane Wood recently noted, “Its fit with antitrust policy is awkward, as it was principally designed to protect small businesses . . . .”<sup>135</sup> For this reason, the Supreme Court explained that the Robinson-Patman Act “was intended to justify a finding of ‘injury to competition by a showing of injury to the competitor victimized by the discrimination.’”<sup>136</sup>

Much of FTC enforcement in the 1950s and 1960s focused on Robinson-Patman violations.<sup>137</sup> Overall, because of a favorably worded statute that re-

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129. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

130. Earl W. Kintner & Joseph P. Bauer, *The Robinson-Patman Act: A Look Backwards, a View Forward*, 31 ANTITRUST BULL. 571, 571 (1986) (quoting H.R. REP. NO. 94-1738, at 1 (1975)).

131. *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

132. ANTITRUST MODERNIZATION COMM’N, *supra* note 122, at 317 (“[T]he Robinson-Patman Act is not targeted at harmful price discrimination. Rather, it condemns low prices.”); *id.* at 318 (“The economic reality is that price differences and price discrimination typically benefit, not harm, consumers. To the extent that price discrimination (as defined by economists) may harm consumer welfare, other antitrust laws already address such conduct.”).

133. Sokol, *supra* note 31, at 2070–76.

134. Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 439 (2012) (“The inertia of fears of size seems to be embedded in antitrust.”).

135. *Woodman’s Food Mkt. v. Clorox Co.*, 833 F.3d 743, 746 (7th Cir. 2016).

136. *Morton Salt*, 334 U.S. at 49 (footnote omitted).

137. Sokol, *supra* note 31, at 2071–73.

quired no showing of market power, plaintiffs often won these cases.<sup>138</sup> But the Supreme Court slowly chipped away at the pro-plaintiff case law by requiring antitrust injury and a showing of consumer welfare loss even though nothing in the statute required either.<sup>139</sup> Change to Robinson-Patman happened gradually. It included a unilateral declaration by DOJ that it would not enforce the Robinson-Patman Act because the Act had a “deleterious impact on competition.”<sup>140</sup> Similarly, the FTC noted that the Act was protectionist.<sup>141</sup> In *Great Atlantic & Pacific Tea Co. v. FTC*, the Supreme Court began to reign in Robinson-Patman enforcement so that it did not have “open conflict with the purposes of other antitrust legislation.”<sup>142</sup> Further, the Court applied the Sherman Act antitrust injury concept to the Act to limit the number of Robinson-Patman cases.<sup>143</sup> In *Brooke Group*, the Court made sure not to repeal the Act but read in a consumer welfare goal to Robinson-Patman where none existed.<sup>144</sup> Thus, the Court pushed the interpretation far, but not so far as to provoke a legislative response.

Robinson-Patman created some of the worst decisions in antitrust history in the sense that they hurt consumers.<sup>145</sup> Those consumers who benefit the most from low prices—the poor—bore the brunt of higher food prices.<sup>146</sup> To the extent that there was a trade-off that supported smaller and inefficient competitors, such competitors benefited over the most vulnerable members of society.

*Utah Pie* epitomized the failure of Robinson-Patman. In the case, national competitors entered the Salt Lake City market where Utah Pie had two-thirds market share.<sup>147</sup> As a result of competition, the price of pie decreased.<sup>148</sup> However, Utah Pie’s market share decreased to just under 50 per-

138. *See id.* at 2070–78.

139. *Id.* at 2077–83.

140. DEP’T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 250 (1977); *see also* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 516 (3d ed. 1990) (“[T]he brunt of the Commission’s effort fell upon the small businesses Congress sought to protect.”).

141. *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 2: Hearing Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act & Related Matters of the H. Comm. on Small Bus.*, 94th Cong. 141 (1975) (statement of Frederic M. Scherer, Director, Bureau of Econ., Fed. Trade Comm’n).

142. 440 U.S. 69, 80 (1979).

143. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

144. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

145. Roger D. Blair & Christina DePasquale, “*Antitrust’s Least Glorious Hour*”: *The Robinson-Patman Act*, 57 J.L. & ECON. S201, S213 (2014).

146. ANTITRUST MODERNIZATION COMM’N, *supra* note 122, at 322–25; Elzinga & Hogarty, *supra* note 124, at 432–33 (providing estimates of the administrative costs of Robinson-Patman enforcement).

147. *See Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 689 (1967).

148. *See id.* at 690.

cent even while its sales and profits increased.<sup>149</sup> The Supreme Court ruled in favor of Utah Pie (protection of a competitor) and against competition.<sup>150</sup> Worse, during this period Robinson-Patman was enforced criminally.<sup>151</sup> Thus, a low-cost pie that benefited consumers could potentially land a baker in jail. Such is the perverse effect of “political” antitrust.

#### CONCLUSION

Antitrust works well because it is technocratic in that a singular (but flexible within its economics) goal is administrable institutionally. To introduce the world of political imperfections into a technical process that examines markets would create further distortions affecting consumers.<sup>152</sup> Antitrust does well dealing with antitrust problems. To the extent that there are other related problems, the right answer is not to create an antitrust that lacks democratic accountability (because antitrust becomes regulation via the backdoor) and exceeds its mandate of the past forty years. Rather, the better solution is to identify the underlying problem and solve it with more effective tools. If the problem is one of redistribution, tax is a better choice than antitrust.<sup>153</sup> If the problem is one of privacy, strengthen privacy laws.<sup>154</sup> If the problem is one of financial institutions or sector regulators not doing what they need to do, correct structural problems with sector regulators. Antitrust has increasingly moved out of sector regulation<sup>155</sup> and toward advocacy.<sup>156</sup> The advocacy budget of the antitrust agencies is tiny, and to the extent that the problem is the rules of the game for particular industry sectors, Wu falls short by not suggesting greater competition advocacy.

Wu’s concern with big tech companies because they are big (p. 126) is as misplaced now as it was earlier in antitrust history. Antitrust has gone through various moments in which it had reevaluated whether it has the proper tools to combat anticompetitive behavior in technology-related markets.<sup>157</sup> It does have such tools and can bring important cases in these mar-

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149. See *id.*

150. See generally *id.*

151. D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 WM. & MARY L. REV. 1545 (2019).

152. Gary S. Becker, *Competition and Democracy*, 1 J.L. & ECON. 105 (1958).

153. Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, in THE GOALS OF COMPETITION LAW 3, 5 (Daniel Zimmer ed., 2012).

154. Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015).

155. See *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

156. James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005).

157. See, e.g., Michal S. Gal & Spencer Weber Waller, *Antitrust in High-Technology Industries: A Symposium Introduction*, 8 J. COMPETITION L. & ECON. 449 (2012) (providing an overview).

kets.<sup>158</sup> It was just a decade ago that we were told that Walmart was taking over shopping, that eBay was the largest online marketplace, or that Facebook was the primary way in which users shared information. Today, Uber competes with Lyft, Amazon has eclipsed eBay, Facebook is a legacy service, and younger people use any other set of applications to share information—such as Pinterest, Twitter, or Snapchat. In a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics. To ask antitrust to go beyond its institutional capacity sets up antitrust to fail, because Wu's deeper concern is with how society is structured. That structure can be changed through elections to the presidency and Congress and through changes as to the makeup of the Supreme Court. Antitrust history shows that it is the Supreme Court that changes antitrust law and policy the most because of antitrust's common law-like nature.<sup>159</sup>

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158. Herbert Hovenkamp, *Antitrust and Information Technologies*, 68 FLA. L. REV. 419 (2016).

159. Deborah A. Garza, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on Modernization of Antitrust Law – Private and Public Enforcement and Abuses – Europe and the U.S. (May 29, 2008), <https://www.justice.gov/atr/file/519641/download> [<https://perma.cc/NU5G-NTVN>] (“Even the most passionate critics of current enforcement policy recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy—a consensus forged on a solid foundation of economic learning. . . . We won't return to what antitrust enforcement looked like 40 years ago.”).



