

# **From Market Power to State Capture: The Fateful Shift in Postwar Antimonopoly**

James T. Sparrow

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**From Market Power to State Capture:  
The Fateful Shift in Postwar Antimonopoly**

James T. Sparrow

From the late 1930s to the 1970s, a golden age of antimonopoly politics cemented the influence of the liberal coalition over the postwar mixed economy. Yet the antimonopoly project faced considerable headwinds in these decades, including a cartelistic defense economy and an elusive global market, that altered the assumptions and operating conditions under which competition policy could be pursued. In these years major liberal constituencies such as organized farmers and unions made their peace with the corporatism that had been forged in depression and war. The initiative for antimonopoly politics fell to independent businesses, trade associations, and a range of professionals advocating consumer safety, health, and welfare—all of whom nonetheless grew increasingly skeptical of state power over time. Mounting fears of totalitarianism cast a troubling light on bureaucratic regulation of economic life, prompting antimonopoly advocates to reframe attacks on consolidated business power as preempting state capture rather than market power per se.

Challenging as they were, these developments did not spell the end of antimonopoly as a political movement—Richard Hofstadter’s notorious complaint notwithstanding. Ever since his influential 1964 essay, “What Happened to the Antitrust Movement?” historians have largely

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taken for granted Hofstadter’s claim that antitrust ceased being a robust political movement from World War II onward, surviving instead as a technocratic apparatus within the postwar state.<sup>1</sup>

While this basic narrative is too well-documented to be entirely wrong, it omits a crucial part of the story, at least for the four decades prior to the deregulatory movement that began toward the end of the late 1970s. The simple fact is that antitrust never lost its political constituency. Instead, it lost its militant edge as liberals embedded it within a broader antimonopoly effort to manage the mixed economy through a range of interlocking measures designed to counteract corporate concentration and malfeasance. During those forty years antimonopoly enjoyed substantial support. As the liberal coalition gained influence in the postwar period, a network of antimonopoly advocates in Congress marshaled an active if fissiparous coalition. By 1950 they accomplished the last major expansion of the antitrust laws to date: the Celler-Kefauver Anti-Merger Act of 1950, which provided a robust but flawed foundation for postwar antimonopoly. Its sustained and effective enforcement remade patterns of corporate concentration, incentivizing firms to avoid the kinds of vertical and horizontal mergers it proscribed. But the same behaviors also enabled the proliferation of conglomerate mergers—a fateful development for antitrust prosecution and for regulation more generally.<sup>2</sup> Meanwhile, a

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<sup>1</sup> Richard Hofstadter, “What Happened to the Antitrust Movement,” in *The Paranoid Style in American Politics* (1965). See also Richard Polenberg, *War and Society: The United States, 1941-1945* (Philadelphia: JB Lippincott, 1972); John Morton Blum, *V Was for Victory* (New York: Harcourt, Brace, Jovanovich, 1976); and Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995), all of whom largely agree with Hofstadter’s central argument.

<sup>2</sup> Neil Fligstein, *The Transformation of Corporate Control* (Cambridge: Harvard University Press, 1990), 191-225, 363-70.

decade of aggressive prosecution had sharpened the opposition, rallying abundant political and intellectual resources to the defense of big business, even as liberal constituencies dissipated their animus against an ever-widening spectrum of corporate targets.

Despite the substantial political clout the liberal coalition exerted, the priorities structuring the antimonopoly agenda they advanced nonetheless shifted in the postwar period, reflecting the initiative of small businesses, trade associations, and consumers. Antitrust experts followed their own trajectory, entrenching themselves within the burgeoning administrative state, and building a massive technocratic hive of inward-looking expertise and regulation.<sup>3</sup> Their long-term success in doing so was sustained by a broader politics that, from the 1940s onward nonetheless celebrated business, prioritized “free competition,” and presumed the sovereignty of the consumer—decades before deregulation and Robert Bork’s “consumer welfare prescription” finally hollowed out the mixed economy.<sup>4</sup>

The critical development for the fate of postwar antimonopoly politics, then, was not so much the inadequate radicalism of the American Left or the rise of reactionary politics to force the “end of reform,” to use Alan Brinkley’s influential and still quite valuable framework.<sup>5</sup>

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<sup>3</sup> Daniel A. Crane, “Technocracy and Antitrust,” *Texas Law Review* 86.6 (May 2008): 1160-1221; and Crane, *The Institutional Structure of Antitrust Enforcement* (New York: Oxford University Press, 2011), 69-90, esp. 86-90.

<sup>4</sup> The primacy of consumer welfare as criterion of legitimate antitrust action was the central, crystallizing thesis of Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

<sup>5</sup> Brinkley, *The End of Reform*; Brinkley, “The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold,” *Journal of American History* 80.2 (September 1993): 557-79.

Instead, it was the reconfiguration of a coalition whose policy accomplishments and political leverage grew even as its focus on market power lost coherence. Thus reconfigured, the antimonopoly coalition was ill-equipped to navigate a domestic political economy that fostered great concentration and uncompetitive activity, especially within the dominant defense economy—much less foster competition within an emerging global marketplace formed by trade and aid policies that favored large firms capable of securing strategic interests.

The seeds of failure are often sown at the heights of success. This was the case for the liberal coalition, whose rapid fall from the commanding heights of the mixed economy in the 1960s and 1970s requires explanation. Political mobilization against monopolies continued with vigor well into the 1970s, as a mature cadre of antitrust professionals brought a wave of cases to meet the conglomerates’ merger mania, while politicians and disparate political movements harnessed the growing anti-corporate mood of the era. But the liberal coalition was overwhelmed by an anti-establishment politics that took on too many enemies at once, diverting anger and attention to other targets while conglomerates only grew stronger. By the time of Bork’s devastating assault on antitrust at the end of the 1970s, he was able to co-opt the most visible surviving elements of antimonopoly politics—notably those emphasizing consumer welfare—while combining them with established fears of corrupt state “capture” and Vietnam-era paranoia about the machinations of “big government.” Without a unified focus on market power as the mobilizing concern of antimonopoly politics, or a popular embrace of government power sufficient to counteract it, the mixed economy was ripe for a takeover by its enemies.

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The political economy of mobilization for total war in WWII seemed at first glance to be an antimonopolist's worst nightmare. Many of the corporatist solutions originally devised for the Great War, and warmed over for the First New Deal, enjoyed a third life—this time secured under the auspices of Presidential war powers that waxed virtually unlimited for more than half a decade. USDA subsidies now boosted rather than suppressed agricultural production. Farmers participated in county-level committees to meet booming production requirements to feed GIs and Allies as well as the domestic population, which overnight increased its purchasing power as unemployment fell to the lowest levels in US history. OPA controls stabilized most prices by late 1942, protecting workers' paychecks without limiting farmers' incomes. Other micro-economic controls, such as rationing, wage caps, and overtime guarantees, further insulated workers from being buffeted by the drastic swings of the booming war economy. Unions took a seat at tripartite production committees in war plants, involving themselves in everything from bond and production drives to promotion, seniority, benefits, hours, and working conditions—this time as co-managers, not only as collective bargaining adversaries.<sup>6</sup>

While farmers and unionists experienced burgeoning prosperity and stature during the war effort, independent proprietors suffered a very different fate. Small businessmen and -women were largely shut out of the war government, relegated to local defense boards charged with organizing civil defense drills, ration book distribution, scrap and bond drives, and the like.

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<sup>6</sup> The summary of corporatism and economic concentration in WWII featured in these three paragraphs is drawn from Mark Wilson, *Creative Destruction*; Paul Koistinen, *Arsenal of World War II*; Brinkley, *End of Reform*, 175-201; and John Morton Blum *V Was for Victory*, 105-146.

Bankers, lawyers, and economists outflanked them at the ramparts of the war planning agencies. The Defense Production Corporation and the Treasury financed the massive output that by mid-war ensured the US outproduced Germany by twofold and Japan by fivefold. The War Production Board—a resurrected WIB—sought to manage the allocation of critical materials such as rubber and gasoline, while local businesses scrambled to secure what they could.

What made the war economy so alarming to the exponents of antimonopoly was not its corporatism per se, but the direction of economic activity by officials—civilian and military—whose overriding concern was massive output to guarantee that Roosevelt’s “Arsenal of Democracy” could be mounted in time to win the day. Roosevelt, who had called for an air force of 50,000 planes after the invasion of France and continued to demand unimaginable outputs of war material thereafter, set the tone. By the end of 1942 virtually all antitrust prosecutions of any consequence to the war effort had been blocked by either the Army or the Navy. “Dollar a year” men in the WPB and other civilian agencies naturally shared the outlook of their erstwhile colleagues when resolving the supply and priority problems that inevitably pitted businesses against each other as they scrambled to operate in the war boom. Military procurement agents, who called the tune of the war economy, did take measures to keep costs and contractors’ practices in line. But the superior efficiency at scale of large concerns like Kaiser, US Steel, Alcoa, and Dupont nonetheless placed the lion’s share of war contracting in their coffers—even if they did subcontract a substantial portion of their war work out to smaller firms.

The result was a striking pattern of corporate concentration, which can be discerned in patterns of employment and prime contracting. Between 1939 and 1944 the proportion of

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workers employed by firms with fewer than 500 employees shrank from 51.7 to 38.1 percent, even though these firms comprised roughly the same proportion (over 97 percent) of all business establishments. During that same period, giant corporations employing 10,000 or more workers engaged almost a third of all employees (31 percent) at their peak in 1944—250 percent of the proportion they had commanded in 1939. These shifts resulted from the distribution of prime war contracts, the lion’s share of which went to the very largest firms. Of the \$175 billion spent between June 1940 and September 1944, two-thirds went to the 100 largest corporations. Among the top 100, concentration was also the rule: the top 10 received 30 percent of all contracts. Half went to the 30 largest firms. The remainder was divided, unevenly, among the other 18,439 corporations receiving prime war contracts—a relatively selective group that excluded tens of thousands of smaller businesses.<sup>7</sup>

In light of the divergent economic and political fates meted out to large versus moderate to small firms by the Arsenal of Democracy, it is unsurprising that Congress should have become a home to politicians who found it easy to score points in their home districts by bashing big business. The friends of labor and small business—not often aligned—constantly sought publicity by criticizing big business for “cost-plus” contracts, “excess profits,” and executive salaries exceeding \$25,000 a year in a time of wage caps. In so doing they touched the nerve Gerald Nye had jolted with his investigations of “war profiteers” and subsequent neutrality

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<sup>7</sup> Smaller War Plants Corporation, *Economic Concentration and World War II: Report of the Smaller War Plants Corporation to the Special Committee to Study Problems of American Small Business, US Senate* (Washington: USGPO, 1946), 24-25, 27-29.



legislation in the preceding decade.<sup>8</sup> A generation of Americans had been badly disillusioned by revelations about the House of Morgan’s financial stake in the Great War, the astronomical profits enjoyed by war contractors like the DuPonts, and the systematic abuse of public power by the likes of Andrew Mellon. They chafed at the likelihood that the “ruling barons” of the American economy, as Roosevelt derided them, would get another bite at the apple.

Harry Truman was, of course, the most prominent politician to capitalize on the currents of antimonopoly sentiment unleashed by the war economy. His national profile was established by the highly publicized investigations into defense contracting he directed as Chair of the Senate Special Committee to Investigate the National Defense Program. That committee’s investigations ran from 1941 until 1948 (extending to cover postwar surplus property disposal), and was distinguished by its extraordinary bipartisan success. All of its many reports were unanimous, perhaps reflecting the influence of populism that had rocked the Southern and Western hinterlands in the previous generation.<sup>9</sup> The Committee’s hearings were a highly publicized and constant influence on public policy discussion during the war years, filling headlines with the sordid details of war contracting and consuming reams of paper in their testimony (27,568 pages’ worth, documenting 2,284 appearances in 432 public hearings). Sharing the limelight with hinterland Democrats Tom Connally of Texas, Carl Hatch of New

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<sup>8</sup> Nelson Lichtenstein, *Labor’s War at Home: The CIO in World War II* (New York: Cambridge University Press, 1982); 82-109; Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995), 190-92; Mark Leff, “The Politics of Sacrifice on the American Home Front in World War II,” *Journal of American History* 77.4 (March 1991): 1296-1318.

<sup>9</sup> Alonzo Hamby, *Man of the People: A Life of Harry S. Truman* (New York: Oxford University Press, 1995), 248-60.

Mexico, and Harvey Kilgore of West Virginia, Truman placed the inconvenient details of the major war contractors' activities before a national audience whose Southern and Western constituents paid special attention to the concerns surfaced by their Senators on the Committee. James Mead of New York, a former railroad switchman, added the perspective of labor, which became even more prominent after he assumed the chairmanship upon Truman's nomination as the Democrats' Vice Presidential candidate in the 1944 election.<sup>10</sup> Another committee, dedicating itself to the concerns and sensibilities of small business, conducted inquiries similar to (if less publicized) than those of the Truman Committee. Democrats Wright Patman of Texas and James Murray of Montana made headlines publicizing corporate profits and contract-hogging from their perches on the Senate Small Business Committee.

Although the war economy stymied any systematic response to small business's demands, it did provide an opening for one substantial victory. Patman and Murray sponsored the creation of a Smaller War Plants Corporation (SWPC) for the giant-friendly War Production Board. The SWPC's last director, Maury Maverick, inserted himself into the reconversion process.<sup>11</sup> Toward the war's end, Patman joined forces with Georgia's Walter George to co-sponsor a Surplus Property Act (1944) that gave teeth to the SPA Administrator, Stuart Symington, who was in charge of disposing of government-owned war plant and capital equipment. Although Patman did not accomplish much for small businessmen, his hearings

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<sup>10</sup>Donald H. Riddle, *The Truman Committee: A Study in Congressional Responsibility* (New Brunswick: Rutgers University Press, 1964), 18-21, 142.

<sup>11</sup>Brinkley, *End of Reform*, 192-4; Nancy Beck Young, *Wright Patman: Populism, Liberalism, and the American Dream* (Dallas: Southern Methodist University Press, 2000), 105-133.

rallied them nonetheless to scrutinize wartime contracting practices. And the creation of the SPA produced results. Alcoa lost its prewar monopoly on aluminum when Symington declined to sell it the government-owned plants it had operated during the war, instead leasing or selling them to Reynolds and Kaiser to foster genuine competition. Together they divided half the market for aluminum while Alcoa took the other half—a great improvement over the 90 percent share Alcoa had enjoyed before 1940.<sup>12</sup>

The politics of war contracting had ramifications that extended well beyond this solitary consequence of Symington’s discretion. All the political energy devoted to scrutinizing big war contractors produced real results, despite the concentration that notoriously occurred during WWII. Notwithstanding the infamous claims of I.F. Stone and C. Wright Mills, it turns out that corporate profit rates during WWII varied *inversely* with company size. Even more surprisingly, military contractors saw lower returns on investment than did their civilian counterparts in manufacturing, thanks to sharp limitations on profit-taking and aggressive contract renegotiation—practices that reflected the considerable public pressures operating upon procurement officials thanks to the work of Truman, Maverick, Patman, and their allies in Congress.<sup>13</sup>

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<sup>12</sup>Mark Wilson, *Destructive Creation: American Business in the Winning of World War II* (Philadelphia: University of Pennsylvania Press, 2018), 261-3.

<sup>13</sup> Bartholomew Sparrow, *From the Outside In: World War II and the American State* (Princeton: Princeton University Press, 1996), 240-43; Wilson, *Destructive Creation*, ch. 4 (esp. tables on 182-3, 186-7).

As formidable as this influence was it did not prevent the arrogation of market share to the biggest firms during the war, who alone had the power to add or drop smaller subcontractors and corner the market even as their profits took a temporary hit.<sup>14</sup> This market power, protected by the shield of national defense, the veil of secrecy, and war-born networks of contracting relationships, set an ominous precedent for the political economy that came together under NSC-68 during the Korean War.<sup>15</sup> Corporate concentration would continue apace after WWII, proliferating within a defense sector inclined to monopsony as well as monopoly. It would also proliferate well beyond it, among burgeoning conglomerates acquiring new divisions to meet the explosive demand of the consumer society. The resulting managerialism of both the public and private sectors would provide a unifying world-view that lent authority to “the establishment” born in these years. It would also provide a target around which political anger could coalesce.

The postwar legislative agenda for expanding antitrust prosecution thus emerged from the heightened politicization of bigness resulting from the WWII mobilization. It was in 1943, at the peak of the war mobilization that Senator Joseph C. O’Mahoney of Wyoming introduced a bill to amend Title 7 of the Clayton Antitrust Act in order to close the loophole allowing vertical and conglomerate mergers through asset purchases. The text of the Anti-Merger bill closely tracked the bold recommendations of the Temporary National Economic Committee (TNEC) final report of 1941—a definitive statement of the antitrust offensive that the Roosevelt administration had

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<sup>14</sup>Cf. Wilson, *Destructive Creation*, 167, 181, 183.

<sup>15</sup>Curt Cardwell, *NSC 68 and the Political Economy of the Early Cold War* (New York: Cambridge University Press, 2011); Michael Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-54* (New York: Cambridge University Press, 1998).

been pursuing for four years running. The administration's prosecution of monopoly was not only a response to the economic maladies of the Depression, but a strategy to defend democracy itself. As Roosevelt had put it in his original message to Congress authorizing TNEC in 1938:

The liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is Fascism—ownership of Government by an individual, by a group, or by any other controlling private power.<sup>16</sup>

O'Mahoney, a Westerner like Nye and a seasoned member of the Democrats' progressive wing, was simply picking up where he had left off as chair of TNEC, when he had pushed antitrust to the forefront of public policy in the last phase of the Depression. Although this bill would fail to pass in 1943 due to Republicans' surging electoral strength and alliance with conservative Democrats in the 78th Congress, it was reintroduced in various forms over the remainder of the decade. Sustained by a strong network of Democrats who remained focused on antimonopoly, Celler and Kefauver finally maneuvered it onto the floor for a vote during the Democratic resurgence of 1949-50, in the 81st Congress.<sup>17</sup> Thus it is the persistence and ultimate success of this policy agenda, rather than the temporary setback of suspended antitrust

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<sup>16</sup>FDR, "Message to Congress on Curbing Monopolies," April 29, 1938, accessed from The American Presidency Project, UC Santa Barbara, <https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies> accessed 2/27/2022.

<sup>17</sup>"Section 7 of the Clayton Act: A Legislative History," *Columbia Law Review* 52.6 (June 1952): 766-81; Bill Luchansky and Jurg Gerber, "Constructing State Autonomy: The Federal Trade Commission and the Celler-Kefauver Act," *Sociological Perspectives* 36.3 (Autumn 1993): 217-40.

prosecutions at the height of the production push in 1942-3, that should guide any conclusions we might draw about the strength of antimonopoly politics in the 1940s.<sup>18</sup>

As Democrats pulled together their coalition in Congress during the 1940s, they enjoyed sustained institutional support from antitrust professionals within the Roosevelt and Truman administrations. This support came in the form of information from the reports the FTC had been diligently filing since its beleaguered years in the 1920s—reports and expertise on which Celler relied extensively in hearings before the Subcommittee on the Study of Monopoly Power—and in a conspicuous wave of cases brought by the FTC and the Antitrust Division of the Department of Justice.<sup>19</sup>

The death of antimonopoly activism that is often presumed to have resulted from the mobilization for WWII was not true even on its face, at least when it came to actual antitrust cases. It is simply wrong-headed to describe the departure of Thurman Arnold from the Antitrust Division in the middle of 1943 as the end of a discrete “antimonopoly moment” that “symbolized the failure of liberals to find a lasting place in American politics for antitrust enforcement and the larger concept of combatting monopoly of which it was a part.”<sup>20</sup> While it *was* true that many cases were suspended at the peak of the mobilization by late 1943, it was also true that electoral

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<sup>18</sup>Cf. arguments advanced by Hofstadter and Brinkley, cited above.

<sup>19</sup>Stoller, *Goliath*, 512n41; Cf. Bill Luchansky and Jurg Gerber, “Constructing State Autonomy: The Federal Trade Commission and the Celler-Kefauver Act,” *Sociological Perspectives* 36.3 (Autumn 1993): 217-40; Robert Branyan, “Antimonopoly Activities during the Truman Administration,” PhD dissertation, University of Oklahoma-Norman, 1961.

<sup>20</sup>Brinkley, *End of Reform*, 122.

calculations for the impending 1944 election prompted FDR to allow the DoJ to return to its backlog of suspended cases in short order, pushing reactivated cases back into the courts soon after the war concluded.<sup>21</sup> The total number of antitrust cases filed in district courts dropped from a robust 64 in 1943 (24 civil, 40 criminal) down to 29 by 1945, but rose steadily thereafter, shooting up to 66 (39 civil, 27 criminal) by 1949 and 76 (42 civil, 34 criminal) the year thereafter. Private cases followed a similar trend line, dipping from a high of 110 in 1941 to a low of 27 in 1945, but then doubling to 68 during the first postwar year and exceeding 160 by 1949. The government cases from that decade represented over 40 percent of all 1064 that had been filed since the adoption of the Sherman Act in 1890.<sup>22</sup>

These aggregate patterns reflected a Democratic determination to counteract the consolidation brought on by the war mobilization—an investment of political capital Truman only doubled down on when he became President, authorizing an even more muscular Antitrust Division that would become the *bête noir* of the resurgent postwar business community. The federal government prosecuted several high profile cases toward the end of WWII, resulting in the landmark *Alcoa* (1945) and *American Tobacco* (1946) decisions, and initiating the *Imperial Chemicals/Dupont* case, which would not be concluded until 1951. Other important cases emerging at war’s end included the *Associated Press* and *Hartford Empire Co.* cases, both decided in 1945.

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<sup>21</sup>Wyatt Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University press, 2002), chs. 3-4, esp. 98-105.

<sup>22</sup>John Chadwell and Richard McLaren, “The Current State of the Antitrust Laws,” *University of Illinois Law Review*, .4 (Winter 1950): 491n2.

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After the backlog of WWII prosecutions made its way through the pipeline a new set of cases emerged in the immediate postwar period, this time supported by a Truman administration that was for obvious reasons predisposed to assist small business and advance antimonopoly initiatives. These cases clustered in sectors decisive to the new economic conditions of the postwar period. Industrial concentration remained a concern, as reflected in the cases decided for *Columbia Steel* and *General Electric* in 1948, or *Standard Oil*, *Richfield Oil*, and *Pillsbury* in 1951. With the reconstruction of Europe, the destabilization of European empire, and the nascent international machinery of the Bretton Woods system coming on line, firms engaged in international trade attracted the attention of antitrust lawyers: *International Salt Co.* (1947), *National Lead Co.* (1947), and the *US Alkali Export Association* joined *ICI/DuPont* (1951) in expanding the sphere of antitrust overseas. And in keeping with their prominent (and privileged) role in the war effort, media companies drew new attention in the *Paramount Pictures* (1948) and *MPAA* (1953) cases. Most economists supported these developments at the time. George Stigler, leading light of the Chicago School law and economics movement, has recalled that “in 1950 I believed that monopoly posed a major problem... and should be dealt with boldly by breaking up dominant firms and severely punishing businesses that engaged in collusion.”<sup>23</sup>

The Truman Administration’s antitrust offensive represented the first surge of a sustained postwar tide. Civil filings by the Department of Justice rose tenfold from the late 1930s to the

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<sup>23</sup>George Stigler, *Memoirs of an Unregulated Economist* (New York: Basic Books, 1988), 99; as quoted in Johan van Overtfeldt, *The Chicago School* (Chicago: Agate, 2007), 73; see also Stigler, “The Case against Big Business,” *Fortune* (May 1952).



late 1970s, dipping slightly only once, in the late 1960s. Its criminal filings spiked in the very early 1940s, but immediately after the war still remained several times higher than at the peak of New Deal prosecution in the late 1930s, and rose steadily through the early 1960s, spiking again by the late 1970s.<sup>24</sup> Budgets followed the same trend line, with the authorization for the DOJ’s Antitrust Division increasing steadily by a factor of four (after adjusting for inflation), and that for the Federal Trade Commission (FTC) by a factor of eight, between the late 1930s and the early 1980s.<sup>25</sup> Not only were the increases in antitrust activity steady and substantial, but expenditures to pursue them consumed a portion of the GDP that counterintuitively spiked well above peak progressive levels during the corporatist moments of World War II and Korea, ramping up again after Vietnam. Even the “peacetime” baseline levels after 1945 remained at least as high as Progressive-Era peaks, if not higher—and well above the New Deal at its peak.<sup>26</sup>

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As had been the case in the 1930s, the new wave of postwar prosecutions rose on a politics of mounting concern about big business. This time it was sparked by WWII demobilization and subsequent remobilization for the Korea War, which locked in the defense economy on which the military Keynesianism of the Cold War would rest. As during WWII, political commentators took aim at businessmen returning to Washington again to work as

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<sup>24</sup>Crane, *Institutional Structure of Antitrust Enforcement*, Figure 4.2, 83.

<sup>25</sup>Crane, *Institutional Structure of Antitrust Enforcement*, Figures 2.1, 31.

<sup>26</sup>Crane, *Institutional Structure of Antitrust Enforcement*, Figure 4.3, 85.

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“dollar a year men.” By 1950, however, the barrage of high-profile prosecutions in the second half of the 1940s had helped mobilize several vocal and overlapping publics. Political entrepreneurs acted to crystallize the issue.

We can gain insight into both the breadth and the complexity of political support for antimonopoly in this period by considering the efforts of its two most successful exponents: Congressman Emanuel Celler of New York and Senator Estes Kefauver of Tennessee. Both were progressive stalwarts essential to the larger coherence and force of the Democratic coalition which dominated Congress throughout the postwar period. Through their leadership in the House and the Senate, Celler and Kefauver crystallized political support for expanding antimonopoly policy. This makes an analysis of their constituent support a particularly valuable window onto the fight against economic concentration at the height of the Cold War.

Today Celler is known more for his work on behalf of immigrants, but throughout his fifty-year career he was a wide-ranging progressive who remained vital to the Democratic coalition until his retirement in 1972. His role as a leader of antimonopoly politics in the late 1940s and early 1950s is indisputable. He chaired the Monopoly Subcommittee of the House Judiciary Committee from 1949-53, conducting high-profile investigations of baseball and the insurance industry, and publishing the larger run of the hearings on a number of industries in a multi-volume collection titled *Study of Monopoly* that has proven an essential reference for the history of antitrust at its most muscular.<sup>27</sup>

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<sup>27</sup>House Committee on the Judiciary, *Study of Monopoly Power* (Washington, DC: USGPO, 1949-52). See also Emanuel Celler, *You Never Leave Brooklyn* (1953).

Kefauver is mostly remembered for his explosive investigations into organized crime during the 1950s, but he remained a driving leader of antimonopoly politics well into the 1960s. He rose to a seat in the Senate in 1949 after a stint as chair on the House Select Committee on Small Business, which he had chaired to much acclaim from 1946-8 while also advocating loudly for bigger budgets for the Antitrust Division and FTC. These hearings prepared him well for a new round of hearings in the Senate, leading to his successful co-sponsorship in 1950 of the bill amending section 7 of the Clayton Antitrust Act. After a few years spent pursuing the Democratic nomination for President—an ambition made plausible, if not ultimately successful, by the national profile his hearings had established—Kefauver turned back to his original issue as Chair of the Senate Antitrust and Monopoly Subcommittee from 1957-63. His hearings on the pharmaceutical industry gained a boost from the Thalidomide controversy, leading to the landmark Kefauver-Harris Drug Act of 1962.<sup>28</sup>

The trajectories that brought Kefauver and Celler into effective partnership intersected within a larger field of antimonopoly politics sustained by intense, if sometimes fractious, pressure by lobbyists, organized interests, and contending constituencies. After years of Democratic effort dating back to O’Mahoney’s failed bill in 1943, Celler and Kefauver managed to pass legislation in 1950 that amended §7 of the Clayton Antitrust Act to support a broader set

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<sup>28</sup>Charles Fontenay, *Estes Kefauver, A Biography* (Knoxville: University of Tennessee Press, 1980); Harvey Swados, *Standing Up for the People: The Life and Work of Estes Kefauver* (New York: E.P. Dutton, 1972); Joseph Gorman, *Kefauver: A Political Biography* (New York: Oxford University Press, 1971); John Anderson, *The Kefauver Story* (New York: Dial Press, 1956).

of anti-merger provisions prohibiting the purchase of a competitor's assets to restrict the formation of vertical and conglomerate monopolies.

The Celler-Kefauver Anti-Merger law was the last major expansion of antitrust law. Yet improbably, Celler and Kefauver secured its passage in the midst of the war mobilization for Korea, which cemented the corporatist contours of the Cold War defense economy authorized by NSC-68. Both men were eloquent exponents of the aims of antimonopoly politics, articulating a non-socialist vision of democracy within the modern economy. Although Celler had introduced his bill in February 1949, getting it passed by the end of that summer, Kefauver's bill still had not passed in the Senate until mid-December of 1950, months after the outbreak of war—and right around the time MacArthur's forces had retreated to their positions in the long stalemate along the 38th Parallel. This would not seem to have been a propitious time to restrict the economic might of the major corporations responsible for war production. The anti-communist politics peaking at that moment must have made the moment for antimonopoly seem even less auspicious. The immensity of these headwinds—McCarthyism and the ineluctable defense-sector cartelism of NSC-68—suggest the formidable electoral forces propelling Celler and Kefauver forward despite the odds. Indeed, the fact that the Senate bill passed with the support of 40 percent of the Republicans and without any Democratic opposition indicates an impressive advance over the partisan gridlock of the 80<sup>th</sup> Congress.<sup>29</sup>

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<sup>29</sup>As recorded in <https://www.govtrack.us/congress/votes/81-1950/s450>.

Celler worked closely with a number of organized interests including the CIO, 15 different railroad brotherhoods, the National Farmers' Union, the Modern Order of American Consumers, the National Federation of Independent Business, the National Association of Retail Grocers, the National Association of Retail Druggists, the National Association of Independent Tire Dealers, and several other associations of small businesses. The opponents testifying against the bill were a who's who of big business, led by the National Association of Manufacturers.<sup>30</sup>

During Celler's hearings on aluminum—still the most concentrated industry by 1949, with 73 percent of the market controlled by Alcoa and its two war-born competitors—he was in constant contact with independent fabricators, who relied entirely on the big three for pig and ingot sources. It was precisely the shortages of pig and ingot aluminum caused by the war mobilization in 1952-3 that brought this pressure, and the hearings, to a head. More than one constituent wrote to denounce the “death sentence” that Alcoa's hold on ingot production exercised over small businesses, especially under conditions of war production for a military newly reliant on aluminum for air power.<sup>31</sup> This was an explicit reference to PUHCA, another highly publicized foundation-stone of antimonopoly, but it was also a reminder of the bitter memories small firms harbored of their marginalization during the WWII mobilization.

Another reliable and active source of small business pressure on Celler was the National Federation of Independent Businesses (formerly of Small Businesses), which also worked

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<sup>30</sup>See box 221, folder 4 “Monopoly Legislation,” Kefauver MSS, and esp. boxes 55-59, Emanuel Celler Papers, MSS51755, Library of Congress [hereafter **Celler MSS**].

<sup>31</sup>See materials on the Alcoa case, especially the correspondence in folder1, box 55, Celler MSS.

closely with Kefauver.<sup>32</sup> No match for giant lobbies like NAM or the US Chamber of Commerce, the NFIB nonetheless provided a steady channel of communication to small businesses that were otherwise disorganized and inchoate as a constituency. Because we lack a developed historical literature on small business in this period—or of small proprietors more generally—it is all too easy to fall into assuming that they shared the same anti-New Deal agenda that the big business pioneers of the New Right cultivated from the Liberty League in the 1930s onward.<sup>33</sup> But the constituent mail that flooded into the offices of Celler and Kefauver suggested otherwise. Far from mindlessly celebrating big business, small businesses had developed sharp critiques of their outsized competitors that they honed into legislative proposals. George J. Burger, Vice President of the NFIB, corresponded frequently with Kefauver and was closely involved in the drafting of the Anti-Merger Act.<sup>34</sup>

Like Kefauver, Celler was in regular contact with antitrust experts in the FTC and Department of Justice, making use of the abundant reports and other factual material they could provide. While it may be a distortion to claim that the experts of the FTC constituted their own

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<sup>32</sup>See, e.g., NFIB to Celler, folder 4, box 52, Celler MSS, protesting the Paramount-ABS merger allowed by the FCC in 1953.

<sup>33</sup>On big business and the organized campaign to roll back the New Deal, see Howell John Harris, *the Right to Manage: Industrial Relations Policies of American Business in the 1940s* (Madison: University of Wisconsin Press, 1982); Elizabeth Fones-Wolf, *Selling Free Enterprise: The Business Assault on Labor and Liberalism, 1945-60* (Urbana: University of Illinois Press, 1994); Kimberly Phillips-Fein, *Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan* (New York: WW Norton, 2009), and Wendy Wall, *Inventing the “American Way”: The Politics of Consensus from the New Deal to the Civil Rights Movement* (Oxford University Press, 2008).

<sup>34</sup>Burger to Kefauver, January 12, 1949, folder 6 “Monopoly: Legislation (3 of 3) – 1948-1949,” box 221, University of Tennessee Modern Political Archives MPA.144 [Hereafter **Kefauver MSS**].

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social movement, they clearly operated as more than a politically inert body of experts.<sup>35</sup> Even as Celler's energies and ideas reflected the rising influence of small business, consumers, and antitrust experts, he continued to devote considerable effort to engaging unions and farmers, as his speech file attests.<sup>36</sup>

Kefauver's constituent mail was just as rich and extensive as Celler's, although it reflected a somewhat different set of concerns and priorities. He was quite cool to unions, and on occasion made guarded comments that reflected deep ambivalence flowing from his belief that unions exercised a monopoly on their members' labor—something inconceivable to Celler, who rejected the idea of labor as a commodity. In response to a female constituent demanding he aim antitrust activity at the notorious UMW leader John L. Lewis, Kefauver wrote, "I wish to say that I am opposed to monopolies whether they be in the field of labor, Government or private business." "The Taft-Hartley law, to curb labor strikes," he reassured her, "has been invoked in the past and may be again if the President sees fit to do so."<sup>37</sup>

Kefauver's closer relationship to small business may have influenced this tendency. Their letters to him boiled over with anti-union sentiment. This constituency harbored a petit bourgeois radicalism that could swerve left or right—or both ways at once. This whipsawing resentment of concentrated power could be seen in a letter from a small electrical supplier who

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<sup>35</sup>Cf. Bill Luchansky and Jurg Gerber, "Constructing State Autonomy: The Federal Trade Commission and the Celler-Kefauver Act," *Sociological Perspectives* 36.3 (Autumn 1993): 217-40.

<sup>36</sup>See folder 2, box 53; folder 10, box 533; folder 8, box 536, Celler MSS.

<sup>37</sup>Kefauver to Talley, December 12, 1949, folder 5, box 221, Kefauver MSS.

sent a clipping that warned of sinister designs to wage a coordinated publicity campaign against public power plants. In the middle of the letter bashing big utility interests, the proprietor took time to digress about the need to investigate big labor, who were guilty of “crookedness, coercion, brow beating... above all things non-taxable funds which relieves them of paying any type of income tax even though they enter into private business.” He thought “union workers themselves” and “the country as a whole” would be better off without them.<sup>38</sup>

Whereas Celler mobilized small businesses concerned with aluminum fabrication, Kefauver reached the more broad-based and overtly progressive public power crowd, reflecting the prominence of the TVA in his home state of Tennessee. He had an abiding relationship to groups like the American Public Power Association and Citizens for TVA. These, in turn, lent a high profile to his hearings on public power and the TVA.<sup>39</sup>

The National Federation of Independent Businesses (NFIB) worked even more closely with Kefauver than with Celler. This closeness was especially evident during the passage of the Anti-Merger Act in 1950, when the NFIB supported letter-writing campaigns, paid for speeches, placed lots of positive press, and provided draft language that Kefauver selectively borrowed in drafting the bill.<sup>40</sup> Ed Wimmer, the Vice President of the NFIB, wrote with revealing candor and

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<sup>38</sup> See, e.g., Scuggs Electric Company (Tennessee) to Kefauver, 7/21/1955, folder 3, box 209, Kefauver MSS.

<sup>39</sup> See PPA newsletters in folder 3, box 204, Kefauver MSS; direct memos from the PPA and the National Rural Electric Association, folder 7, box 209.

<sup>40</sup> See materials supporting the Celler-Kefauver bills, e.g. letter dated November 30, 1950, cosigned by the National Federation of Independent Businesses, the National Association of Retail Druggists in folder 4, box 221, Celler MSS.



intimacy in early November of 1950: “Estes, I am doing everything possible to stir up interest in H.R. 2734 [the anti-merger bill]. We are still mailing copies of the reprint which was placed in the Record, and I think that 99 per cent of the people in the audiences to whom I talk are in favor of the bill.”<sup>41</sup>

Kefauver’s relationship to the FTC was also especially close, as reflected in his bold decision to appoint veteran antitrusteer John Blair as chief economist of the Subcommittee for Antitrust and Monopoly upon his assumption of the Chairmanship in 1957.<sup>42</sup> That move earned abundant hate mail, with the expected constituent fulminations against Kefauver’s “leanings toward socialism,” and statements against the “Marxian dialectical proofs” advanced by “Mr. Blair and his Philosophy.” But interspersed with such complaints were letters of a seemingly opposite tenor, such as the one that denounced his dedicated critic the *New York Herald Tribune* as a “pawn” of the oil companies.<sup>43</sup>

Celler and Kefauver’s constituents seized on the terminology and conceptions of antimonopoly law to identify the harms and vulnerabilities they suffered as “the little guy.” The mail they sent to Washington, DC, featured sharp complaints about the monopolistic behavior they wanted to see the government curb through more effective measures. Mergers dominated

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<sup>41</sup>Wimmer to Kefauver, November 10, 1950, folder 4, box 221, Celler MSS.

<sup>42</sup>Blair was an old antitrust hand and author of *Seeds of Destruction: A Study in the Functional Weakness of Capitalism* (New York: Civici, Friede, 1938). A thick file of material organized to track opposition to Blair can be found in folder 3, box 206, Kefauver MSS.

<sup>43</sup>See letters responding to hostile *Herald Tribune* coverage in May 1957, in folder 3, box 206, Kefauver MSS.

Celler and Kefauver’s constituent mail, which was natural given the purpose of the proposed amendment. For example, Burger’s earliest appeals to Kefauver were made from his point of view as the proprietor of a small automobile tire business. Noting the dramatic decline in the number of tire makers from 300 in 1921 to 21 in 1947, he claimed that roughly 93 percent of all sales were controlled by four manufacturers. “All of the mergers,” he claimed, “involving the strongest of the companies so acquired were accomplished through purchase of assets.”<sup>44</sup>

Almost as frequently, constituents wrote to decry other practices proscribed by antitrust law, including predatory pricing, price discrimination, patent and copyright abuse, and unfair marketing practices such as tying. In 1947, as Kefauver conducted hearings on antimonopoly measures, a gas station operator wrote in to Kefauver about being forced by oil companies to buy appliances he could not sell. That same year a “small insurance operator” complained that General Motors locked out other insurers by making dealers into registered insurance and financing agents. “In no less than 90% of the cases,” the letter claimed, “a purchaser of a new General Motors car (Cadillac, Buick, Olds, etc.) MUST not only buy insurance to cover the installment payments but, in most cases, cannot pay cash for his purchase.”<sup>45</sup> Just as small contractors supplying independent radio makers had written to O’Mahoney back in the 1930s to complain of predatory pricing practiced by the Radio Corporation of America to secure exclusive

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<sup>44</sup>George J. Burger, Burger Tire Consultant Service, summarizing testimony in “Confidential Bulletin,” March 21, 1947, folder 8 “Legislation, Clayton Act Amendment 1946 – 1947 (Folder 2),” box 221 Kefauver MSS.

<sup>45</sup>Statement attached to letter from Kefauver to Victor Kramer, Assistant Chief, Small Business Section, Antitrust Division, Department of Justice, May 24, 1947, box 221, Kefauver MSS.

sourcing of parts from licensees, so too did a bookstore owner write to Kefauver in 1947 to report a local “dime and dollar store that undersells everybody with their cheap goods.”<sup>46</sup>

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Anger at the predations of big business did not automatically carry over into the faith in government power that Celler and Kefauver sought to instill. On the contrary, the suspicion of centralized power that antimonopoly politics stirred up seemed to adhere to everything around it in a generalized revulsion at corruption in high places.<sup>47</sup> Amid the rising anti-communism of the late 1940s, which consistently sought to conflate liberal administrators with “communists in government,” fears of “big government” could become especially poisonous, reinforcing Hayekian arguments against regulation as a “road to serfdom.” This was quite clear among the small businesses that opposed antimonopoly. In March of 1949 F.W. Danner, owner of a modest-sized print shop, wrote to Kefauver against his Anti-Merger bill. He was convinced that antitrust laws would only “accelerate the giant glacier of Statism, or Fascism that is slowly, but inexorably, moving down on us.” Once “there was a time when the employer was on one side; the union on the other; and the government in the middle. Today, the government and union are on one side; we are on the other.” Most revealingly, Danner admitted that:

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<sup>46</sup>“National Union Accuses R.C.A. of Unfair Trade,” *NY Herald Tribune*, 11/17/1936, Folder 34 “Speech Material – General, 1936,” box 22, O’Mahoney Papers.

<sup>47</sup> On this theme, see Michael Czaplicki, “The Corruption of Hope: Political Scandal, Congressional Investigations, and New Deal Moral Authority, 1932-1952” (PhD thesis, University of Chicago, 2010), ch. 5.

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As a small businessman, I am willing to be taken over by a large corporation. In fact, I want to be taken over by a large corporation. What I have worked all my lifetime for, is in machinery and in other hard merchandise and assets. It is not liquid. If I were taken over by a larger printing plant, or corporations and given stock therefor, I could easily become liquid.<sup>48</sup>

The small businessmen whom Celler and Kefauver rallied in support of antimonopoly measures probably did not have a fundamentally different perspective from Danner's. They simply wanted to craft public power to enable them to enter and engage the marketplace with the autonomy they presumed should inhere in free enterprise. As "small" concerns they were disinclined to think of cashing out as contributing to dangerous consolidation. Until they should choose to exit their markets, they wanted the federal government to act as a powerful referee to guarantee fair competition. But to the extent that the government seemed to be forming alliances with big labor as the Democratic Party had since the 1930s, or favoring large corporations through regulations or contracting relationships, it ran afoul of the very political commitments that many of their antimonopolist constituents sought to cultivate. For this reason, many of the protests that were later lodged against the appointment of John Blair as chief economist to the Sub-Committee in 1957 opened with claims that he was "anti-capitalist," but soon revealed more fear of state micro-management of "free enterprise" than genuine worries about Soviet subversion.

Even without the fears and suspicions fostered by loyalty politics, small business's interests had already shifted in ways that infused their attachment to antimonopoly politics with

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<sup>48</sup>F.W. Danner, Danner Press Co., to Kefauver, March 4, 1949, in folder 6 "Monopoly: Legislation (3 of 3) – 1948-1949," box 221, Kefauver MSS.

newly anti-statist resonances. The 1940s were not the 1930s: boom had replaced bust; inflation prevailed where deflation had threatened; labor was organized and ascendant; the war had burnished the image of corporate America; the government was bigger, stronger, and more effective than ever. In this new context of what Barton Bernstein once called “the politics of inflation,” small business found itself squeezed by large organized economic actors and inclined to see conspiracies in restraint of trade in all corners, public and private.<sup>49</sup> This can be seen even amid expressions of support for robust enforcement of antimonopoly. In 1949 the NFIB informed Kefauver of a poll it had conducted showing that 80 percent of its members supported a bill sponsored by Wright Patman to prohibit chain stores from deducting losses from below-costs sales from their tax obligations. But an even higher proportion, 89 percent, also opposed Truman’s plan for compulsory national health insurance because it would “create too many taxes for business.”<sup>50</sup>

Beyond this general aversion to expanding bureaucracies and high tax rates, memories of micro-economic management and heavy-handed contracting practices in WWII burned strong. What had begun in 1940 as a crash program for defense mobilization evolved into a permanent defense economy in which contracting relationships were no longer “for the duration.” By 1947 Missouri’s James E. Murray, erstwhile Democratic Chair of the Senate Committee to Study the Problems of Small Business, warned that independent businesses were locked in a “death

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<sup>49</sup>Barton Bernstein, “The Truman Administration and the Politics of Inflation” (PhD dissertation: Harvard University, 1963).

<sup>50</sup>NFSB Press Release, March 18, 1949, folder 6, “Monopoly Legislation (3 of 3) – 1948-1949,” box 221, Kefauver MSS.

struggle” with large firms, and required special protections. He contrasted small firms’ neglect with the privileged treatment accorded to “big business,” which had “turned a deaf ear on the pleadings of the government for increased output for previous long months at the beginning of this recent war until given every assurance that government provision covering all costs of such expansion would be forthcoming, plus an assured profit.”<sup>51</sup> As West Virginia’s Harvey Kilgore would observe to Kefauver a few years after the Anti-Merger Act was passed, by which time NSC-68 had been transformed by the Korean War from a white paper into the framework for a permanent war economy, “the United States Government is the largest single customer of business and industry,” a fact which consistently led small businesses to call for a review of the Government’s procurement program to determine whether it was “contributing to the growth of monopoly control, and a weakening of our free economy.”<sup>52</sup>

Vernacular fear of “big government”—a dread of “creeping socialism” on the right; a suspicion of “sweetheart deals,” insider fixing, and pandering to business interests on the left—was not restricted to the political rank and file. Antimonopoly politicians and experts also grew wary of statism operating under the wrong influences, despite their aggressive pursuit of expanded government power in the public interest. The late 1940s and 1950s marked a transformative moment in US political culture, when pervasive fears of totalitarianism suffused

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<sup>51</sup>“Senator Murray Urgest Inquiry into Monopoly: Sees Big Industry Gaining in Power, Threatening End to Small Business,” *New York Herald Tribune* (Feb. 10, 1947): 26.

<sup>52</sup>Kilgore to Kefauver, February 18, 1955, folder 8, box 206, Kefauver MSS.

public life and reoriented even center-left politics away from mass democracy and toward more liberal solutions circumscribing centralized power.<sup>53</sup>

Both Celler and Kefauver partook of this anti-totalitarian turn in Cold War liberalism. In a press release during the summer of 1949 intended to bolster an Antitrust Division suit against life insurance companies, Celler affirmed the need for measures against “private power over production and prices” that would constrain “free enterprise” or “burden consumers with monopoly prices.” If the government failed to act against monopoly, all of democracy would be in jeopardy. Echoing the concerns of “virtually every witness” who had appeared before his committee to study monopoly power, he argued that private monopoly “cannot fail to result in ‘big government’.” It eventually provoked a government search for alternatives to it, which led inevitably to “fascism, communism, or some form of democratic socialism” which he hastened to add was “unsuited to the American tradition.”<sup>54</sup> Three years later Kefauver drew similar conclusions about the ultimate threat posed by monopoly, while campaigning for Adlai Stevenson at the very start of the election season in Concord, New Hampshire. He reminded his audience of the state-run monopolies of interwar Germany and Italy, which “financed Hitler and Mussolini” and helped “create Fascism and Nazism with all their horrors.” But “the monopolists also breed socialism,” he warned, “for when the great mass of the people find that the great

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<sup>53</sup>David Ciepley, *Liberalism in the Shadow of Totalitarianism*; Richard Primus, “A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought,” *Yale Law Journal* 106.2 (1996): 423-57.

<sup>54</sup>“Celler Counters Charges Made by Mutual Life Insurance Policy,” statement by Congressman Emmanuel Celler, June 24, 1949, 1-3, in folder 2 “Press Releases 1949,” box 533, Celler MSS.

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industries are being permanently controlled by the few for the few, they will want the state to take over these industries and operate them for the many.” Kefauver concluded by stating, “Now I am opposed to both Nazism and Socialism. That is why I am also opposed to private monopolies and near monopolies which help to spur on both of these movements.”<sup>55</sup>

In casting antitrust as an antidote to totalitarianism, Celler and Kefauver affirmed the social democratic political theories and legal ideas developed during WWII by Karl Polanyi, Franz Neumann, and Wendell Berge—the last two of whom were centrally involved in the “export” of American antimonopoly politics for the purposes of reconstructing post-Nazi Germany through decartelization.<sup>56</sup> In particular, the idea that monopoly capital not only leads to fascism, but in doing so shuts down the market society in a totalitarian “solution” driven by mass politics, appears to be a direct adaptation of Polanyi’s idea of the “double movement.” But claiming that the same trajectory could also run through socialism departed from any of the social democratic theorists, and hitched Celler and Kefauver’s concerns to the dire warnings against socialism articulated by Hayek in *The Road to Serfdom*.<sup>57</sup> Never mind that Hayek and Polanyi understood their ideas and principles to be mutually incompatible; in electoral politics, all confluences are possible.

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<sup>55</sup>Press release for President Headquarters, Concord, NH, nd [early] 1952, folder 11 “Monopolies 1952,” box 854, Kefauver MSS.

<sup>56</sup>See the chapter by Dan Crane in this volume Franz Neumann, *Behemoth* (1942); Polanyi, *The Great Transformation* (1944); Wendell Berge, *Cartels: Challenge to a Free World* (1944) and *Economic Freedom for the West* (1946).

<sup>57</sup>Friedrich Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944).



Although this anti-totalitarian synthesis still prioritized the need to counteract corporate consolidation, it made the centralization of power in the national state the ultimate threat to free society, tacitly reinforcing the very “free market” ideology that corporate conservatives had been using to bludgeon New Deal projects since the late 1930s.<sup>58</sup> Even for Celler and Kefauver, state capture of the economy was the ultimate threat; firms’ market power was ultimately a danger insofar as it led to that threat. Antimonopoly leaders like Celler and Kefauver harbored sufficiently articulated notions of regulation in the public interest that the postwar regime could continue and grow for another twenty years. But their center-left understanding of the dangers of centralized power operated in a political climate awash in vernacular antistatism and vehement anticommunism, both of which leaned right, giving businessmen the benefit of the doubt while leaving government officials narrowed straits within which to maneuver.<sup>59</sup> Closer to home, the ambivalence expressed by Celler and Kefauver regarding centralized power may ultimately have worked against their antimonopoly agenda. Celler’s extramural hearings in 1950 and 1957 concerning the applicability of antitrust law to professional baseball, an all-American pastime, cannot have won much popular support beyond the already committed. Kefauver’s blockbuster

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<sup>58</sup>Kimberly Philips-Fein, *Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan* (New York: Norton, 2009); Wendy Wall, *Inventing the “American Way”: The Politics of Consensus from the New Deal to the Civil Rights Movement* (New York: Oxford University Press, 2008); Howell John Harris, *The Right to Manage: Industrial Relations Policies of American Business in the 1940s* (Madison: University of Wisconsin Press, 1982).

<sup>59</sup>Landon Storrs, *The Second Red Scare and the Unmaking of the New Deal Left* (Princeton: Princeton University Press, 2013).

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hearings on organized crime only confirmed suspicions of big city racketeering and government corruption, rather than affirming public faith in government's ability to clean up it up.

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The eclipse of market power as the overriding danger against which antimonopoly had to guard did not immediately diminish the scope or force of antimonopoly politics, but it did redirect political energies. This shift can be seen in Kefauver's last major accomplishment, the passage in 1962 of the Kefauver-Harris Amendments to the 1938 Food, Drug and Cosmetic Act. With public outrage surging in 1961 over the tragic spate of birth deformities caused by the anti-nausea drug Thalidomide, Kefauver moved to reopen hearings on the pharmaceutical industry that he had begun in 1959 as Chair of the Senate Subcommittee on Antitrust and Monopoly. Adapting to overriding concerns about testing, safety, and government oversight, he reintroduced legislation aimed at bolstering the powers of the FDA. This greatly raised the regulatory bar pharmaceutical firms had to meet to bring a drug to market, requiring clinical studies, rigorous reporting, an intensive approval process overseen by the FDA, and an extensive evaluation of efficacy for drugs approved since 1938. The law also regulated the marketing of generic drugs and set industry standards requiring regular government inspection. In short, Kefauver-Harris imposed substantial restrictions on pharmaceutical firms pertaining to some of the most enduring concerns of antitrust policy, including price, competition, and public accountability. Despite this,

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the pharmaceutical sector would become one of the most monopoly-prone precincts of the economy.<sup>60</sup>

The Amendments that finally passed in 1962 were a far cry from the legislation Kefauver and Celler had been shepherding in parallel bills after hearings on administered prices from 1959-60 had established clear patterns of anticompetitive activity in the pharmaceutical industry. The most important issues that emerged from Kefauver’s hearings had to do with the use of patents and licensing to keep prices high and suppress competition. Of the more than 1,200 drug companies, only 22 firms dominated the market for “ethical drugs,” with 15 accounting for over two-thirds of all prescriptions in the United States. As a consequence, these firms enjoyed levels of profitability that greatly exceeded those of other manufacturing industries. They accomplished their effective oligopoly through a variety of mechanisms, notably patent monopolies and restricted cross-licensing, as well as marketing arrangements and aggressive advertising.<sup>61</sup>

Kefauver was also concerned about the general failure to test drugs for their efficacy (the central failing that had led to the Thalidomide disaster), as well as procedures to insure that consumers could be assured of product safety, but these consumer welfare measures were clearly secondary to addressing the cause of drug companies’ evasion of accountability. However, as a consequence of secret meetings between the Kennedy Administration and the conservative

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<sup>60</sup>The story of FDA regulation of the drug industry since 1962 is far too involved to evaluate here. For a comprehensive account, see Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton: Princeton University Press, 2010), esp. chs. 2-4.

<sup>61</sup>*Drug Industry Antitrust Act: Hearings before the Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary*, 87 Cong., 1<sup>st</sup> Sess.

members of his own subcommittee, Kefauver was outmaneuvered and another bill substituted for his that dropped all of the patent and licensing provisions aimed at market power. At the last moment, the Thalidomide controversy forced a new bill that included many of Kefauver's consumer protection measures. The result was a law that did a great deal to regulate drug companies and address the most pressing concerns of consumers, but was toothless to prevent the worst monopolistic practices (aside from advertising and marketing).<sup>62</sup>

The final contours of the 1962 legislation may tell us more about pressure group politics and the desperation of the Kennedy Administration to attain some kind of visible domestic policy gains than it reveals about the demands of the antimonopoly coalition. But the hearings Kefauver held leading up to them do offer considerable insight into the ways in which it was becoming more difficult to politicize market power per se.

The first thing that stands out is the constituencies that mobilized most intensely for the legislation. It was letters from hundreds of doctors and thousands of patients, concerned primarily with high prices and aggressive, misleading promotions, that initially led to the hearings in 1959. The doctors proved to be the most essential to the hearings. They testified to the abject failure of the American Medical Association to guide physicians and thus enable the market to regulate itself. They also revealed how intensely drug companies' advertising efforts bombarded them and often shaped their colleagues' approach to particular drugs and therapies.

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<sup>62</sup>A concise history of the pharmaceutical legislation can be found in Joseph Bruce Gorman, *Kefauver: A Political Biography* (New York: Oxford University Press, 1971), ch. xxi.

Thousands of new drugs had flooded the market since the end of the Second World War, many of them representing very minor chemical modifications to justify marketing them as a new product, and many others of dubious efficacy. Physicians were under great pressure and considerable temptation to file prescriptions that served drug companies' needs rather than their patients' welfare. Dr. Ronald Lamont-Havers, Medical Director of the Arthritis and Rheumatism Foundation, testified that "I am always surprised at the number of physicians—I shouldn't say I'm surprised, I am not—who rely a great deal on many of the drug detail men for their knowledge of the drugs, and certainly this is one way in which new types of therapy are disseminated among the medical profession."<sup>63</sup> Even doctors who kept up with the most recent literature were blinkered by the industry, whose advertising was so important to most journals that it preempted the publication of critical studies.

The doctors who testified before Kefauver were not, for the most part, independent proprietors like the small businesses that had supported the Anti-Merger Act over a decade before. But their expertise and professional standards lent them a similar kind of independence, at least in their outlook toward the drug companies. They were quite critical of the ways in which they used their market power to undermine competition, raise prices and profits, and dump most of their externalities on the unsuspecting consumer. Yet their focus on high prices and aggressive marketing did not get at the root causes of monopolization. Perhaps this was because, unlike the trade associations and independent businesses that had supported the Anti-Merger Act, they were

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<sup>63</sup>Hearings before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, 85 Cong., 1<sup>st</sup> Sess. to 88 Cong., 1<sup>st</sup> Sess., 8010.

not in fact competitors of the pharmaceutical industry, and so did not concern themselves with patent restrictions and licensing (as Kefauver did). While the legislation enjoyed the support of critical groups—notably the National Association of Retail Druggists and the AFL-CIO—these groups were not a driving presence in the hearings or behind the scenes. It is worth noting that the American Farm Bureau Federation opposed some provisions of the legislation, notably on drug efficacy.

There really were no small business competitors to speak of. The pharmaceutical industry was by that point so concentrated that small firms were confined to the cut-throat 10 percent rump of the market that dealt in generic drugs—a consequence of the massive barriers to entry posed by capital-intensive research and development, and by the legal expenses pertaining to intellectual property. Large firms “just wouldn’t license a small manufacturer like ourselves,” stated Dr. Phillip Berke of Formet Laboratories.<sup>64</sup> The arms race over advertising and marketing only made things even more hopeless for small operators. “Right now,” Seymour Blackman of Premo Pharmaceutical Laboratories observed, “the advertising costs have become so disproportionately expensive, small companies cannot afford to make their way in the marketplace.”<sup>65</sup>

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<sup>64</sup>Dr. Philip Berke, Vice President, Formet Laboratories, Roselle, NJ, testimony before Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate (1959-62), 8057. [Hereafter cited as **Senate Pharmaceutical Hearings.**]

<sup>65</sup>Seymour N. Blackman, Executive Secretary of Premo Pharmaceutical Laboratories, Senate Pharmaceutical Hearings, 8210.

The dangers posed by market power couldn't have been clearer, with the FDA enfeebled by limited appropriations, the AMA and the Pharmaceutical Manufacturers Association practicing little to none of the self-regulation that critics of state capture claimed made strong government intervention unnecessary, and no competitive pressures able to break through the interlocking edifices of patents and licensing. And Kefauver saw them clearly. But political leverage obtained mainly for matters of consumer interest, while the harms of concentrated market power that Kefauver had originally unearthed in antitrust hearings a decade earlier fell by the wayside. And while the consumer welfare measures that resulted from his campaign were formidable, they ultimately proved unequal to the juggernaut that would become “Big Pharma” in a few decades’ time.

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By the time of his untimely death in 1963, Kefauver had earned accolades for his work advancing drug regulation. The broader antimonopoly agenda remained alive and well. As one review concluded, by the start of the 1960s “antimerger litigation” had “become a paramount concern” of both the FTC and the Antitrust Division, with cases evenly split between the two agencies, and the great preponderance of them (86 percent) initiated during the Eisenhower Administration—facts which suggested considerable bipartisan acceptance.<sup>66</sup> The distinctiveness and force of antitrust policy was also readily apparent to interested observers overseas, who were

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<sup>66</sup> Milton Handler and Stanely Robinson, “A Decade of Administration of the Celler-Kefauver Antimerger Act,” *Columbia Law Review* 61.4 (April 1961): 629.

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struck by the American approach to competition—particularly as it was imposed on them by way of US policies for aid, trade, and increasingly internationalized antitrust enforcement. “Antitrust thrives,” wrote the British observer A.D. Neale four years before Hofstadter’s infamous essay, “and the Attorney General’s National Committee... can unanimously declare that the Sherman Act stands well above partisan controversy.”<sup>67</sup>

Neale thought the robustness of the policy could be attributed to the abiding “American distrust of all sources of unchecked power,” which explained “the breadth and persistence of the public favor enjoyed by antitrust” and its accommodation by big business and other organized interests whose foreign colleagues watched on in bemusement. It was crucial, he thought, that antitrust relied on a juridical framework dedicated to ensuring that the rules of economic competition were openly applied to all entrants, regardless of size. Had support for antitrust been mere lip service, “this service would not long be paid” if it “were a system of administrative regulation carried on by politicians and economic experts.” And far from being grounded in anti-capitalist sentiment or Brandeisian suspicion of bigness, support for antitrust was instead “very much the same thing” as support for market society, and contained within it acceptance of the efficiencies of large-scale enterprise along with unrelenting suspicion of the same.<sup>68</sup>

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<sup>67</sup>A.D. Neale, *The Antitrust Laws of the U.S.A.: A Study of Competition Enforced by Law* (Cambridge, UK: Cambridge University Press, 1960), 423.

<sup>68</sup>Neale, *The Antitrust Laws of the U.S.A.*, 421-3. The preface written by Abe Fortas attests to Neale’s “highly perceptive evaluation” of American antitrust and attributes it to Neale’s ability to “trace the particulars of antitrust development to their abiding source: to America’s ‘distrust of all sources of unchecked power.’” (v-vi)



Yet there were unanticipated consequences to the vigorous antitrust enforcement that flowed from Celler-Kefauver. With more than a decade of lively application of the Anti-Merger law, firms consistently avoided mergers among closely related businesses, instead opting for conglomerate opportunities that did not run afoul of the legislation. According to one economist writing two decades later, the “extremely strict antitrust enforcement of the ’60s made most related acquisitions infeasible, or at least costly, and so forced firms to diversify.”<sup>69</sup>

The result was a wave of conglomerate mergers that took off in the second half of the 1960s, reaching 2,442 mergers in 1968, a 150 percent increase over the previous year and a 300 percent increase above 1960 levels. These were driven by the largest firms at the very top of the economy. From 1966 to 1968 alone, the number of acquired firms with assets exceeding \$10 million nearly doubled, from 101 to 192.<sup>70</sup> Between the passage of the Celler-Kefauver Act in 1950 and the peak of conglomerate activity twenty years later, the value of horizontal and vertical mergers dropped from 62.6 percent to 11.4 percent of the assets of all mergers, while

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<sup>69</sup> Fligstein, *The Transformation of Corporate Control*, 190-225, 365-70; Andrei Schleifer and Robert Vishny, “Takeovers in the ’60s and the ’80s: Evidence and Implications,” *Strategic Management Journal* 12 (1991): 51-59, esp. 58. See also Frank J. Kottke, “Mergers of Large Manufacturing Companies, 1951 to 1959,” *Review of Economics and Statistics* 41.4 (November 1959): 430-33, for contemporary recognition that while mergers had “increased significantly” over the decade, resulting in great “disparities in size among the largest manufacturing companies,” they did not strike antitrust authorities as serving to “lessen competition substantially” in any particular market (433).

<sup>70</sup> Emanuel Celler, “Conglomerate Merger Investigations,” *Antitrust Law Journal* 38.2 (1969): 184.

conglomerates swamped them by absorbing 88.5 percent of merged assets in 1968 (up from less than half that in 1948-51).<sup>71</sup>

Celler continued to pursue this burst of conglomerate mania undaunted by the loss of his comrade in arms Kefauver, holding intensive investigations that extended into the early 1970s. His investigations tracked a secular rise in antitrust activity more generally, which only increased through the end of the decade and well into the 1970s, as private litigation augmented suits by the Federal Government. This second wave of cases crested in the late 1960s and early 1970s, as Nixon's Antitrust Division followed through on suits begun during the late Johnson Administration, while the FTC also increased its caseload.<sup>72</sup> According to Robert Pitofsky, "the United States had by far the most stringent antimerger policy in the world in the 1960s." The Supreme Court affirmed the government's aggressive enforcement, "embark[ing] upon a relentless condemnation of mergers" in the words of Philip Areeda.<sup>73</sup> By the late 1960s there

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<sup>71</sup> Jerome B. Cohen, "The Economic Aspects of Conglomerates," *St. John's Law Review* 44.5 (Spring 1970): 49.

<sup>72</sup> Crane, *The Institutional Structure of Antitrust Enforcement*, 52, Fig. 3.1; William Kovacic, "The Modern Evolution of U.S. Competition Policy Enforcement Norms," *Antitrust Law Journal* 71.2 (2003): 377-478; and Kovacic, "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration," *Iowa Law Review* 74 (1989): 1106-8, 1125-7.

<sup>73</sup> Robert Pitofsky, "Proposals for Revised United States Merger Enforcement in a Global Economy," *Georgetown Law Journal* 81.2 (December 1992): 196; Phillip Areeda, "Monopolization, Mergers, and Markets: A Century Past and the Future," *California Law Review* (May 1987): 975n86 as cited in Kovacic, "The Modern Evolution": 431n177 and 433n185. Crane, *Institutional Structure*, 83-86, notes that when considered in the context aggregate levels of economic activity the 1970s enforcement wave is less striking than that of the 1940s; yet the number of civil filings was at its highest in absolute numbers during the 1970s (Figure 4.2), and the Antitrust Divisions' expenditures as a proportion of the GDP also peaked in that period (Figure 4.3).

were eight ongoing investigations of mergers, including inquiries by the FTC, the House Antitrust Subcommittee, and the Antitrust and Monopoly Subcommittee in the Senate.

More unsettling than the quantitative explosion of mergers was their qualitative effects on American society, which cut at the very fabric of democratic life. “What happens in these mergers?” Celler asked while testifying before Miles Kirkpatrick for the American Bar Association’s Antitrust Section in 1969:

Frequently corporate headquarters are moved from a small or medium sized city to a metropolis. Local management is removed or subordinated to outside interests. Civic leaders familiar with community needs may be replaced with professional managers whose concern is with the problems of a profit and loss statement, and who have little time or interest for the problems of local school boards, municipal and county government, community charity, local real estate taxes, adequate policing of crime, and to solutions to other civic disruptions manifest throughout the land.<sup>74</sup>

Rejecting the defense of conglomerates as more efficient than smaller concerns, Senator William Proxmire of Wisconsin reported to Celler that the viability of free enterprise was threatened by “industrial giants with their immense political clout.” Such a grave threat to the market, and to democracy itself, required a comprehensive overhaul of government power to regulate large firms.<sup>75</sup> Celler recommended repealing all existing antitrust laws and replacing the century-old, fragmented antitrust machinery with a unified Office of Industrial Organization in the executive office of the President with the power to authorize or reject all corporate mergers or acquisitions.

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<sup>74</sup> Celler, “Conglomerate Merger Investigations,” 184-5.

<sup>75</sup> “Antitrust Drive Urged by Celler,” NYT (September 7, 1971): 19; Celler, *Investigation of Conglomerate Corporations* (1971); Celler, *Conglomerate Merger Investigations* (1969).

Emmanuel Celler did not have time to pursue the ambitious plans he outlined in 1971 for a unified Office of Industrial Organization. He lost his seat to a young lawyer named Elizabeth Holtzman by a razor-thin margin in 1972—the first in a wave of senior Democrats washed out by the reformers flooding into Congress in a burst of energy unleashed by liberal outrage over Vietnam and Watergate. The most senior member of Congress had lost his seat of half a century, and his chairmanship of the Judiciary Committee.<sup>76</sup>

Celler’s demise was partly due to his vote against the Equal Rights Amendment, a stance that drove a wedge between him and the rising generation of Democrats who challenged corporate power to attack sources of inequality that extend well beyond the confines of market power. His defeat also heralded the mounting success of Congressional reformers who would unseat several older Democratic chairs, institute reforms to the seniority-based committee system, and make Party leadership more accountable to rising constituencies. While these reforms were aimed at conservatives who had long thwarted civil rights legislation and expansive welfare programs, they also took down Cold War liberals like Celler who had advanced more progressive agendas.<sup>77</sup> A rising generation of “Watergate Babies” completed the task, supplanting antimonopoly firebrands in Congress like Wright Patman by 1974.<sup>78</sup>

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<sup>76</sup> Grace Lichtenstein, “Holtzman-Celler,” *New York Times* (21 June 1972): 29.

<sup>77</sup> Julian Zelizer, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences, 1948-200* (Cambridge: Cambridge University Press, 2007).

<sup>78</sup> Matt Stoller, *Goliath* (New York: Simon & Schuster, 2019), esp. 332-47.

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Beyond the paneled rooms in which Congressional hearings and antitrust enforcement played out, social movements coalescing around consumer, environmental, and civil rights, as well as opposition to the war in Vietnam, made the 1960s and 1970s a veritable trial by fire for big business. Activists directed a surge of anger against corporate power as a major obstacle to the equal citizenship on which democratic society must rely.

Some of the most intense criticism of concentrated corporate power emerged from the antiwar movement, which served as a cultural and organizational transmission belt for the proliferating social movements of the period. Widespread protests against defense contractors crested throughout the Vietnam War. During the Free Speech Movement at Berkeley in the early 1960s, protesters chanted “do not fold, spindle, or mutilate” to simultaneously critique IBM, the prominent defense contractor that processed their enrollment data, and to bemoan their reduction to the status of alienated punchcards in the technocratic machine that was Clark Kerr’s “multiversity.” At Berkeley and on other campuses of the Cal system, students put flame to punch cards and draft cards alike to communicate their rejection of the multiversity’s complicity in the war effort.<sup>79</sup> Campus criticism of universities’ entanglement with defense contracting sometimes turned violent, most memorably in the Dow Chemical riot on the campus of the

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<sup>79</sup> Steven Lubar, “‘Do Not Fold, Spindle or Mutilate’: A Cultural History of the Punch Card,” *Journal of American Culture* (Winter 1992): 43-55, card-burning referenced at 48.

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University of Wisconsin–Madison in 1967.<sup>80</sup> At that point Dow, the maker of Napalm, was drawing passionate protest across the many campuses where it sponsored research, including Berkely and Wayne State.

The machine that Berkeley activist Mario Savio urged his fellow protesters to stop by placing their “bodies upon the gears and upon the wheels” was the cartel-like complex in which research universities, defense-related agencies, and government contractors had combined. Yet this seemingly impregnable “Establishment” was too all-encompassing, its sins too varied, to provide the kind of coherent legal target that antimonopoly constituencies had attacked since Celler-Kefauver. Anti-war furies ran too hot, were too global, in their campaign against a system of endless war and informal empire, patriarchal violence and neocolonial domination, to content themselves with focused assaults on corporate concentration. The will to counteract militarism overflowed policy domains in a surfeit of participatory democracy that repudiated even the more progressive strand of Cold War liberalism that Celler and Kefauver had learned to practice. It also drew on profoundly anti-statist sensibilities that ultimately undermined faith in any systematic use of government power—whether to assault market power or geopolitical enemies.

Civil rights provided another salient along which the burgeoning social movements of the 1960s and 1970s could mobilize great political energy against corporate power. Following the passage of the Civil Rights Act and the creation of the Office of Economic Opportunity in 1964, African Americans sought to realize concrete gains from the campaign against segregation and

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<sup>80</sup> “76 Hurt in UW Rioting; Campus Strike Results,” *Wisconsin State Journal* (19 October 1967): 1;

discrimination. Title VII prohibited employment discrimination, exposing employers to unprecedented scrutiny of their personnel practices. Large firms soon discovered that their national scope, symbolic importance, and deep pockets made them targets of scrutiny. In the first decade of its existence the EEOC was overwhelmed by a flood of complaints that greatly exceeded expectations, rising from 9,000 to 77,000 per year.<sup>81</sup>

Black workers were the pioneers, building on the Northern Civil Rights Movement's long-term emphasis on social and economic rights as foundational to full citizenship. Through boycotts, union pressure, demonstrations, and formal complaints, black workers seized upon the opening provided by the equal opportunity law. Other groups suffering from workplace discrimination followed suit: women, Jewish- and Mexican-Americans, later Asian-Americans and the disabled.<sup>82</sup> As the decade wore on, black professionals and entrepreneurs pressed for greater access to corporate decision-making as an index of black empowerment. One such pioneer, Leon Sullivan of General Motors, succeeded in establishing a code of conduct for corporate involvement with firms and agencies in South Africa, leveraging social movement pressure into a visible form of "social responsibility."<sup>83</sup> Affirmative action, as initiated in the

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<sup>81</sup> Nancy MacLean, *Freedom Is Not Enough: The opening of the American Workplace* (New York: Russell Sage Foundation, 2006), 76.

<sup>82</sup> MacLean, *Freedom Is Not Enough*, Prologue and Chs. 1-3. See also John Skrentny, *The Minority Rights Revolution* (Cambridge: Harvard University Press, 2002) esp. Chs. 4 and 9.

<sup>83</sup> Jessica Levy, "Black Power in the Boardroom: Corporate America, the Sullivan Principles, and the Anti-Apartheid Struggle," *Enterprise & Society* 21.1 (March 2020): 170-209; Skrentny, *Minority Rights Revolution*, Ch. 5.

Johnson Administration and cemented under Nixon’s Philadelphia Plan, placed further pressure on corporate boardrooms by setting expectations for federal contractors.<sup>84</sup>

The EEOC and affirmative action did not eliminate occupational inequality. But employment rights did rock assumptions of corporate sovereignty, particularly when they were asserted through the rising tide of litigation that began in the 1960s. After the brief window offered by the Great Society had passed, Congress increasingly relied on private enforcement rather than expert-led agency authority to implement national policy. A generation of fresh-faced lawyers answered the call, making litigation an increasingly prominent avenue by which to realize employment rights, and effectively expand the state—as was also the case for private antitrust litigation.<sup>85</sup>

Women’s employment rights benefitted dramatically from the litigious turn, as women’s right organizations took aim at the workplace. Opportunities opened after Congress made the

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<sup>84</sup> Guian A. McKee, *The Problem of Jobs: Liberalism, Race, and Deindustrialization in Philadelphia* (Chicago: University of Chicago Press, 2008); Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: University of Chicago Press, 1996).

<sup>85</sup> Sarah Staszak, “Realizing the Rights Revolution: Litigation and the American State,” *Law & Social Inquiry* 38.1 (Winter 2013): 222-45. Charles Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press, 2009); Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton: Princeton University Press, 2010); Quinn Mulroy, “Public Regulation through Private Litigation: The Regulatory Power of Private Lawsuits and the American Bureaucracy” (PhD dissertation in Political Science, Columbia University, 2012); Mulroy, “Approaches to Enforcing the Rights Revolution: Private Civil Rights Litigation and the American Bureaucracy,” in *The Rights Revolution Revisited: Perspectives on the Role of Private Enforcement of Civil Rights in the U.S.*, ed. Lynda Dodd, Cambridge University Press (2018). On the flood-tide of private antitrust litigation, see Crane, *Institutional Structure of Antitrust Enforcement*, 49-67, esp. 53-6.



EEOC responsible for enforcing the 1963 Equal Pay Act, the Age Discrimination and Employment Act of 1967, and fair employment practices within the federal government. In the first half of the 1970s, NOW and a local coalition of feminist organizations undertook a massive campaign against the retail giant Sears to counteract its pattern of relegating women to the least remunerative and lowest-status jobs, helping to launch a lawsuit that exerted a minatory influence for years, despite its ultimately disappointing outcome in *EEOC v Sears* (1986).<sup>86</sup> The big successes didn't come until the 1980s. From his position in AFSCME, the pioneering lawyer Winn Newman urged women to "step up the pace of filing discrimination charges and litigating these cases." By 1979 AFSCME had founded the NCPE as a clearinghouse to foster efforts to establish pay equity for women. NCPE soon attracted over 100 members, and formed a litigation task force. By the 1980s AFSCME led the charge, taking on comparable worth cases and winning.<sup>87</sup>

If litigation over employment discrimination was a force to be reckoned with by corporate legal and personnel departments, it nonetheless did not challenge market concentration. Arguably, it posed a challenge that the largest firms with the greatest resources were best positioned to meet. Furthermore, by privatizing enforcement of public policy, it obscured the public goods framework within which antimonopoly measures were most effective.

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<sup>86</sup> Katherine Turk, "Out of the Revolution, into the Mainstream: Employment Activism in the NOW Sears Campaign and the Growing Pains of Liberal Feminism," *Journal of American History* 97.2 (September 2010): 399-423.

<sup>87</sup> Turk, *Equality on Trial: Gender and Rights in the Modern American Workplace* (Philadelphia: University of Pennsylvania Press, 2016), 104-118.

Finally, employment rights—whether secured through public measures like affirmative action or private remedies including litigation—served to reinforce their beneficiaries’ place within an existing corporate structure, rather than fundamentally reorganizing it to decentralize market power.

Civil rights were not the only quarter from which corporate interests faced profound political challenges. Consumer and environmental activism expanded dramatically in the political space directly adjacent to antimonopoly. From the dawn of the Kennedy administration to the close of the Carter administration, consumer advocates enjoyed considerable success, prompting Congress to pass over 30 new laws protecting consumer welfare and safety in a range of areas ranging from cigarette labeling and flammable fabrics to toxic substances and fair lending practices. They prompted established government agencies like the FDA and the FCC to adopt a more proactive stance, and fostered a wave of class action lawsuits and related litigation (particularly around product liability) that placed the onus on corporations for establishing limits to their liability. With the sensational publication of *Unsafe at Any Speed* in 1965, Ralph Nader became a standard-bearer of this resurgent consumer movement, directing trained legal inquiry and broad popular concern at corporate abuse of power in a wide range of industries. Within a few years he commanded a small army of young litigators recruited from the top ranks of elite law schools.<sup>88</sup>

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<sup>88</sup> For the definitive overview of consumer activism in this period, see Lizabeth Cohen, *A Consumer’s Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003), 345-87, esp. 357-61 (see Table 7 on 360) and 384-7.

Rachel Carson's *Silent Spring*, published in 1962, exerted a similarly catalyzing influence on organized groups that after WWII had shifted political concern from a more nationalist understanding of conservation to understandings of environmental protection that often prioritized concerns about quality of life and standard of living. With the creation of the Environmental Protection Agency in 1970, and the enactment of laws protecting air (1962, 1970) and water quality (1965, 1970), a wide array of groups—from traditional conservation, fish, game, wildlife, and recreation organizations, to more aggressive new entrants such as the Environmental Defense Fund, Environmental Action, and Greenpeace—exerted enormous pressure on large corporations. Thanks to the conglomerate merger movement, offending companies were increasingly likely to affect sister enterprises that would have had nothing to do with each other before they were acquired by a common corporate parent.

Like antitrust, consumer and environmental regulatory measures were designed to prevent the abuse of concentrated corporate power. But they did not strike at the root causes of concentration—namely, mergers—and they tended to have a fracturing effect on the myriad interest groups that formed around particular consumer items and public welfare concerns. Indeed, accentuating individual consumer benefit in ways that would feed directly into the Bork-led assault on more comprehensive understandings of market power. Furthermore, environmental organizations were heavily localized and specialized, with particular communities (e.g. Love Canal) and regions (such as the Pacific Northwest) cultivating strong but particularistic

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loyalties.<sup>89</sup> Concentrating public attention intensely on a particular dam, power station, chemical, endangered creature, or nature preserve, these movements succeeded in circumscribing corporations' power to operate as they saw fit, and brought substantial regulation of entire industries. But regulations are not incompatible with the concentration of corporate power. And after decades of well-funded pushback denouncing it as market-killing bureaucracy or even socialism, environmental protection fell prey to the ambient anti-statism that had animated the New Right from its inception.

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If postwar antimonopoly politics were robust, they also contained critical vulnerabilities that precipitated their subsequent decline. In keeping with broader trends in postwar politics and political economy, the interests of the consumer increasingly came to dominate center-left politics.<sup>90</sup> Indeed, they had inflected public support for antitrust since the earliest years of its golden age. A study of attitudes in 1949 revealed that most respondents approved of antitrust to the extent that it lowered prices—but that same criterion produced an acceptance of bigness, a majority (60 percent) opposition to splitting up the retailer A & P or breaking up big companies in general, and an even split over whether mergers, acquisitions, interlocking directorates, or

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<sup>89</sup> Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985* (Cambridge: Cambridge University Press, 1987).

<sup>90</sup> Lizabeth Cohen, *A Consumer's Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003); Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2007).

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sheer size should be circumscribed by government action.<sup>91</sup> This basic orientation among the voting public was in place and ready to be exploited decades before Bork made the consumer king of antitrust in 1978.<sup>92</sup> It eclipsed an older producerist outlook once prevalent among farmers, workers, and small businesses, whose intense focus on market power and fair competition had provided a coherent and forceful basis for political action. Yet it was in these years that producerist politics really lost their bite, as labor devolved into a Cold War variant of bread-and-butter unionism, while agribusiness swelled on a tide of crop subsidies, food relief, and preferential trade conditions sustained by foreign aid, multilateral agreements, and international institutions.<sup>93</sup>

The coalition sustaining antimonopoly measures had shifted. The mixed economy of WWII and the Cold War changed the terms on which small producers might pursue their economic independence. Once labor relations stabilized around a corporatist model during and after WWII, and the challenge of exporting “free labor” to anti-communist allies overshadowed shop-floor challenges at home, unions lost much of their incentive to tilt forcefully against combinations in restraint of trade. Not only were formerly militant unions politically purged by anticommunists and placated by the private welfare state built into their contracts, but they were

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<sup>91</sup>ORC, October 1949.

<sup>92</sup>Cf. Stoller, *Goliath*, e.g. 242-50.

<sup>93</sup>Nelson Lichtenstein, *Labor’s War at Home*; Lichtenstein, *The Most Dangerous Man in Detroit: Walter Reuther and the Fate of American Labor* (New York: Basic Books, 1995); Jennifer Klein, *For All These Rights: Business, Labor and the Shaping of America’s Public-Private Welfare State* (Princeton: Princeton University Press, 2010).

excluded from rapidly industrializing states that instituted hostile “right to work” laws. Crop subsidies and food aid had a similar effect on small farmers (particularly from the South and West), who had provided much of the base of the movement against monopoly since the days of populist revolt over half a century earlier. The rise of agribusiness made small and even medium-sized farmers an endangered species. As farmers and workers made their separate peace with the postwar political economy, still supporting antimonopoly in a general way but no longer really fighting for it, small businesses and consumers rose to the fore. But consumers were largely unconcerned about firms’ market power if it served to keep prices low and products proliferating. And small businesses only resented larger firms’ market power when it thwarted them—not when it generated preferential contracting agreements, or enabled a big buyout upon acquisition. Of particular significance, small businesses largely departed the folds of the center-left, alienated by the corporatism of the postwar labor-management social contract, and drawn to the center-right by anti-communist politics and mounting anti-regulatory sensibilities.

Only in the 1970s—with the collapse of the Bretton Woods system, spiking inflation coupled with persistent unemployment, and the crusade for deregulation—did the mixed economy finally become vulnerable to the critical onslaught waged by the Chicago School. That vulnerability resulted from diverging priorities within a liberal coalition whose political investments had come unyoked.<sup>94</sup> With market power displaced by a more straitened

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<sup>94</sup> See the “Janus-faced” model of the state developed by Ira Katznelson, “Rewriting the Epic of America,” in *Shaped by War and Trade: International Influences on American Political Development*, ed. Ira Katznelson and Martin Shefter (Princeton: Princeton University Press, 2002).

understanding of the harms of monopoly, even a resurgence of antitrust prosecutions such as happened in the late 1960s and 1970s could not preserve the vitality of antimonopoly politics. Labor, farmers, and small business had long since gone their own ways. As they disengaged the coalition, they took with them their focus on economic concentration as a direct threat to democratic market relationships. New constituencies, notably consumer rights and environmental organizations, offered conceptual and political resources for attacking corporate power, but prioritized its harms to consumers' pocketbooks and standard of living—problems that might be resolved without democratizing market power. Unfortunately, their focus on consumers' rights rather than market structure fed directly into the Chicago School's decisive reduction of antitrust to price minimization. Other potential constituencies, such as the rising number of black businesses and professional women, understandably devoted their political energies to civil rights and feminism, neither of which prioritized monopoly per se as a central concern. With the arrival of "Watergate Babies" to reform the committee system and revolutionize generational dynamics in Congress, standard-bearers like Emmanuel Celler and Wright Patman left the national legislature without any seasoned leadership in antimonopoly. The robust cadres of professional antitrust officials in the FTC and the DOJ would continue to pursue ambitious cases, notably against IBM and AT&T for another decade, but they did so while suspended above a political chasm that would swallow them when the Reagan administration adopted a radically new approach to antitrust.

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