Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?

BY WILLIAM E. KOVACIC

THE UNITED STATES STANDS AT THE threshold of a major realignment of its competition policy regime. How did this development, which seemed improbable only five years ago, come to pass? This Comment offers an initial explanation. It focuses on the shocks generated by an extraordinary body of recent commentary and related advocacy that depicts U.S. antitrust doctrine and policy since the late 1970s as derelict and demands a transformation of American competition policy.[1]

Transformation proponents have seized the momentum in debates about the U.S. regime. Their advocacy has shaped legislative reform proposals,[2] pushed public antitrust agencies to boost enforcement,[3] and pressured the Biden administration to appoint transformation advocates to high-level competition policy positions. On June 15, 2021, Lina Khan, one of the transformation movement's leading figures, was sworn in as Chair of the Federal Trade Commission.[4] Even if they achieved no further success, the transformation proponents have shown how advocates of sweeping policy reform can challenge a well-entrenched framework of ideas and implementing institutions.

This Comment considers the ascent of the transformation movement as a force in the U.S. antitrust regime. I situate the transformation movement among competing schools of contemporary antitrust thought before describing how the transformation movement gained influence. The Comment offers tentative thoughts about the transformation movement's future success in achieving a top-to-bottom overhaul of the U.S. antitrust system.

As a starting point, major implementation obstacles confront any attempt to reconstruct U.S. antitrust policy. In discussing how history can inform government policy, Richard Neustadt and Ernest May posed a simple test for implementation: "Will it stick?"[5] Making reforms stick requires the construction of what Graham Allison called "the path between preferred solution and the actual performance of government."[6] Neustadt and May found that misjudgments about public policy "are mostly in the realm of feasibility."[7] Forming a consensus to support basic change is a necessary foundation for transformation. The vital next step is to find the often-elusive implementation path that Allison described a half-century ago.[8] Inattention to implementation failures that have crippled earlier antitrust reform campaigns may be the transformation movement's greatest vulnerability.[9]

Two preliminary observations are in order. The first involves choosing a vocabulary to describe the contestants in today's policy debate. Some observers refer to transformation advocates as antitrust "hipsters"[10] or "populists."[11] Transformation proponents at times call themselves "New Brandeisians."[12] The terms used here try to convey more accurately the policy aims of each group in the modern debate. The term "transformation" expresses the movement's main ambition: what Sandeep Vaheesan has called a "root and branch reconstruction"[13] that aligns doctrine and policy with an egalitarian vision of citizen welfare and strives to dissolve monopoly power.

The second observation concerns perspective. I am not a neutral observer of the events described here. I was General Counsel at the Federal Trade Commission from 2001 to 2004, served on its board from 2006 to 2011, and chaired the agency from March 2008 to March 2009. These years fall within an era of federal antitrust enforcement that transformation advocates depict as abysmal, a characterization I reject. But my aim here is to explore how the transformation

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movement emerged and to ponder its future impact, not to assess the merits of its program.[14]

The Modern Competition Policy Debate

Three schools of thought dominate modern debates about the U.S. antitrust system. The descriptions here are simplifications. None of the schools is self-contained or single-minded. Indeed, expansionists and transformationalists share some policy preferences—e.g., that government antitrust agencies use their existing powers to police mergers and dominant firm conduct more aggressively. The antagonism between these two groups obscures the considerable extent of their common cause.

Traditionalists: Leave It Alone. One group of commentators opposes major changes to (much less, transformation of) U.S. antitrust policy. They are "traditionalists" in the following sense: they generally applaud the intervention skepticism of courts and enforcement agencies and support the application of an efficiency-oriented consumer welfare standard.[15] Traditionalists endorse a federal enforcement agenda that focuses mainly upon cartel agreements, large horizontal mergers, and government policies that impede new entry into markets. Traditionalists entertain some modest extensions of current legal doctrine and contemporary enforcement policy, but they insist that such adjustments rest upon widely accepted and empirically tested economic concepts.

Expansionists: Do More with the Existing Tools (and Add New Policy Instruments). A second school, referred to here as "expansionist," proposes significant extensions in competition policy, but it rejects the restoration of an egalitarian goals framework and broad application of structural remedies to deconcentrate the American economy.[16] Carl Shapiro describes the group's philosophy as "modern" in the sense that it seeks to expand enforcement based on "what antitrust scholars and practitioners have learned in recent decades and reflecting how the economy has evolved over time."[17]

Expansionists embrace a concept of consumer welfare that encompasses effects on prices, quality, and innovation, and also safeguards the well-being of workers by constraining the exercise of monopsony power by employers.[18] Expansionists contend that learning in industrial organization economics since the late 1970s dictates more activist antitrust policy.[19] For expansionists, existing antitrust doctrine, though too permissive, presents important untapped possibilities for useful intervention. Realization of these possibilities would employ creative applications of existing doctrine[20] and a recalibration of error cost analysis,[21] which to date has treated the hazards of intervening too much (for example, to control mergers and improper exclusion by dominant firms) as exceeding the costs of intervening too little. In an expansionist program, federal enforcement agencies should change their appetite for risk by bringing more cases in the courts, even if the cases might fail.[22]

Beyond urging antitrust agencies to do more with what they have, expansionists have endorsed legislative proposals to expand funding for the DOJ and the FTC; repudiate certain Supreme Court antitrust decisions; create presumptions of illegality for various mergers and forms of single-firm conduct; and authorize the adoption (perhaps by the FTC) of ex ante rules to control large information services platforms.[23]

Expansionists present their program as occupying a sensible, pro-enforcement middle ground between hyperactive transformationalists ("populists") and do-nothing (or do-little) traditionalists.[24] In this framing exercise, expansionists scorn a number of stringent rules (e.g., for merger control) that transformation advocates hold dear.[25] Some expansionists also deride transformationalists as "extremists"[26] and naïve in their assumptions about implications of transformation proposals to deconcentrate American industry.[27]

Transformation: Root and Branch Reconstruction. Transformation advocates endorse various elements of the expansionist agenda as necessary but not sufficient. They would, for example, argue for stronger application of existing enforcement tools, acceptance by enforcement agencies of a greater appetite for litigation risk, and repudiation of confining judicial precedents. Most important, the transformationalists insist upon restoring a citizen welfare goals framework that is true to the egalitarian aims of the original antitrust statutes[28] and is embraced in earlier Supreme Court decisions such as *Brown Shoe Co. v. United States*.[29] This is the defining characteristic of the transformation cause, the main distinction that separates the transformationalists from the expansionists.[30]

The reorientation of goals is the foundation for the transformationalist reform program. It includes intensified enforcement, with more use of structural remedies;[31] curtailment of advocacy and law enforcement efforts that challenge occupational licensure restrictions or attack efforts by low-income service providers to raise their fees;[32] renewed prosecution of Robinson-Patman Act cases;[33] and rulemaking to control large digital platforms.[34] To this end, transformationalists regard a steadfast commitment to the citizen welfare standard to be an indispensable requirement for candidates aspiring to lead the DOJ or the FTC.

Transformation advocates denounce the performance of the federal antitrust agencies since the late 1970s. They argue that the DOJ and the FTC have formed cozy relationships with the business community and its advisors and that some agency leaders have embraced an unduly diminished role for antitrust because they ultimately aspire to lucrative private sector posts.

Transformationalists widely assign blame for the decay of federal enforcement. More than any other target, transformation advocates berate the Obama antitrust agencies for promising a major expansion of enforcement and delivering little.[35] Thus, a reform bonfire is needed to scour the institutions, purge them of timidity, and restore an uncompromising commitment to bold enforcement.

Root and Branch Reconstruction: How the Transformationalists Ascended

As an Air Force pilot and policy analyst from the early 1950s through the early 1990s, John Boyd changed the way armed forces think about conflict and military strategy. Boyd developed a model of conflict that showed how military forces could prevail by assessing their adversaries' capabilities and using speed and maneuverability to bring their own strengths to bear upon their adversaries' vulnerabilities. Boyd distilled his approach into four steps known as the OODA Loop:

Observe existing conditions.
Orient the observed information within a context that accounts for past experience and the cultural values of the institutions that molded existing conditions.
Decide what strategy promises the greatest success.
Act with specific measures to carry out the strategy.

Each step takes place continuously and interactively. Newly observed information about changing conditions guides decisions about what to do next.[36]

Boyd's OODA Loop has influenced the analysis of conflict in domains beyond military affairs. With two caveats, the discussion below explains the ascent of the transformation movement using OODA concepts. First, the transformation movement is not a single-minded, centrally managed enterprise. Professional and personal relationships connect transformation advocates, but no agreed-upon comprehensive plan directs the actors. Second, John Boyd developed the OODA Loop to understand armed conflict, not to comprehend struggles over antitrust policy. The contexts assuredly differ, and there are other models an analyst could use to study the development of the transformation movement (e.g., the familiar story of how a new firm enters a market commanded by a dominant incumbent). The OODA Loop is a meaningful device here because its insights about conflict have applications to the conflict of ideas. Its concepts illuminate how the transformation movement has upset the antitrust status quo and help us to gauge the movement's prospects for enduring success.

Observation. Careful observation of surrounding conditions has informed the development of the transformation strategy. Since the early 2000s, the transformation program has grown out of close study, by researchers like Barry Lynn, of individual commercial sectors, and of the intellectual and institutional structures that support the public policy status quo.[37] The diligent stocktaking in the transformationalist scholarship displays several important characteristics.

Awareness of the Enduring Significance of Formative Ideas. In his study of U.S. jurisprudence, Neil Duxbury emphasized the staying power of ideas that have deep roots in the American experience: "Ideas—along with values, attitudes and beliefs—tend to emerge and decline, and sometimes they are revived and refined. But rarely do we see them born or die. History is not quite like that."[38]

Duxbury's interpretation pointed to a key phenomenon in American antitrust policy. In some periods after 1890, judicial doctrine and enforcement policy have reflected a broadly egalitarian vision. By the early 2000s, when the first transformation-oriented scholarship appeared, there was a general consensus among academics, enforcement officials, judges, and practitioners that consumer welfare had displaced, perhaps permanently, the egalitarian vision.[39]

Transformation advocates correctly perceived that although the egalitarian vision of U.S. antitrust law fell out of favor after the late 1970s, it never "died." Its revival awaited the reemergence of conditions that previously had fostered expansive application of egalitarian principles in the U.S. system, notably: sustained relaxation of antitrust enforcement (especially involving existing dominant firms and tight oligopolies); development of a literature that challenged the prevailing intellectual foundations for enforcement permissiveness and documented harmful economic, social, and political effects of inadequate antitrust policy; and external economic shocks that discredited existing public policy and spurred demands for stronger government intervention.[40]

The Power of Historical Narratives. Transformation advocates recognized that perceptions of the past can mold antitrust policy in the present. They saw how, in *The Antitrust Paradox*, Robert Bork supported his consumer welfare goals framework with an influential (and much disputed) interpretation of the origins of the antitrust laws.[41] Transformation advocates have developed their own historical narratives that emphasize the egalitarian roots of American antitrust law (and other antimonopoly policies) and celebrate its role in promoting economic progress and preserving democracy.

Understanding of Conditions that Enable Policy Upheaval. The transformationalists have produced several strands of scholarship relating to the conditions that enable fundamental reforms. One strand recounts the relaxation of antitrust enforcement and judicial adoption after the mid-1970s of permissive standards governing mergers and dominant firm exclusionary conduct. A second strand presents sector-specific case studies that link the weakening of antitrust oversight to increased concentration, the growing vulnerability of supply chains to disruption, and faltering economic performance. A third strand examines the causes and consequences of the Global Financial Crisis (GFC) that began in 2007–2008. Transformation advocates realized that the GFC, by inflicting economic misery on millions of Americans and revealing the blunders of business executives and their government regulators, made U.S. economic regulation (and antitrust policy) ripe for rethinking.[42] Transformation advocates understood that the GFC and its dire economic aftermath created (and still sustain) a combustible social and political atmosphere in which dramatic reforms might flourish.[43]

Fortress: The Antitrust Establishment. Transformation advocates have studied the community of interests that oppose, or likely will resist, root and branch reconstruction of the U.S. antitrust system. David Dayen has described one formidable obstacle:

> The antitrust apparatus—in government, in academia, in the establishment—has built a fortress around itself, a cloistered world where nothing is inherently wrong with the economy, where there's been no rampant inequality, stunting of innovation, degradation of quality of service, or concentration of political power, and where there aren't even any monopolies around that could have possibly instigated such bad outcomes.[44]

In a recent interview, Tommaso Valletti, the former chief economist of the European Commission's Directorate-General for Competition, described how unhealthy customs and behaviors connect the establishment's constituencies and impair effective antitrust enforcement.[45] Amorality permeates the establishment, whose mercenary culture is nurtured by a fast-spinning revolving door that moves economists and lawyers in and out of government.[46] Companies engage economic consultancies, law firms, and academics to construct clever but contrived justifications for dodgy mergers and shabby business practices. In Valletti's words, the external advisors "will do anything for money."[47]

From the perspective of transformation advocates, the establishment fortress is reinforced by traditionalists and expansionists. Though they disagree vigorously about the enforcement implications of industrial organization economics, the traditionalists and expansionists share a commitment to anchor antitrust in microeconomic policy analysis, and they oppose the restoration of an egalitarian goals framework.

The transformation movement at first saw the traditionalists as their chief adversary in the establishment fortress. Transformation movement historical narratives initially focused their scorn on two architects of traditionalism: Robert Bork and Ronald Reagan.[48] More recently, transformationalist commentators have treated the expansionists as a barrier to reconstruction because expansionists deride the egalitarian goals framework as misguided populism.[49] Transformation advocates today attack expansionists as curators of inadequate federal enforcement during the Obama administration; as captives of private consulting interests; and as proponents of complex, expensive analytical techniques that enrich consulting economists, with little improvement in antitrust analysis (especially compared to the application of simple structural rules).[50] In the future, transformation advocates still might join expansionists to support certain legislative reforms. For the moment, antagonism between the expansionists and transformationalists is acute.

Orientation: Using Observed Phenomena to Develop a Strategy. Transformation advocates have developed a strategy that shrewdly applies lessons derived from the observation of existing conditions. The transformation strategy has the following main elements.

Annihilate Status Quo Policies and Their Adherents. To clear the path toward sweeping reforms, the transformation movement has strived to annihilate the policy status quo. Transformationalists portray the U.S. antitrust system since the late 1970s as a catastrophe. If legislators perceived the status quo to have important redeeming features, they might approve a more cautious remodeling. Abject failure is the only characterization that justifies absolute demolition and reconstruction.

Earlier advocates of dramatic antitrust reforms have used the annihilation strategy. Notable examples include the 1969 American Bar Association study of the FTC;[51] congressional justifications for measures considered from 1979–1981 (and, in some instances, enacted in 1980) to curtail the Commission's powers;[52] and Robert Bork's call in 1978 in *The Antitrust Paradox* for a fundamental redirection of U.S. antitrust policy.[53]

Antitrust annihilation narratives often go beyond a mere recitation of policy failures. Many such narratives depict the actors (individual leaders and institutions) as deranged, incompetent, or ethically compromised.[54] As the 1970s drew to a close, legislators said the FTC had not simply made mistakes; it was "a rogue agency gone insane."[55] Robert Bork asserted that from the late 1930s through the 1970s, DOJ and FTC officials were megalomaniacs, chasing power for its own sake without regard for the public interest.[56] Transformation commentary since 2000 has described federal antitrust agency personnel as "lunatics"[57] and saboteurs[58] and maligned them with the innuendo of moral delinquency.[59] The older and newer annihilation narratives have a common theme: terrible policies were generated by reprehensible institutions controlled by bad people.

Transformation advocates appear to regard annihilation as necessary to discredit the status quo and clear the path for reconstruction. The transformation literature portrays federal antitrust doctrine and enforcement from the late 1970s forward, with a few grudging exceptions, as a wasteland. In the typical transformation narrative, the courts and the federal enforcement agencies abandoned meaningful controls on mergers and allowed dominant firms and oligopolies to impose their will upon sector after sector. Rather than forestall or eliminate monopoly power, the DOJ and FTC used their resources to crush efforts by poorly paid service providers to achieve just compensation and to strip away regulatory measures, at the national and state levels, designed to ensure fair wages for workers and to safeguard public health and safety. For transformationalists, the gravest default occurred between 2000 and 2020, when the modern Tech Giants exploited feeble oversight of mergers and exclusionary conduct to attain unassailable power.

Transformationalists detest Robert Bork, but they emulate his argumentation methods: they buttress reform proposals

with intriguing but often debatable interpretations of antitrust history, and they savage the individuals responsible for disfavored policies, sometimes accusing those who led the federal agencies during periods they perceived as marked by inadequate enforcement as corrupt.[60] Transformation commentators do not attribute policy failure to anonymous officials;[61] they name their targets. Frequent objects of hostile transformation commentary are leading expansionist figures perceived to be adversaries. Transformation advocates single out expansionists for their failings in government service and condemn their consulting engagements on behalf of large companies.[62] By going for the throats of their opponents (expansionists and traditionalists, alike), the transformation movement has accomplished, for the moment, an important OODA Loop goal: disorient adversaries with boldness and surprise and unnerve them with ferocious, fearless assaults.

The annihilation strategy has gained force because the antitrust establishment underestimated the transformationalists. Five years or so ago, traditionalists and expansionists tended to write transformationalists off as interesting but inconsequential. Lina Khan, whose student law review paper in 2017[63] quickly became a transformation manifesto, was dismissed by traditionalists and expansionists as a mere curiosity. As Khan drew closer to joining the FTC, her critics (especially expansionists) disparaged her in terms that arguably reflected anxiety about the rise of a formidable activist outsider who, it turns out, not only gained a seat on the agency's board but became its Chair, as well.[64] The antitrust establishment never saw it coming.[65]

Righteousness: Claiming the High Moral Ground. Transformation movement commentary often juxtaposes its virtue and purity of motive against the establishment's compromised values. Righteousness arguably is essential to any movement seeking to demolish and reconstruct the policy status quo. Without a sense of superior virtue, how could advocates of transformation in antitrust or other policy domains summon the fortitude to take on daunting (maybe unsurmountable) opposition? As the difficulty of the reform endeavor grows, the advocate must draw upon a deeply held conviction that the cause is not merely wise but also just. Thus, some righteousness may be necessary to inspire commitment and perseverance.[66]

Today's antitrust transformation advocates seek to establish a culture of ethical decision making to replace the "corrupt" and amoral culture that allowed antitrust enforcement to disintegrate after 1980. The take-no-prisoners denunciation of opponents, especially in media such as Twitter, partly reflects the moral dimension of the transformationalist point of view. Another morally infused component of the annihilation narrative is the demand that the Biden administration, in making leadership appointments to the DOJ and the FTC, nominate no individual who: (a) had a key government antitrust role during the wasteland era (especially after 2000); or (b) has acted for dominant firms—especially tech giants—as an academic or as a member of a law firm or economic consultancy.[67] Transformation commentators have mounted a relentless campaign against such individuals on the ground that their judgment and motives cannot be trusted. This campaign seems to have succeeded in driving some candidates for high office out of consideration and casting a shadow over others.

Bypassing the Establishment Fortress. A key aim of the OODA Loop is to guide decision makers to deploy their greatest strengths against the opponent's weaknesses. The framework disfavors direct assaults on an opponent's main strengths. The transformation strategy is consistent with this approach in its effort to bypass and envelop the antitrust establishment and its institutions. The bypass strategy created a new community of scholars, practitioners, legislators, public officials, and journalists to promote the transformation vision and supplant the incumbent community that supported, or acquiesced in, the status quo.

The new transformationalist community has several pillars:

Academic hubs (e.g., the Stigler Center at the University of Chicago's Booth School of Business) that support research sympathetic to transformation aims, convene events that showcase transformation scholarship, and develop short courses on transformation topics.[68]

Networks of scholars doing research that undermines assumptions of existing doctrine and policy and supports the basic overhaul of the antitrust system. Many younger scholars doing work on competition policy are writing papers[69] that provide support for the transformation program.[70]

Journalists in mainstream publications, such as the *Financial Times*, who have authored critiques of light-handed economic regulation and recommended more powerful government intervention.[71]

New venues for news gathering, reporting, and publishing, such as The American Prospect, The Revolving Door Project, The Intercept, and Substack.

Legislators who have made anti-monopoly issues a priority. Perhaps the most important example is Congressman David Cicilline, Chair of the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law. Cicilline hired Lina Khan to help organize the subcommittee's influential series of hearings on competition and Big Tech.[72] Her presence provided a valuable way to set the policy agenda and inject transformation views directly into the mainstream of discussion.

Think tanks and advocacy groups, such as the Open Markets Institute, the American Economic Liberties Project, the Balanced Economy Project, the Revolving Door Project, all of which endorse transformationalist proposals and prepare reports, issue commentary on current developments, and organize events.

Decide: Decentralized Decision Making. There is no central mechanism that takes decisions on behalf of individuals

and institutions who support the transformation movement. Decisions about what to do and when to do it are made by individual commentators and organizations. Decentralization gives the movement's participants flexibility to exercise initiative and respond quickly to developments. Subnetworks of academics and other commentators have formed to address specific issues important to the transformation program.[73] Although operating without a central hierarchy, transformationalists have built relationships that provide some degree of coherence by creating a common understanding of objectives and the means to achieve them.[74]

Act. Transformation proponents have used various means to execute their program. Most impressive is the mastery of social media. Twitter, in particular, has supplied a formidable distribution network for transformation ideas—to popularize articles, papers, and books; to announce appearances at conferences, podcasts, and webinars; and to shape the interpretation of events.

Speed is vital to the OODA framework. In a conflict over ideas, the skillful use of Twitter can provide the high level of adaptability and mobility that keeps the user several steps ahead of rivals. Transformation advocates recognized early on that Twitter is a powerful device for building and supporting the emerging transformation community. Just as important, Twitter helps transformation commentators attack opponents rapidly and forcefully—challenging their arguments and, frequently, questioning their motives. In the OODA framework, swift and highly adaptive responses can disorient, intimidate, and dispirit adversaries.

Root and Branch Transformation: Future Prospects

The transformation movement has reshaped modern discourse about U.S. antitrust policy and helped inspire a larger global reconsideration of the aims and means of competition policy. In the United States, the portrayal of a system that foolishly abandoned its egalitarian roots, damaged the economy, and undermined the nation's democratic institutions has achieved remarkable popular and political salience. This is an exceptional achievement in policy advocacy. It did not happen by accident.

To paraphrase Richard Neustadt and Ernest May, will the transformation movement stick? For the most part, the discussion here does not address the outcome of future deliberations in Congress that will determine the extent of antitrust reform. For example, will Congress expand Sherman and Clayton Act prohibitions on mergers and dominant firm exclusionary behavior, or will Republicans provide needed votes only to subject large digital platforms to tougher controls? Nor does the discussion speculate about whether the Biden administration will make additional appointments (beyond Lina Khan to the FTC and Tim Wu to the White House) of transformation proponents to public agencies. The discussion focuses on whether the transformation movement will continue to progress in creating conditions that facilitate fundamental change.

Conditions that May Foster Enduring Influence. Several factors predict that the transformation movement will have staying power. One is the creation of a large, expanding intellectual infrastructure. The narrowing of U.S. antitrust enforcement that took place from the late 1970s onward drew support from extensive commentary that criticized doctrinal and institutional pillars of the system's expansion from the late 1930s to the early 1970s. The flow of antitrust commentary today runs strongly in the other direction. Much literature embraces transformation viewpoints regarding the goals and substance of competition policy. Among more junior academics, those who advocate transformation, or embrace many of its core tenets, are a rising force. By contrast, the cohort of traditionalist commentators who drove retrenchment since the late 1970s, are older, fewer in number, and, perhaps, weary.

The development of a strong, pro-transformation intellectual infrastructure will help place transformation themes in the forefront of debate about competition policy for years to come. Several issues elevated by transformation advocates likely will remain focal points for attention, including:

- Restoration of the egalitarian vision of antitrust policy.
- Safeguards against capture of public antitrust agencies by business interests.
- Criteria for appointing antitrust agency leadership.
- Standards for measuring the performance of the antitrust system.
- Optimal mix of law enforcement, research, advocacy, and rulemaking to formulate policy.
- Disclosure of funding that supports work by academic researchers, advocacy groups, and think tanks.
- Impact of the revolving door on antitrust agency policy.
- Openness of existing antitrust institutions (e.g., professional societies) to contrarian perspectives that challenge prevailing assumptions.

Another enduring impact of the transformation movement is to increase the attention going forward, by antitrust agencies and by research institutions, to evaluate the effects of past antitrust policy decisions. Transformation advocates make strong claims about antitrust failures since the late 1970s. They argue that the agencies brought too few cases, brought the wrong cases, and/or resolved cases with ineffective remedies. They then point to the positive effects of strong competition policy intervention before and after the adoption of antitrust laws in the late 19th century. One imagines that the scrutiny of experience with antitrust enforcement and other competition policy tools will intensify.

The study of past policy outcomes likely will be one aspect of a deeper, continuing examination of the history of U.S. competition policy. The transformation movement has built its proposals for root and branch reconstruction substantially on historical narratives. This contribution probably could induce policymakers and researchers to devote more attention to the evolution of competition policy over

time, to test the interpretation offered by the transformation scholarship, and to examine unexplored, potentially informative features of earlier programs. We may see the development of better data sets on government enforcement activity and the creation of better data reporting methodologies to facilitate analysis of trends across eras.[75]

Conditions that May Limit Enduring Influence. A number of circumstances may limit the lasting impact of the transformation movement and impede a root and branch reconstruction of U.S. policy. The presence of these obstacles does not diminish the effect the transformation movement already has achieved. The discussion below highlights four conditions that could obstruct the full realization of the transformation vision.

In discussing the use of history by antitrust scholars, Daniel Ernst has warned against the tendency of researchers to search for "a useable past."[76] Ernst feared that historically oriented antitrust scholarship too often resembled advocacy that selects supporting historical precedents and omits important context. A history of an event or period need not be comprehensive to be informative. Problems arise when the narrator's simplifications seriously reduce accuracy and reliability.

The transformation commentary often invites the reader to revisit basic assumptions and beliefs about the American antitrust system. This commentary has performed a valuable service by bringing new information (some based on study of little-known original source materials) and fresh interpretations to the debate. At times, however, the transformationalist invocation of history resembles brief-writing that can diminish understanding. Here are two examples.

The Golden Age of Antitrust. Transformation scholars tend to portray the period before roughly 1980 as an era in which the antitrust system performed effectively and fostered robust economic growth and technological dynamism.[77] Some transformation commentators set the start of the Golden Age in the late 1930s or early 1940s,[78] though others extend its beginning to the early 1900s.[79]

In the literature produced in the Sherman Act's first century, it is difficult to find pro-antitrust commentators who thought they were living in a Golden Age of enforcement. A gloomy narrative of unfulfilled promise and dashed hopes dominates contemporary writing by antitrust enthusiasts.[80] A prominent, continuing theme of disappointment, up through the 1960s and into the 1970s, is that the antitrust system had failed to correct a dangerous condition that was sapping the economy of needed vitality: persistent and rising economic concentration.[81] The modern transformation literature hails this era of antitrust policy. How would today's transformation advocates have scored the system's performance at the time? For example, would they have joined the chorus of disappointed observers who damned the DOJ for its settlement in 1956 of the monopolization case against American Telephone & Telegraph—a result held out today as a foundation for the digital era but berated at the time as a craven, politically inspired capitulation?[82] One imagines that today's transformation advocates would have called the 1956 settlement a failure because the DOJ did not achieve the divestiture of Western Electric from AT&T, the remedy that motivated the DOJ to bring the case in 1949.

Bork and the Chicago School. In the typical transformation narrative, the Golden Age comes to an end in the 1970s because Robert Bork and the Chicago School convince courts and enforcement agencies to reject the egalitarian vision in favor of the consumer welfare standard.[83] With important exceptions, transformation commentators do not acknowledge the influence of Harvard scholars such as Phillip Areeda and Donald Turner in promoting abandonment of an egalitarian goals framework.[84] Most transformation scholars do not mention the role of Ralph Nader in the early 1970s in advocating that "consumer welfare" receive greater attention in regulatory policymaking.[85]

These omissions in transformationalist historical narratives are significant for contemporary policymaking. The Golden Age narrative arguably exaggerates the success and effectiveness of antitrust policy as a stimulus for economic growth and innovation and creates unsupportable expectations about what bolder antitrust enforcement might accomplish today. The "Bork and Chicago did it" account of policy since the mid-1970s overlooks the Harvard school's criticism of the egalitarian goals framework: that its multiple, internally conflicting objectives rendered the routine adjudication of cases impossible for courts to administer in a principled, coherent manner. This perspective lives on the courts, and vanquishing Bork will not make it disappear. An enforcement strategy that comes to grips with distinctive Harvard School concerns about administrability (and the consequences of private rights of action) stands a greater chance of success, even before federal courts containing numerous antitrust skeptics.[86]

A second impediment to the realization of the transformation vision is the use of the annihilation strategy to discredit the status quo and clear the path for sweeping reforms. If American antitrust enforcement and related regulatory policy have been a wasteland since the late 1970s, there presumably is little purpose in studying that period to identify projects or implementation techniques worth replicating. A wasteland is, by definition, barren. Annihilation has no room for nuance or thoughtful discernment. In antitrust policy, its application overlooks valuable lessons that could be derived from useful initiatives that the federal agencies carried out in eras condemned as useless.[87] To overcome the formidable doctrinal obstacles that lie before them in the courts, the antitrust agencies will need all the help they can get, including insights gained from the study of agency successes from the late 1970s to the present.

One also might ask why existing antitrust agency staff, who are aware of the faults (in some instances, the dishonesty) of the annihilation narrative, should have confidence in new leadership that portrays their past efforts as

bankrupt? The career professional staff knows better, and their efforts will be vital to the success of a reconstruction program. Other audiences also may respond to the annihilation narrative in ways that harm the reform cause. Why should courts in future cases defer to agencies that claim to be advancing sound policy positions at the moment, but have been depicted as being prone to grave, sustained lapses in judgment?[88]

A third obstacle to future success is a consequence of righteousness. A sense of moral superiority may be an essential catalyst for the commitment to pursue fundamental reforms in the face of massive opposition. If the righteousness dosage is uncontrolled, harmful side effects are possible. Consider the demand that candidates for antitrust agency leadership positions have no significant past or current role in advising large corporate defendants. So restrictive a standard can exclude individuals whose professional experience enabled them to serve the nation's best interests with distinction (and in many ways consistent with transformation policy goals). If the representation of large corporate interests categorically disqualified prospective candidates, Louis Brandeis, an inspirational figure for many transformation advocates, and Miles Kirkpatrick, a leader of the FTC's renaissance in the early 1970s, might fail the test.[89] A purist also might have opposed the appointment of Thurman Arnold to head the DOJ Antitrust Division in the 1930s after reading Arnold's academic writings, which appeared to ridicule the antitrust system as a charade.[90]

A fourth obstacle to success is to underestimate the institutional and political prerequisites for enduring policy reform. Here there is great value in studying the experience of the FTC from 1969 to 1980. The Commission undertook an extraordinary collection of competition and consumer protection initiatives that, in many ways, sought to fulfill core aims of the modern transformationalist vision for the agency. The agency achieved some success, including lasting, positive contributions to competition and consumer protection policy. Yet much of the agency's ambitious agenda collapsed. The Commission's grief stemmed significantly from a grave mismatch between its policy commitments and the skills of its management and staff,[91] and from its failure to anticipate how a powerful program of intervention ultimately would elicit crippling political backlash.[92] Transformation advocates will have to come to grips with this history to take measures to ensure that a new program of reconstruction avoids the same fate.

Conclusion

Advocates of the root and branch reconstruction of the U.S. antitrust system have changed the policy debate. Years from now, students of policy advocacy will study how advocates of transformation challenged a deeply entrenched status quo, inspired a basic re-examination of the proper aims of antitrust policy, and pushed the system toward a bolder program of intervention. This is a striking achievement, accomplished through the creation of a new community of commentators who bypassed the antitrust establishment. The transformation policy agenda promises to anchor discussions about antitrust policy for years to come.

Will the transformation movement restore the primacy of egalitarian values and mobilize sustained efforts to deconcentrate American commerce? The transformationalists have relied heavily upon a reinterpretation of American's competition policy history. To my mind, further study of that history arguably is necessary for transformation advocates to see more clearly the obstacles that lie before them and find ways to overcome them.

[1] Notable books include David Dayen, Monopolized—Life in the Age of Corporate Power (2020) [hereinafter Dayen, Monopolized); Thom Hartmann, The Hidden History of Monopolies (2020); Sally Hubbard, Monopolies Suck—7 Ways Big Corporations Rule Your Life and How to Take Back Control (2020); Barry C. Lynn, Liberty from All Masters—The New American Autocracy vs. the Will of the People (2020); Michelle Meagher, Competition Is Killing Us (2020); Zephyr Teachout, Break 'Em Up—Recovering Our Freedom from Big AG, Big Tech, and Big Money (2020); Matt Stoller, Goliath—The 100-Year War Between Monopoly Power and Democracy (2019) [hereinafter Stoller, Goliath]; Jonathan Tepper & Denise Hearn, The Myth of Capitalism—Monopolies and the Death of Competition (2019); Tim Wu, The Curse of Bigness—Antitrust in the New Gilded Age (2018).

[2] Subcomm. on Antitrust, Commercial & Administrative Law, House Comm. on the Judiciary, Majority Staff Report, *Investigation of Competition in Digital Markets* (2020) [hereinafter *House Judiciary Report*]; Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, Wash. Post (June 24, 2021), https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/.

[3] Since October 2020, the Department of Justice and the state attorneys general have filed a total of three monopolization cases against Google. In the same period, the FTC and a group of states led by New York filed monopolization cases against Facebook. In May 2021, the District of Columbia filed an antitrust case against Amazon. On June 27, 2021, a federal district court dismissed the FTC and New York complaints against Facebook. Cat Zakrzewski & Rachel Lerman, *Court Says FTC Wasn't Provided Evidence Facebook Is a Monopoly, Dismisses Lawsuit*, Wash. Post (June 28, 2021), https://washingtonpost.com/technology/2021/06/28/ftc-facebook-antitrust-complaint-dismissed/.

[4] In March 2021, President Biden nominated Lina Khan to be a member of the FTC. Following her confirmation by the Senate on June 15, Khan was designated by President Biden as Chair. President Biden also has placed Tim Wu, Professor Khan's colleague on the Columbia Law School faculty, on the National Economic Council to serve as Special Assistant to the President for Technology and Competition Policy.

[5] Richard E. Neustadt & Ernest R. May, Thinking in Time 270 (1986).

[6] Graham T. Allison, Essence of Decision: Explaining the Cuban Missile Crisis 268 (1971).

[7] Neustadt & May, *supra* note 5, at 270.

[8] *See also* Eric M. Patashnik, Reforms at Risk—What Happens After Major Policy Changes Are Enacted 3 (2008) ("General interest reforms are frequently adopted with great fanfare, but their success simply cannot be taken for granted. . . . Indeed, sustaining reforms against the threats of reversal and erosion may be even tougher than winning the reforms' adoption in the first place.").

[9] Alison Jones & William E. Kovacic, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 Antitrust Bull. 227 (2020) [hereinafter Jones & Kovacic, *Implementation Blind Side*]; Alison Jones & William E. Kovacic, *The Institutions of Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition*

Policy Reforms (June 4, 2020) [hereinafter Jones & Kovacic, *Institutions*), https://ssrn.com/abstract=3619095; William E. Kovacic, *"Competition Policy in Its Broadest Sense:" Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977–1981*, 60 Wm. & Mary L. Rev. 1269 (2019) [Kovacic, *Broadest Sense*].

[10] Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293 (2019).

[11] Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, *supra* this issue, at 33 [hereinafter Shapiro, *How to Fix It*].

[12] Lina M. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. European Competition L. & Practice 131 (2018).

[13] Sandeep Vaheesan, *How Robert Bork Fathered the Gilded Age*, Promarket Blog (Sept. 5, 2019), https://promarketblog.org/how-robert-bork-fathered-the-new-gilded-age/ ("Antitrust needs root and branch reconstruction").

[14] In describing how the transformation movement emerged, I have benefited greatly from recent work in which major figures in the movement have recounted the movement's origins, particularly Lynn, Liberty from All Masters, *supra* note 1, and Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655 (2020) [hereinafter Khan, *History Revisited*].

[15] Wright et al., *supra* note 10.

[16] Representative statements of the expansionists' reform program include Center for Equitable Growth, *Restoring Competition in the United States* (Nov. 2020) [hereinafter *Restoring Competition*], https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states; Jonathan B. Baker, The Antitrust Paradigm (2019) [hereinafter Baker, Paradigm]; Collection, *Unlocking Antitrust Enforcement*, 127 Yale L.J. 710 (2018); Shapiro, *How to Fix It*, *supra* note 11.

[17] Shapiro, *How to Fix It*, *supra* note 11.

[18] *Id.*

[19] Baker, Paradigm, *supra* note 16; Shapiro, *How to Fix It*, *supra* note 11.

[20] See *Unlocking Antitrust Enforcement*, *supra* note 16.

[21] Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 8 (2015).

[22] Center for Equitable Growth, *Restoring Competition*, *supra* note 16. Some expansionists also have indicated that enforcement could be focused on matters that are likely to result in the greatest inequality, given the link between market power and widening economic inequality, Jonathan B. Baker, *Market Power in the U.S. Economy Today*, Wash. Ctr. Equitable Growth (Mar. 20, 2017).

[23] Center for Equitable Growth, *Restoring Competition*, *supra* note 16; Stigler Center Committee on Digital Platforms, *Digital Platforms: Final Report* (2019).

[24] Shapiro, *How to Fix It*, *supra* note 11.

[25] *Id.*

[26] See Brendan Bordelon, *Can Lina Khan Fix the FTC?*, Nat'l J. (June 12, 2021) (in discussion of Lina Khan's appointment to the FTC, quoting Herbert Hovenkamp: "Putting more extremists on the Commission is not the way to do better."), https://www.nationaljournal.com/s/713429/can-lina-khan-fix-the-ftc/.

[27] See Bordelon, *supra* note 26 (quoting Fiona Scott Morton: "Lina Khan may advocate for breakups as a [FTC] commissioner, but what's the authority under which you do this? The FTC can't just announce that they'd like to break up some corporation. Having radical ideas is fun, but it's not what the day job is going to be in terms of bringing cases and voting on cases and winning cases.").

[28] *See, e.g., House Judiciary Report*, *supra* note 2, at 392 (Recommending that Congress restate "the original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not just consumers but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.")

[29] 370 U.S. 294, 315–23, 322 n.38 (1961).

[30] Khan, *History Revisited*, *supra* note 14; Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J. Forum (June 4, 2018).

[31] *See, e.g.*, Wu, *supra* note 1, at 127–39; Teachout, *supra* note 1, at 6–7, 213–18.

[32] *See, e.g.,* Vaheesan, *supra* note 13.

[33] *See* Stoller, Goliath, *supra* note 1. The federal antitrust agencies have not brought a Robinson-Patman Act case since 2000. D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064 (2015).

[34] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 1357 (2020).

[35] *See, e.g.*, American Economic Liberties Project, *The Courage to Learn—A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach* (Jan. 2021), https://www.economicliberties.us/up-content/uploads/2021/01/Courage-to-Learn-final.pdf.

[36] Boyd's career and contributions to military strategy are recounted in Robert Coram, Boyd—The Fighter Pilot Who Changed the Art of War (2002).

[37] For shorter informative accounts, see John M. Newman, *Reactionary Antitrust*, Concurrences Rev., No. 4 (2019), https://ssrn.com/sole/cf_dev/AbsByAuth.cfm?per_id=1639655; Luke Mullins, *The New Trustbusters*, Washingtonian 65 (Sept. 2019); for a more complete treatment, see Lynn, *supra* note 1.

[38] Neil Duxbury, Patterns of American Jurisprudence 2–3 (1995).

[39] The prevailing consensus is described skillfully in Khan, *History Revisited*, *supra* note 14.

[40] These enabling conditions are described in William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L. Rev. 1105, 1149–50 (1989).

[41] Robert H. Bork, The Antitrust Paradox—A Policy at War with Itself 50–89 (1978).

[42] The Transformation movement reform literature drew upon a new scholarship that documented how the GFC had accentuated income inequality in many nations. A landmark in this literature is Thomas Piketty, Capital in the Twenty-First Century (2014).

[43] *See* Jason Cowley, *The Left Are Now More Forgiving of Ed Miliband—But Many of His Fellow MPs Are Furious with Him*, New Statesman 9 (Sept. 14–20, 2018) ("Ten years on from the crash, the consequences of the financial crisis are still working themselves out, still yet to be fully understood.").

[44] Dayen, Monopolized, *supra* note 1, at 285.

[45] *The European System of Monopoly . . . and How to Fix It,* The Counterbalance (Apr. 20, 2021 (interview with Tommaso Valletti) [hereinafter *Valletti Interview*], https://thecounterbalance.substack.com/p/the-european-system-of-monopoly.

[46] *See also* Asher Schechter, *The Antitrust Doctrine We've Seen over the Last 40 Years Simply Does Not Match the Lived Experience of People,* Promarket (Aug. 27, 2020) (interview with David Dayen: "You see not just the same people come up again and again but the same institutions. One law firm, Arnold & Porter, produced almost all of the major officials at the Federal Trade Commission and the antitrust division of the Justice Department. Two consulting firms produced almost all the chief economists. This is a very cloistered group. They learn the same things, they share the same experiences. You cannot step outside that very narrow range that has been set up for the last 40 years without taking scorn from your colleagues and associates. If you want to advance and gain more power, better jobs, and more access, you're going to go along with the dominant paradigm. Intellectual capture is a great way of describing that."), https://promarket.org/2020/8/27/we-are-more-than-our-amazon-prime-accounts/; *Trustbusting in the 21st Century*, The Economist (Nov. 18, 2018) (in the United States, the "competition regulators have been captured").

[47] *Valletti Interview*, *supra* note 45 ("The gatekeepers are the law firms. Clients establish relationships with big law firms, and these relationships continue over time. The big law firms instruct the consultants about what they have to say. The economists who serve them are just useful fools. . . . There are basically three economic consultancies: Compass Lexecon; Charles River Associates . . . and RBB. There is a fringe of less relevant ones. It is very few law firms, for example Freshfields, Latham and Watkins, Clearly Gottlieb, Skadden, Linklaters, Clifford Chance and others. Not everything they do is bad, of course. But this legal mentality has proved toxic. They will do anything for money.").

[48] William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. Chi. L. Rev. 459, 459–63 (2020) (collecting sources).

[49] *See, e.g.*, Matt Stoller & Shaoul Sussman, *The US Government Wants to Break Up Facebook. Good—It's Long Overdue*, The Guardian (June 12, 2021) (focusing attention on Herbert Hovenkamp, a leading expansionist figure and successor to the antitrust treatise created by Phillip Areeda and Donald Turner).

[50] Matt Stoller, Twitter (Apr. 24, 2021) ("The worst people in the Obama administration were the antitrust enforcers. Total failures, and completely unashamed."), https://twitter.com/matthewstoller/status/1386108628642435072.

[51] David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 Geo. Wash. L. Rev. 1948, 1965–67 (2015).

[52] William E. Kovacic, *Keeping Score: Improving the Positive Foundations for Antitrust Policy*, 23 U. Pa. J. Bus. L. 49, 74–79 (2020).

[53] William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 Antitrust L.J. 855, 857–65 (2014).

[54] William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Policy*, 79 Antitrust L.J. 687, 692–704 (2014).

[55] 128 Cong. Rec. 466 (1979) (remarks of Rep. William Frenzel).

[56] Bork, Antitrust Paradox, *supra* note 41, at 415–16.

[57] Tepper & Hearn, *supra* note 1, at 165 ("Not only have the lunatics taken over the Department of Justice, but they have completely taken over the courts.").

[58] Jonathan Tepper, *Why Regulators Went Soft on Monopolies*, The American Conservative (Jan. 9, 2019) ("Antitrust law is not so much dormant as it is actively sabotaged by the very people who should enforce it."), http://perma.cc/LHR2-NH39.

[59] In their account of modern antitrust enforcement, Jonathan Tepper and Denise Hearn write that "[t]he process of merger review is a scene where lawyers and economists argue with future colleagues in a revolving door of money and influence peddling." Tepper & Hearn, *supra* note 1, at 164. The authors assert that "the Department of Justice now essentially works to serve the interests of companies." *Id.* at 162. Tepper and Hearn further observe: "Dozens of industries are so egregiously concentrated that it begs the question as to what the authorities are doing with their time. We don't know. We know for a fact that workers at the Securities and Exchange Commission spent their time watching porn while the economy crashed during the Financial Crisis. We would hate to speculate about the Department of Justice and the Federal Trade Commission." *Id*. at 116.

[60] *See, e.g.*, Matt Stoller, *How Economists Corrupted the Internet*, Big (Mar. 22, 2021), at https://mattstoller.substack.com/p/how-biden-can-clean-up-obamas-big-mess [hereinafter Stoller, *Corrupted*]. In discussing the FTC's decision in January 2013 not to bring a monopolization case against Google, Matt Stoller observed: "There were three main reasons for the reluctance to bring a case. The first is simple corruption. Google was extremely close with the Obama administration, with its lobbyists averaging a meeting a week at the White House. Today, four out of the five FTC Commissioners who voted on the case, as well as staffers involved like Howard Shelanski, receives money directly or indirectly from one of the five big tech giants."

[61] For an example of a style of criticism that assigns blame to unnamed officials, see Robert Pitofsky, *Introduction: Setting the Stage*, *in* How the Chicago School Overshot the Mark 3, 5 (Robert Pitofsky, ed. 2008) (stating that "an effort to find a middle ground between overenforcement of the 1960s and underenforcement of the 1980s . . . came to an end with appointments during President Bush's second term of some agency enforcement officials, lower court judges and, most important, the confirmation of two conservative justices to the Supreme Court").

[62] David Dayen, *Fiona, Apple, and Amazon: How Big Tech Pays to Win the Battle of Ideas*, The Am. Prospect (July 20, 2020) (discussing consulting by Professor Fiona Scott Morton on behalf of Apple and Amazon; observing "It's very clear that monopolist purchases of experts who align with their self-serving claims threaten the functioning of democracy in the public interest."; adding that "Good people working to fight the influence of monopolies must not be tainted by those who decide to compromise themselves."); Stoller, *Corrupted*, *supra* note 60 ("It's not just that money from dominant firms offered to the antitrust economics world is endemic; [Carl] Shapiro, for instance, is now a consultant for Google.").

[63] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

[64] The expansionist critique of Khan rankles transformationalists. Matt Stoller on Twitter (Apr. 24, 2021) ("The regular condescension towards Lina Khan from antitrust status quo adherents Fiona Scott Morton and Herb Hovenkamp is just infuriating. The monopoly mess is their fault, you'd think they'd have some humility."), https://twitter.com/matthewstoller/status/1386108628642435072.

[65] Robert Coram's biography of John Boyd quotes Boyd as saying the consequence of effective application of the OODA Loop in conflict situations is "unraveling the competition." Coram explains that "The most amazing aspect of the OODA loop is that the losing side rarely understands what happened." Coram, *supra* note 36, at 334.

[66] For example, it is difficult to read *Antitrust Paradox*, especially the preface to the Second Edition, without sensing the moral imperative that drove Robert Bork to finish his own brief for transformation.

[67] Elise Alsbergas & Andrea Beaty, *Biden's Antitrust Minefield*, Revolving Door Project (Jan. 16, 2021) (presenting "a brief list of personnel minefields that Biden should avoid for any antitrust role because of their deep and varied connections to monopolistic industries, and their histories of abusing public sector experience for profit"; naming four private practitioners with previous government antitrust enforcement experience who "should be kept out of the Biden administration"), https://therevolvingdoorproject.org/bidens-antitrust-minefield/.

[68] The Stigler Center has given a major boost to transformation advocates by showcasing their work at the Center's conferences and providing, through its online publication *ProMarket*, a platform for the presentation of transformation perspectives.

[69] Notable recent examples include Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. Rev. 431 (2021); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 U.C.L.A. L. Rev. 378 (2020).

[70] Among other venues, transformation-minded scholars feature prominently on the annual conference agency of the Academic Society for Competition Law (ASCOLA). *See* Program of the 16th Annual ASCOLA (Virtual) Conference, https://law.haifa.ac.il/indx/php/en/ascola.

[71] Among the most important is Rana Foroohar, a columnist with the *Financial Times* and the author of a volume that highlights the work of transformationalist commentators. Rana Foroohar, Don't Be Evil—The Case Against Big Tech (2019). Kara Swisher of the *New York Times* also has written supportive accounts of the transformation movement and featured some of its leading figures on her podcasts.

[72] A team of analysts produced the House Subcommittee's report in October 2020 on competition in digital markets, *supra* note 2, but Khan appears to have been the report's principal author.

[73] For example, one group of transformation-minded researchers (including Sanjukta Paul, Hal Singer, Marshall Steinbaum, and Sandeep Vaheesan) focuses extensively on issues regarding compensation and other conditions for workers.

[74] *See, e.g.*, *Welcome to the Balanced Economy Project Newsletter*, The Counterbalance: An Antimonopoly Newsletter (Mar. 15, 2021) [hereinafter *Balanced Economy Project*] (announcing creation of United Kingdom-based Balanced Economy Project "to tackle monopolies and excessive concentrations of market power, around the world"; noting interaction between Barry Lynn of the Open Markets Institute regarding the creation of the Balanced Economy Project), https://thecounterbalance.substack.com/p/the-counterbalance-an-anti-monopoly.

[75] Kovacic, *Keeping Score*, *supra* note 59, at 108–30.

[76] Daniel R. Ernst, *The New Antitrust History*, 74 N.Y. L. Sch. L. Rev. 879, 883 (1980).

[77] *See, e.g.*, *Balanced Economy Project*, *supra* note 74 ("In the 1970s a small group of scholars and activists in Chicago, led by the jurist Robert Bork, popularized a novel set of ideas about corporate power and competition. At the time, antitrust authorities worked with other regulators and institutions, to watch out for excessive concentrations of economic power and to keep economies in balance. Corporations were seen as essential for economic

dynamism, but were constrained by strong regulation to channel this vitality to serve the wider public interest.").

[78] Teachout, *supra* note 1, at 207 ("The golden age of antitrust started by the New Deal lasted from 1940 to 1980.").

[79] Hubbard, *supra* note 1 at 198–99 ("The result of the golden age of enforcement from 1913 to 1982 was an economy with distributed opportunity.").

[80] The disappointment (sometimes verging on doomsday) literature published during the "golden age" is voluminous. For a just few samples, see Mark J. Green et al., The Closed Enterprise System ix (1972) (Introduction by Ralph Nader: describing "the federal antitrust effort as "terribly lagging, sometimes aiding and abetting"; calling for "wider exposure" of "the weak, politicized, and fractionated antitrust enforcement effort" by the federal agencies); Walton Hamilton & Irene Till, Antitrust In Action, Monograph No. 16, at 4 (Temporary National Economic Committee 1941) ("The Sherman Act has been called a 'charter of freedom.' Why has it not been a success?").

[81] *See, e.g.,* Philip A. Hart, Future Antitrust Policy with Respect to Economic Concentration: A Forecast, N.Y. State Bar Ass'n Antitrust Law Symposium 39 (CCH Trade Regulation Reports 1965) (observing that "the overwhelming weight of the data and testimony" presented to Senator Hart's Senate Antitrust Subcommittee "clearly indicates that overall concentration during the past two decades has increased significantly"; expressing concerns about trends in conglomerate and horizontal mergers and noting that the federal antitrust agencies "have not been able to do the job required").

[82] Green et al., Closed Enterprise System, *supra* note 80, at 38–41 (describing circumstances surrounding 1956 DOJ settlement of monopolization case against AT&T).

[83] Kovacic, *Chicago Obsession*, *supra* note 48, at 459–64.

[84] Recent transformation commentary that is attentive to Harvard's influence includes Stoller, Goliath, *supra* note 1, Lynn, *supra* note 1, and Khan, *History Revisited*, *supra* note 14.

[85] For important exceptions, see Lynn, *supra* note 1, at 199–200; Stoller, Goliath, *supra* note 1, at 322–31.

[86] Kovacic, *Chicago Obsession*, *supra* note 48, at 478–82.

[87] From 1980 onward, the DOJ and the FTC demonstrated how to devise cases with considerable economic or doctrinal significance and defend them successfully. Jones & Kovacic, *Institutions*, *supra* note 9, at 19–21.

[88] A reputation for good judgment can be a valuable asset for an antitrust agency when it defends its cases and rules before the courts. William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 Geo. Mason L. Rev. 237 (2015).

[89] Purists would have applauded Brandeis's commitment to public interest causes and his general opposition to monopoly. Purists also would have observed, and perhaps objected to, Brandeis's occasional representation in private practice of dominant enterprises. For example, at different times Brandeis served as a director and of counsel for United Shoe Machinery, which by the early 20th century had achieved a dominant position in the shoe manufacturing sector. Alpheus T. Mason, Brandeis—A Free Man's Life 214–29 (1946). At times Brandeis defended United against criticism that it had abused its dominance by imposing tying arrangements in connection with the lease of its shoe manufacturing machines to footwear producers. *Id.* at 215–24. Brandeis later had a falling out with the company and turned against United. He allied himself with various shoe producers, which also had been his clients while he was serving as an advocate for United, assisting the company in opposing legislative proposals in Massachusetts to curb its use of the tying clauses. *Id.* at 224–29. By the time President Woodrow Wilson appointed Brandeis to the Supreme Court in 1916, the "people's lawyer" also had become wealthy from private practice. From 1901–1915, Brandeis earned a total of nearly $1.1 million. *Id.* at 691. That amount is equivalent to over $25 million today.

Before he became the FTC's chair in 1970, Kirkpatrick had spent most of his career counseling antitrust defendants in private practice with the Morgan, Lewis & Bockius law firm in Philadelphia. In 1969 he chaired a blue-ribbon panel convened by the American Bar Association, at the request of President Richard Nixon, to evaluate the FTC. American Bar Association Commission to Study the Federal Trade Commission, *Final Report of the American Bar Association Commission to Study the Federal Trade Commission* (1969). A purist probably would have given Kirkpatrick high marks for shepherding a report that called for a drastic overhaul of the FTC and the pursuit of more ambitious competition and consumer protection matters, but purists might have balked at Kirkpatrick's private practice background and antitrust defense work.

[90] Thurman W. Arnold, The Folklore of Capitalism 207–29 (1937). Arnold wrote that "the antitrust laws, instead of breaking up great corporations, served only to make them respectable and well thought of by providing them with the clothes of rugged individualism." *Id.* at 227.

[91] On the implementation weaknesses that beset many of the FTC's competition and consumer protection matters in the 1970s, see Jones & Kovacic, *Implementation Blind Side*, *supra* note 9; Kovacic, *Broadest Sense*, *supra* note 9, at 1317–25; William E. Kovacic & David A. Hyman, *Consume or Invest? What Do/Should Agency Leaders Maximize*, 91 Wash. L. Rev. 295, 304–13 (2016).

[92] On the Commission's inattentiveness to the adverse political consequences of its competition and consumer protection programs of the 1970s, see Kovacic, *Broadest Sense*, *supra* note 9, at 1315–17; William E. Kovacic, *Congress and the Federal Trade Commission*, 75 Antitrust L.J. 869 (1989).