

Module 2

History of Antitrust Thought

Antitrust enforcement arose in the U.S. at the turn of the 20th century as part of a political reaction to the growing wealth and power of industry and banks in the first Gilded Age. After a slow start, antitrust enforcement became more important in the 1930s, thanks in part to Thurman Arnold at the Department of Justice's Antitrust Division. Enforcement remained vigorous through the 1970s, as evidenced by cases like the AT&T breakup.

In the 1980s, however, conservative and anti-interventionist approaches associated with the Chicago school of law and economics substantially reduced antitrust enforcement. Chicago-school theorists and judges often argued that economic theory supported a lack of intervention. But these scholars rarely used the best available economic tools, instead relying on assumptions about markets' ability to self-correct. Yet even after mainstream economists discarded these assumptions (or had never used them in the first place), legal precedents and political lobbying kept them alive in the law.

The most recent intellectual movement in antitrust is the Neo-Brandesian school of thought. This movement stresses the political origins of the antitrust laws and advocates for enforcement that accounts for political and distributive concerns.

The history of antitrust law demonstrates that translating political motivations and economic knowledge into legal structures can be challenging. A key factor is that courts are bound by precedent, and jurisprudence moves very slowly. Thus, antitrust law can lag far behind the political forces, intellectual movements, and economic evidence shaping it.

Reading

Required Reading

Brandeis, Louis D., *The Regulation of Competition Versus the Regulation of Monopoly* (An address to the Economic Club of New York on November 1, 1912) (1912).

United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 164–65 (D.D.C. 1982) (section A2)

Naomi R. Lamoreaux, "The Problem of Bigness: From Standard Oil to Google," *Journal of Economic Perspectives* 33 (Summer 2019), 94–117.

Recommended Reading

Hovenkamp, Herbert and Scott Morton, Fiona M., *Framing the Chicago School of Antitrust Analysis* (June 9, 2020). U of Penn, Inst for Law & Econ Research Paper No. 19–44, University of Pennsylvania Law Review.

United States v. Addyston Pipe & Steel Co., 85 F. 271, 280–82 (6th Cir. 1898)

Background Reading

[Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 \(2020\).](#)

Naomi Lamoreux, *The Great Merger Movement in American Business, 1895–1904*, Cambridge University Press (1985).

Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*. New York, N.Y: Columbia Global Reports. 2018.

William E. Kovacic and Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, *Journal of Economic Perspectives*, Vol. 14, Issue 1 (Winter 2000), pp. 43–60.

Phillips Sawyer, Laura. "[U.S. Antitrust Law and Policy in Historical Perspective.](#)" Harvard Business School Working Paper, No. 19–110, May 2019. (Revised September 2019.)

Shelanski, Howard, Antitrust and Deregulation, *The Yale Law Journal*, Vol. 127, Issue 7 (May 2018), pp. 1922–1961.

Weber Waller, Spencer, The Antitrust Legacy of Thurman Arnold, *St-John's Law Review* (2004) 78:3 *St John's L. Rev.* 569.

John J. Flynn, The Reagan Administration's Antitrust Policy, " Original Intent " and the Legislative History of the Sherman Act, 33 *Antitrust Bull.* 259, 265–90 (1988).

Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, *The Hastings Law Journal*, Vol. 34, September 1982, pp. 65–151.

Gene M. Grassley, Thurman Arnold, Antitrust, and the New Deal, *The Business History Review*, vol. 38, no. 2 (1964), pp. 214–231.