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Antitrust's Right Turn in the Late 1970s

Abstract: In this essay, we detail the fundamental reasons for antitrust policy's right turn toward the consumer welfare theory and against antitrust enforcement in the 1970s. Two recent articles raise questions as to the cause of this turn, with one article arguing that big business capture facilitated the right turn, while another touts a consensus around science-based economics. We argue that while the capture theory is more persuasive, power dynamics between heterogeneous business alliances shifted due to changes in the economy that eroded the incomes of the wealthiest; reductions in antitrust enforcement was one means of restoring that lost income. This essay details that economic history in support of a more nuanced capture theory.

Keywords: antitrust, industrial organization, Law and Economics, welfare, economic history

I. Introduction

In this essay, we consider the dramatic change in antitrust policy that occurred in the late 1970s in the United States. We call the period before this break the "New Deal Consensus;" in that period, antitrust policy sought to limit monopoly power, protect small business, promote democracy from outsized economic power, and reduce income inequality. We term the period after the break the "Era of Neoliberalism." This era is marked by a reduction in the power of unions, the globalization of capital, and the financialization of the US economy. The Era of Neoliberalism ushered in changes in corporate law, labor legislation, and securities law, as well as in antitrust enforcement.

What led to these drastic changes in the antitrust policy? In a recent article in the *Antitrust Law Journal*, Filippo Lancieri, Eric Posner, and Luigi Zingales (2023) (hereafter LPZ) demonstrate how the late-1970s shift in antitrust enforcement was not justified by changes in public opinion or the views of elected officials. Nor was this shift supported by any new economic benefit such as actual higher productivity. Instead, they argue that lax antitrust enforcement resulted from regulatory capture by big business. Undergirding this shift, they write, is Chicago School economics, "co-opted and promoted" by big business "as a tool to advance its interests" (LPZ, 446).

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In a companion article in the same issue of the *Antitrust Law Journal*, Jon Baker (2023) argues that big business was not as powerful as LPZ posit. He asserts that LPZ ignore other interest groups, such as workers, farmers, consumers, and small business, that might have influenced policy. Baker thinks it is inconsistent for LPZ to assume that big business could solve its collective action problem in the 1970s, but that other interest groups could not. In place of LPZ's regulatory capture theory, Baker posits a "settlement theory," in which equally powerful interest groups come to a social contract (or a Nash equilibrium) that guides government policy. Baker ascribes the policy changes starting in the 1970s to the advances of a "value-neutral" economics. Baker also argues that big business favors democracy, serving as a bulwark against the populist authoritarians, which implies that vigorous antitrust enforcement is dangerous because it helps the authoritarians.

We find Baker's critique of LPZ and his alternative explanation baseless. Our thesis as to what changed in the 1970s is consistent with, and can be seen as a refinement of or complement to, LPZ's. We add nuance to LPZ's theory by noting the heterogeneity of "big business" and characterizing specific shifts in political power within this heterogeneous group. In particular, we note a deterioration of the old alliance between certain business groups and unions, and a remarkable rise in the political power of finance.

II. Understanding the Right Turn in Antitrust

To understand what changed in the late 1970s, it is important to understand what came before. The Era of Neoliberalism overturned what we have referred to as the New Deal Consensus. To set the historical stage, the 1929 Depression followed a period in the 1920s of lax antitrust enforcement. The managerial revolution had already occurred, and most large corporations were managed by trained professional managers. Financial interests, led by the House of Morgan, were influential because firms primarily funded themselves through the sale of securities on the stock market. Wholly owned affiliates of the big banks sold these securities to the public, who in turn financed their investments by call loans through brokers (White 1990). In August 1929 the economy entered a recession, and the stock market crashed in October, exacerbated by customers having bought stocks from brokers on margin. Between 1929 and 1933, one-third of all manufacturing firms closed. Because of the visibility of the stock market crash, most of the public was keenly aware that financial speculation was to blame for the collapse.

A. The New Deal Consensus

On March 4, 1933, Franklin Delano Roosevelt was inaugurated President. In his inaugural speech, Roosevelt blamed the crisis on "the unscrupulous money changers." Two days later, he declared a national bank holiday. In June, the Glass-Steagall Act was passed, regulating banks. This was followed by the Securities Act of 1933 and the Securities and Exchange Act of 1934. This legislation severely reduced the freedom of action of financial firms for decades. Morgan financial interests and other bankers bitterly opposed the new regulations, but a number of non-Morgan banks lined up behind Roosevelt. Indeed, Winthrop Aldrich, brother-in-law of John D. Rockefeller Jr. and president of Chase Bank, helped draft the Glass-Steagall Act (Ferguson 1995).

In times of serious economic crisis, the typical structural constraints imposed by big business can be loosened. The threat of declining business confidence and investment loses power, and popular demands for decisive change are strong. In such periods, governments can make wide-ranging reforms

to redistribute income and reduce unemployment, reforms that would be impossible during normal times (Block 1987). For example, the Depression in Europe led to the rise of fascism. Big business lost its political power. In Germany, the big firms retained their property and were offered slave labor by the Nazis, but they were also reduced to mere functionaries of the Nazi Party. They could not decline orders or investments that the Nazis required (Block 1987; Ferguson 1995). In the United States, Roosevelt had considerable leeway to attempt to solve the crisis, and he sought a path that preserved democracy.

Roosevelt's first plan for industrial restructuring was a failure. The National Industrial Recovery Act created the National Recovery Administration (the NRA), which focused on forming cartels and planning, similar to the War Industries Board during World War I. Hugh Johnson, one of the leaders of the War Industries Board, headed the NRA. The NRA sought to reflate the economy by setting prices and establishing industrial codes. Section 7(a) of the NRA required that industries collectively bargain with labor.[1] But the NRA quickly began to self-destruct. Not only was there infighting between firms, but there was a major, unexpected labor upheaval (Domhoff and Webber 2011). Not long after, in 1935, the Supreme Court declared the NRA unconstitutional. *A. L. A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

As described in great detail by Thomas Ferguson (1995), a new power bloc of business forces consisting of capital-intensive industries such as oil, tobacco, and chemicals emerged to support Roosevelt after the NRA was declared unconstitutional, in what is called "the Second New Deal." These industries were less vulnerable to labor's newly outsized influence and resultant higher wages and incomes. In 1935 Congress passed the Wagner Act, which allowed workers to engage in collective bargaining. Between its passage and the end of the 1930s, union membership tripled. By 1945, 25 percent of the American workforce was unionized (Badger 1989). As described by Domhoff and Webber, executives from General Electric and Standard Oil played a major role in the passage of the Act, although others have stressed the importance of the strength of labor at this conjuncture (Domhoff and Webber 2011). The Act was further shaped by the American Federation of Labor and the opposition of the National Association of Manufacturers, and by the views of congressional leaders. The Act established the National Labor Relations Board (NLRB), which then took on a life of its own (Gross 1995).

In 1935 Congress also passed the Social Security Act. Again, the forces that drafted and pushed for the Social Security Act reflected the new power bloc. Most of the intellectual analysis was paid for by the Rockefeller Foundation. The drafters of the bill included representatives of Standard Oil, General Electric, and Eastman Kodak, and members of the Roosevelt cabinet, as well as think tanks and universities (Domhoff and Webber 2011). The Bank of America, Chase National Bank, and Lorillard Tobacco Company also supported Roosevelt's Social Security Act (Ferguson 1995).

Most of the industries in the new power bloc also favored free trade. One of these capital-intensive firms, Standard Oil (of New York, New Jersey, and California), which was owned by the Rockefeller family, was particularly influential in the Depression. The Rockefeller fortune was far and away larger than any other family's in America in the 1930s. Most of the fortune was managed by John Rockefeller Jr., and he figured prominently in the conception and drafting of most New Deal legislation. As described by Ira Katznelson, in order to pass any major legislation, Roosevelt had to neutralize the

[1] The National Association of Manufacturers bitterly opposed Section 7(a) and plantation owners accepted it only because it excluded agricultural and household workers.

plantation capitalists in the Southern states. As long as favorable labor legislation excluded agricultural and household labor, the plantation capitalist opposition to the New Deal reforms was not strong and could be finessed and overcome (Katznelson 2013).

Many of Roosevelt's circle (including a group referred to as the (original) Brandeisians[2]) lobbied Roosevelt to revitalize antitrust policy. In 1937 Robert Jackson was appointed head of the Department of Justice's Antitrust Division, a position he held until March 1938. He brought two landmark cases that would guide antitrust law in the post–World War II period: *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150 (1940), and *United States v. Aluminum Company of America*, 148 F.2d 416 (2d. Cir. 1945). In March 1938, Thurman Arnold replaced Jackson and served at the Antitrust Division until 1943 (Waller 2004). In 1938, Congress approved the Temporary National Economic Committee (TNEC). The TNEC report in 1941 recommended strong antitrust enforcement including prohibiting all horizontal mergers above $5 million, as well as mandatory patent licensing, among other restrictions. During the New Deal Consensus, the Supreme Court fashioned broad per se rules against horizontal price fixing and other conspiracies, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), limited mergers when they contributed to a "rising tide of concentration," *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962), and condemned vertical restraints when they resulted in even moderate levels of "foreclosure" of rivals, *Ford Motor Co. v. United States*, 405 U.S. 562, 592 (1972).

On April 29, 1938, Roosevelt delivered his Message to Congress on Controlling Monopolies. The message stressed that concentration was harmful because it undermined democracy by creating too much private power, and that it harmed income distribution. 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 essence, is Fascism," he said. Similarly, "a democracy is not safe if its business system does not provide employment and produce goods in such a way as to sustain an acceptable standard of living" (quoted in Freyer 2006, 22). The address was written by Robert Jackson, Ben Cohen, and Tommy Corcoran, and reflected the thinking of the Brandeisians. It was consistent with the 1941 TNEC report and congressional debates in 1950 that amended the Clayton Act. The goals of the antitrust laws were broad social goals: to limit the power of big business in order to preserve democracy and advance the population's standard of living.

B. *The Crisis of the 1970s*

The New Deal Consensus continued after World War II for almost three more decades.[3] It was continually under attack, as demonstrated by the 1947 Taft-Hartley Act and the deterioration of the National Labor Relations Board's support for union positions (Gross 1995). Nevertheless, finance remained highly regulated, and antitrust, regulation, labor, and corporate law checked the power of big business. The government embraced expansionary fiscal and monetary policy. The Bretton Woods agreement regulated international trade, and the volume of world trade grew at an annual rate of almost 7 percent between 1948 and 1990 (Rodrik 2011).

The US economy emerged from World War II with modern technology, high wages, strong unions, low and declining inequality, and a political consensus favoring government management of the macro

[2] The Brandeisians were the New Deal lawyers influenced by Louis Brandeis. They included Felix Frankfurter, Ben Cohen, James Landis, Tommy Corcoran, and Robert Jackson (Hawley 1966).

[3] Thomas Ferguson dated the beginning of the disintegration of the New Deal coalition as 1966, the year the rate of profit began to rapidly decline (Ferguson and Rogers 1986; discussion with Professor Ferguson).

economy (Chandler 2005). The economy successfully transitioned from its war footing (Field 2011). During the 1950s and 1960s, the US economy grew at an average rate of 4.4 percent per year. Unemployment averaged 4.6 percent per year. Inflation was low, at an average of 2 percent, and productivity was growing. At the same time, the United States was constructing infrastructure and building the Great Society programs of the 1960s, and the private sector was leading the world in industries such as consumer electronics and computers, as well as traditional industries such as automobiles and steel (Chandler 2005). In these decades, corporate profits were high and income inequality was low. The average rate of profit for the period 1950–1969 was 11.7 percent, and the share of the top 1 percent of income earners was about 10.1 percent, compared to approximately 18.8 percent in the 1920s. (This era of high growth and low inequality, coupled with the subsequent era of low growth and high inequality, conclusively disproves Baker's fundamental belief that there is a necessary tradeoff between high growth and low inequality (see Baker 2023).)

Then, the 1970s arrived. The economic problems of the 1970s were the catalyst for the right turn in antitrust, according to LPZ.[4] We agree. The 1970s were a period of significant crisis in the United States. The initial fall in the rate of profit in 1966 was a result of competition from Japan and Germany. By the late 1960s, the German and Japanese economies had recovered from World War II and successfully challenged the US in several major industries, including consumer electronics, automobiles, steel, and petrochemicals. The oil crisis after 1973 made conditions even worse.

In addition to lower corporate profits, the stock market struggled and the bond market did even worse (Duménil and Lévy 2011). From 1972–1981 the real stock return (in total, not per year) was −17.55 percent (compared to +43.16 percent in the previous decade). The real ten-year Treasury bond return (in total, not per year) was −39.35 percent for 1972–1981 (compared to +4.37 percent for the previous decade). The profits of financial corporations experienced a greater decline than those of corporations outside the financial sector. There were few if any strategies to obtain high real income in the United States. This ceiling on high income growth resulted in the share of the top 1 percent of income earners reaching its lowest point since 1913, and 1976 had the lowest income inequality of any year for which we have data in the United States.

Big business, and especially finance, responded by funding and providing political support for the neoliberal revolution in Law and Economics, as we discuss in the following sections. Their investment in neoliberal ideology had a spectacular return on investment. Regulatory capture became easier when the Supreme Court expanded the role of corporate money in politics.[5] Corporate lobbying increased, and the revolving door between government agencies and big law firms made agency lawyers reluctant to take anti–big business positions. Dark money was used to influence judicial appointees, who then diluted the antitrust laws.

C. *The Chicago School and the Disintegration of the New Deal Consensus*

Jon Baker criticizes LPZ for failing to explain why big business solved its collective action problem in the 1970s but labor and consumers did not. Baker wrongly theorizes that political power in the United States is exercised through a process similar to a competitive market, in which politicians compete for

[4] Jon Baker (2006, 507) attributes the change to a reaction "to the expansion in the role of government that had taken place during the previous half-century, from the New Deal to the Great Society." Anderson also contends that neoliberalism was a reaction to the cultural shifts of the 1960s (Anderson 2020).

[5] The story of how this occurred is recounted in detail by Adam Cohen (2020) and Adam Winkler (2018).

support of voters and power derives from those voters who can form interest groups that solve their collective action problems. The government itself is viewed as a neutral entity, capable in principle of advancing the interests of any group in society, including labor. In political science, this view of political power is referred to as "pluralism" (Domhoff 2005; Hay 2016).[6]

In our view, the investment theory of politics provides a more plausible explanation of how large firms can control political decisions even when their interests differ from those of the vast majority of the voting public. A key tenet of this theory is that the relevant information voters need is prohibitively expensive to access (Ferguson 1995). Voters must instead rely on advertising and political party affiliation to guide their voting decisions (Klein 2020). Voters cast their ballots for candidates who represent a bundle of positions. Dominant firms and rich individuals are the only entities with sufficient resources to make the required investments to make their preferences attractive, and political parties compete for investment (in the form of campaign contributions) by these dominant firms and rich individuals. As Peter Temin, following Ferguson, describes:

> Elections become contests between several oligarchic parties whose major public policy proposals reflect the interests of large investors. The Investment Theory of Politics focuses attention on investors' interests, rather than those of candidates or voters. The expectation is that investors will not be responsive to public desires, particularly if they conflict with their interests, and they will be responsive to their own concerns. They will try to adjust the public to their views, rather than altering their views to accommodate voters. (Temin 2017)

Moreover, the interests of big business are not homogeneous. Most labor-intensive companies strongly oppose unions, but large capital-intensive firms often find it advantageous to support unions in one form or another in order to avoid potentially intensive class struggle. Gabriel Kolko's *Triumph of Conservatism* and James Weinstein's *The Corporate Ideal in the Liberal State* document how big business worked together with the AFL to achieve union exemption from the Sherman Act and to propose the framework that eventually became the Clayton and FTC Acts (Kolko 1977; Weinstein 1968; Mitchell 2008). Different firms are also affected differently by regulation. Firms that produce world-quality products want open markets to allow them to sell overseas. For example, the leading meatpackers during the Progressive Era wanted federal inspection of meat because small meatpackers selling adulterated meat endangered the ability of the leading meatpackers to access foreign markets.

At any particular time, the interests of a particular power bloc of large firms are organized by a leading political party. However, government policy must still take into account the interests of all businesses, and even of workers, if it is to achieve stability. Thus, the state may sometimes make decisions that compromise the interests of some businesses (Block 1987). For example, antitrust laws sacrifice the interests of some monopolies to preserve the viability and credibility of the market system as a whole. Even the power bloc is not immune from prosecution. This is necessary to preserve the ideology that all citizens are equal under the law.

In contrast to Baker's theory, however, there is no parity or near parity between different social classes: Big business always predominates, even though its power is not total. There are structural reasons why other classes and groups outside of big business cannot wield much political power. Big business is the ultimate source of most investment and revenue production. If elected officials want to maintain

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[6] LPZ are not explicit in how they view political power and they deviate from a pluralist approach when they show that the change in antitrust was not a result of voter preference changes.

a manageable standard of living for their constituents, they must ensure the continued investment by big business and prevent, for example, massive capital flight. Thus there are certain binding limits on reforms that harm big business. And, as LPZ point out, big business can fund more lobbying and campaign contributions, and offer more remunerative revolving door opportunities, than the other groups. They can even fund more educational seminars, grants to academics, and think tanks. So, while labor and small business can sometimes win concessions, reforms achieved by these groups cannot threaten the core interests of large capital.

Baker (2023, 529), however, writes that "the new coalition . . . did not discard the goal of inclusive economic growth." This is not borne out by the institutional changes that encompassed the neoliberal revolution, which, in fact, were aimed at restoring high incomes.

In this new era, the conditions that created the New Deal Consensus no longer existed. Perhaps most importantly, the impact of the financial speculation of the late 1920s receded "into the dimly remembered past" (Kotz 2017, 80). Labor's political power had significantly declined from its peak in the 1950s, and a new power bloc dominated by financial interests arose.

Others have also theorized that financial interests were behind the neoliberal revolution. Gérard Duménil and Dominique Lévy have analyzed the leading role played by financial interests in the rise of neoliberalism (Duménil and Lévy 2011). Thomas Ferguson and Joel Rogers (1986) concur that the leading force in the new power bloc was financial firms, along with other large multinational firms. However, what the precise corporate alliances in the neoliberal power bloc were is an understudied area of political science. According to Ferguson and Rogers, at first the labor-intensive protectionist firms that backed Barry Goldwater in 1964 played a major role in the Reagan campaign, but they were quickly replaced by multilateral leading firms, including military providers, that favored free trade and a strong military buildup to ensure investment opportunities in the global South.

Robin Greenwood and David Scharfstein (2013) show that the share of GDP attributable to financial services increased from 4.9 percent of GDP in 1980 to 8.3 percent in 2006. As described by Gérard Duménil and Dominique Lévy (2011), the profits of the financial sector quickly overtook the profits of nonfinancial businesses beginning in the late 1980s, and advanced much faster than nonfinancial profits. Financial deregulations introduced in the 1980s and 1990s resulted in an enormous growth in the financial sector (and resulted in the 2008 crisis) (quoted in Glick 2019). Between 1980 and 2003, the number of banking organizations decreased from about sixteen thousand to about eight thousand (mostly due to mergers of healthy institutions), the share of industry assets held by the ten largest commercial banking organizations rose from 22 percent to 46 percent, and their share of industry deposits rose from 19 percent to 41 percent (Pilloff 2004). The financial share of profits has remained between 25 percent and 35 percent in the last twenty years, despite the fact that the financial share of GDP is 7 to 8 percent (Taylor 2022). Almost overnight, traders, hedge fund managers, and private equity managers were able to make tens or hundreds of millions of dollars in a year. This was unheard of in the 1960s.

Essentially every firm of any consequence in the modern economy must deal with the financial sector, and by facilitating much of the access—or lack thereof—of firms to credit, the financial sector's self-serving ideas about how firms should be run affect the entire economy unless curbed by regulation, especially antitrust regulation. According to research by Clayton Christensen, formerly the Kim B. Clark Professor of Business Administration at Harvard Business School, financial firms do not want other firms managed to maximize profit; they want other firms managed to maximize short-run return

on investment (Lozada 2022). One way to increase return on investment is to decrease its denominator, which is the capital stock. For example, the quicker one firm's capital stock can be liquidated, the higher the return on investment; and being able to get a high return on investment from liquidation means the hurdle rate for investing in more capital in other firms, instead of liquidating them too, goes up. Christensen says this explains why the American firms Texas Instruments, IBM, Motorola, and Intel all gave up producing high-end computer chips and ceded that market to the upstart Taiwanese firm TSMC, founded in 1987, which is managed to maximize profit, not return on investment, and is now one of the most important companies in the world.

During the waning days of the New Deal Consensus, economists such as Milton Friedman argued that the sole purpose of a corporation was to enrich its shareholders—the "shareholder value" theory of corporate management. Because many important US firms were not managed in that way, it was a controversial point.[7] In 1985, the Delaware courts adopted this view in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), "which held that the goal of the corporation is shareholder profit maximization" (Glick 2019, p. 69). The original purpose of corporations in the United States was to perform a socially useful function, which is why they had to be chartered by legislative acts. As described by William Lazonick (2009), the high dividends and share buybacks characterizing the new, finance-friendly US management style resulted in a cash flow drain to shareholders and financial interests, causing investment and growth in the economy as a whole to decline, while financial income skyrocketed, as did the income of those who worked in tandem with financial interests, such as corporate lawyers and CEOs.

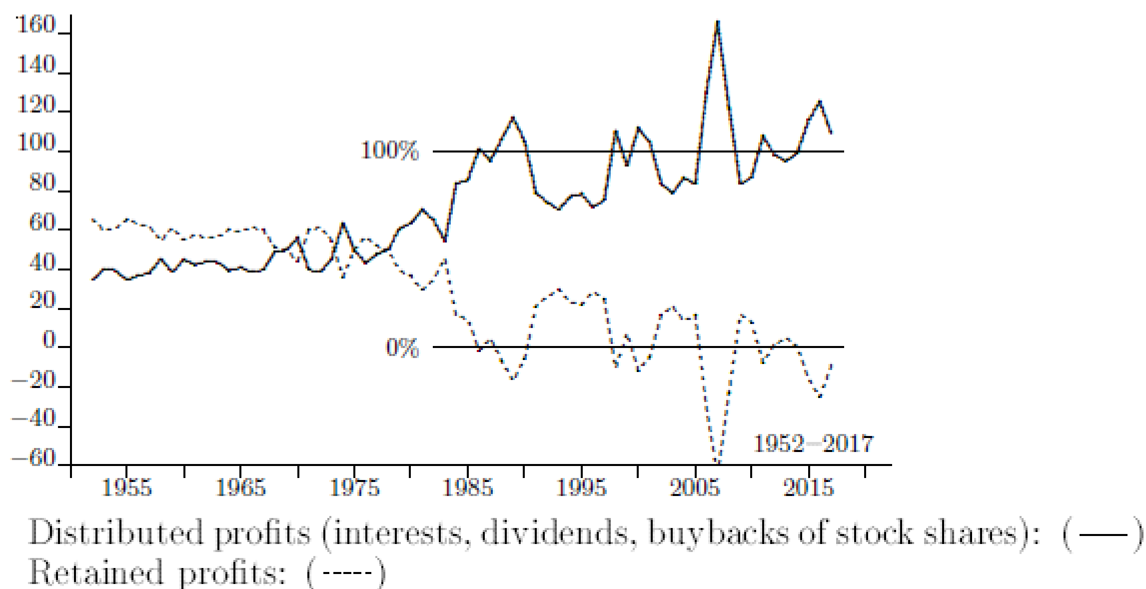
Figure 1 below, from Duménil and Lévy (2019, 19), charts total profits and retained earnings.[8]

[7] Friedman condemned firms that did not maximize shareholder value, demonstrating that there were such firms:

> I hear businessmen speak eloquently about the "social responsibilities of business in a free-enterprise system." . . . The businessmen believe that they are defending free enterprise when they declaim that business is not concerned "merely" with profit but also with promoting desirable "social" ends; that business has a "social conscience" and takes seriously its responsibilities for providing employment, eliminating discrimination, avoiding pollution and whatever else may be the catchwords of the contemporary crop of reformers. In fact they are . . . preaching pure and unadulterated socialism." (Friedman 1970, 122)

[8] See also Tepper (2019).

Figure 1. Total Profits and Retained Earnings



Retained earnings are what is left after the distribution of cash to dividends and stock buybacks. Investment is highly correlated with retained earnings (Duménil and Lévy 2011).[9] The low and falling retained earnings help explain why neoliberal policies have resulted in falling rates of investment and declining growth.[10]

D. *The Neoliberal Revolution Was About Distribution*

The disintegration of the older corporate alliances led to enormous economic changes. In addition to deregulation of finance, several other policy initiatives were aimed at releasing constraints on high income. They were not, as Baker claims, policies aimed at inclusive, higher growth. First and foremost was the attack on labor. Republican appointees to the NLRB passed measures that significantly eroded union strength and ultimately resulted in a continued decline in union membership in the United States. By 2013 only 11.3 percent of the workforce belonged to a union (Dunn and Walker 2016). Reducing union strength is a transfer of labor rents to profits, not a growth strategy. The same is true of lowering high tax brackets. The primary impact is distributional. There is virtually no evidence that lower taxes increase macroeconomic growth.

Quinn Slobodian describes how a central tenet of the neoliberal agenda was free trade and globalization (Slobodian 2018). Investment abroad primarily involved a shift of manufacturing activity from industrialized countries to developing countries, with a significant number of US companies

[9] Lewellen and Lewellen (2016, 1161) agree: "Our results suggest that investment and cash flow are strongly linked after controlling for a firm's investment opportunities."
[10] For support for this statement, see Gutierrez and Philippon (2017a; 2017b); Stockhammer (2004); Cordonnier and Van de Velde (2015); Shambaugh et al. (2018).

moving offshore.[11] US multinational firms then exported much of this production back to the United States. The incentives behind these adjustments are obvious. Corporations can extract significant concessions from American labor by threatening to move production facilities abroad. Further, corporations can avoid corporate taxes by moving to lower-tax locations. Here again, the motive is redistribution.

Big business's support for less antitrust regulation, particularly in the realm of merger control, was important for creating high incomes. There is no evidence that the goal was higher inclusive growth, throwing doubt on Baker's claim and implying that even if that was the goal, it was unimportant because the actual effect of the neoliberal policies was completely the opposite: lower growth, lower investment, and lower productivity growth, coupled with greater inequality.

III. The Role of Economics and the Chicago School

In his critique of LPZ, Jon Baker claims that if antitrust's right turn is explained by a resurgence of big business, then "antitrust rules and decisions cannot be justified as largely the product of value-neutral and academically oriented economic analysis and arguments" (Baker 2023, 522). We do not view economics as value neutral. Economists have to select what are acceptable topics of study, what assumptions can be made, and what results are tolerated. Those outside the mainstream find it difficult or impossible to publish in top journals or obtain positions at leading universities (Kvangraven and Alves 2020). And, crucially, political forces outside of economics help shape what is considered mainstream at any particular time.

For example, the Great Depression transformed the field of economics. During the 1920s, virtually all US economists believed that a market economy was stable and that forces would return the economy to full employment without state intervention. During the Depression, the American economy experienced 20 percent or more unemployment for a decade. The mainstream shifted, accepting Keynesian macroeconomics, and welfare economics grew as an important area of microeconomic debate.

However, the intellectual founders of the Chicago School staunchly adhered to free-market economics, even in the face of the Depression. This group of Chicago economists did not bend to the economic orthodoxy and were largely sidelined from the mainstream.[12] They were organized in the Mont Pelerin Society, which held is first meeting in 1947 and became the organizing hub of the future neoliberal movement. Its leaders included Milton Friedman and Austrian School economists Friedrich Hayek, Ludwig von Mises, and Wilhelm Ropke. George Stigler, Gary Becker, and James Buchanan were frequent participants (Mirowski and Plehwe 2009). The participants in the neoliberal movement did not have a unified theory in all respects.[13] As the historian Ben Jackson describes, "Among the authors

[11] The growth in financial capital movements has also caused damage to developing countries with inadequate capital controls (Rodrik 2011, 108-109). Rodrik notes, "The mid-1990s saw another round of financial crises, the most severe of which was the 'tequila crisis' in Mexico (1994) brought on by a sudden reversal in capital flows. The Asian financial crisis followed in 1997–98, which would then spill over to Russia (1998), Brazil (1999), Argentina (2000), and eventually Turkey (2001). These are only the better-known cases. One review identified 124 banking crises, 208 currency crises, and 63 sovereign debt crises between 1970 and 2008" (ibid.).

[12] Not all Chicago economists opposed the New Deal, of course.

[13] The various schools of neoliberal thought include the Chicago School, the Virginia Public Choice School, and the Washington Consensus. In this essay we consider the Chicago School because of its focus on antitrust policy. However, for an introduction to the public choice literature, see James Buchanan and Gordon Tullock (1962) and Amadae (2003).

conventionally bracketed together as the founders of neoliberalism, there was, as might be expected, a spectrum of positions on these [economic] issues, rather than a uniform line" (Jackson 2010, 140). What united them was their opposition to the New Deal Consensus and expanding the role of the state, including opposition to regulation that protected unions and employees, to government social programs, to public or regulated enterprises, and to any obstacles to free trade.[14]

As Mirowski and Plehwe (2009) explain, Hayek worked with Henry Simons to bring Aaron Director to Chicago and to establish the original Chicago School. Hayek was instrumental, along with others at the University of Chicago law school and department of economics, including Milton Friedman, in securing funding for the "Free Market Study" under the direction of Aaron Director and Edward Levi. The funding came from the Volker Fund. The project strove to advance the neoliberal project into new areas of policy. The "Antitrust Project" followed the Free Market Study and ran from 1953 to 1957. The project developed the basic Chicago School analysis of antitrust law. The Antitrust Project included work by Aaron Director, Edward Levi, John McGee, Ward Bowman, and Robert Bork (Van Horn 2009). This effort's later expansion included a program in Law and Economics, and research fellowships were granted to Ronald Coase and Richard Posner. The subsequent Chicago School "research program" produced a massive number of papers, all of which questioned the premises of the New Deal antitrust policy regime.[15]

The Chicago School masked the power relationships at play with quasi-scientific notions such as "efficiency" that are in fact ideological constructs that limit the focus of policy. In her book *Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy*, Elizabeth Popp Berman describes how the rise of neoliberalism in numerous policy areas was justified by that ideological construct. In antitrust, Judge Robert Bork advanced the Consumer Welfare Standard (CWS) in his 1976 book *The Antitrust Paradox*, contending that the sole goal of antitrust policy should be to increase consumer welfare, defined as consumer surplus.[16] This approach leads to "efficiency" being defined as Potential Pareto Efficiency, a particular notion with strong, but rarely acknowledged or understood, ideological content. As we discuss elsewhere, the CWS/Potential Pareto Efficiency approach was thoroughly debunked by mainstream neoclassical welfare economists,[17] yet it survives in antitrust economics because of its ideological value (Glick et al. 2024). Antitrust policy based on the CWS is reduced to concerns about price and output (or demand growth via innovation). Issues of equity were sidelined. There is also no place within that theory for the New Deal Consensus goals of supporting small business, dispersing economic and political power, and preventing inequality. According to the Chicago School economists Aaron Director and Edward Levi, "the conclusions of economics do not justify the application of the antitrust laws in many situations in which the laws are now being applied" (Director and Levi 1956, 282).

There is also a large literature critical of public choice theory. See, for example, Block and DiLorenzo (2001). Because of its extreme assumptions concerning rational utility-maximizing behavior, this literature is vulnerable to the advances in behavioral and experimental economics.

[14] In this section we recount the origins of neoliberal economic theory. For a more general history of neoliberal theory, see Turner (2008).

[15] The authors included Yale Brozen, Harold Demsetz, John McGee, Gary Becker, Sam Peltzman, Milton Friedman, Richard Posner, Robert Bork, Lester Telser, and several others.

[16] Consumer surplus is the difference between what a consumer is willing to pay for a good or service and its price.

[17] Every major welfare economics text points out these problems. See Ng (1979), Mishan (1981), Boadway and Bruce (1984), Johansson (1991), McCain (2020), and Adler and Posner (2006).

In less than two decades, the antitrust policy of the Era of Neoliberalism was sidelined. The Era of Neoliberalism's antitrust policy was guided by the Chicago School view that horizontal price fixing is not a major concern because cartels are claimed to be unstable (Stigler 1964). Only mergers to monopoly are a serious concern, since, it is assumed, mergers short of monopoly are likely motivated by efficiencies (Easterbrook 1984). Predatory pricing is an irrational business strategy and should not be investigated (Posner 1979). Vertical restraints benefit the economy by incentivizing the provision of dealer services (Posner 1977). Vertical mergers are benign and should be per se legal (Bork 1978).

When the neoliberal revolution occurred, the Chicago School and other neoliberal economists suddenly were recipients of new sources of funding and access to top journals, and their students populated the leading economics departments and law schools. In part, this was because the views of the Chicago School aligned nicely with the laissez-faire ideology of finance that now was the leading force in the neoliberal power bloc. Moreover, finance replaced management as the most influential field in business schools, and financial faculty salaries skyrocketed beginning in the 1990s.

Nonfinancial corporate managers more often supported the New Deal Consensus than financial managers did (Davis 2009). The corporate managers who participated in building the New Deal were concerned with sustaining the system as a whole. They participated in building the welfare state. In contrast, many bankers have long upheld economic laissez-faire orthodoxy (though not all; for example, Utah's Marriner S. Eccles, chair of the Federal Reserve during the New Deal). Despite the repeated history of financial crises and instability, financial interests remain staunchly opposed to regulation.

In our view, laissez-faire is not a sustainable strategy for capitalism. One of the best recent examples of this is how free-market economists advised Russia to impose "shock therapy" to allow the natural market incentives to appear and guide the Russian economy toward prosperity. The impact of the policy was a weakened economy and prolonged recession in the 1990s. Concomitantly, life expectancy decreased in Russia by five years, accounting for over 1.5 million excess deaths (Bloom and Malaney 1998). The experience of the neoliberal revolution in the United States also shows that markets with insufficient regulation result in massive inequality, low investment, and inadequate provision of public goods such as health care, universal quality education, and environmental protection. Concentration and market power grow; so do "deaths of despair" (Case and Deaton 2020). Absent macroeconomic stabilization and controls, the economy is also unstable and prone to periodic recessions. Finally, the ideology of unchecked self-interest and unbridled greed undermines the values of trust that are required to make markets function in the absence of complete contracts (Bowles 2016).

Just as economists in the 1930s had to face up to the existence of involuntary unemployment, antitrust economists today are starting to recognize the growing market power in the American economy and its detrimental consequences.

IV. Democracy and the Right Turn in Antitrust

The New Deal Consensus stressed the importance of democracy and low income inequality as critical to the preservation of capitalism. Not only was the New Deal Consensus a period of superior economic performance compared to the period after the rise of neoliberalism (Glick and Bush 2023), but more general research by Daron Acemoglu and James Robinson (2012) shows that inclusive economic and political institutions are the one common element of successful economies:

> Central to our theory is the link between inclusive economic and political institutions and prosperity. Inclusive economic institutions that enforce property rights, create a level playing field, and encourage investments in new technologies and skills are more conducive to economic growth than extractive economic institutions . . . . Inclusive economic institutions are in turn supported by, and support, inclusive political institutions, that is, those that distribute political power widely in a pluralistic manner. (Acemoglu and Robinson 2012, 430).

For Acemoglu and Robinson, an inclusive economy is one that is not dominated by a few large firms, and an inclusive political system is one in which political power is similarly dispersed. They argue that inclusive political institutions create successful economies by allowing creative destruction of old technologies and the encouragement of new and better innovations (think replacement of fossil fuels by more efficient climate-friendly technologies). Only when dominant firms unduly wield political power can rent seeking and extraction of value be sustained.

Excessive political influence allows dominant firms to externalize costs. Fred Block describes this process of firms growing ever larger and more powerful, outsourcing wages and benefits to smaller firms, and forcing the costs of environmental damage and other harms onto the public. Block (2018, 75) concludes:

> Since their size generates profits and political influence, they have both the incentive and the capacity to get political rulings that support these shortcuts to continuing profitability. Without strong democracy, this degenerative process saps the economy of its dynamism.

The result, in other words, is oligarchy. Block also points out that such "oligarchies will have slower rates of economic growth than egalitarian democracies" because, once dominant firms capture political power, they can blunt competitive challenges, resulting in "little incentive to invest much in upgrading their production facilities." As Block describes, "members of the existing elite might occasionally invest in something new, but this still means a much slower rate of change than occurs in more open [political] systems" (Block 2018, 70).

Democracy, in contrast, allows the other classes in society (for example, smaller firms, workers, smaller agricultural interests, emerging firms) to penalize government officials that subsidize dominant firms, aid in large-firm rent seeking, and facilitate the imposition of unreasonable costs on the public.[18]

The Chicago School economists prioritize laissez-faire economics above democratic values. They have often stated that a nondemocratic state may be required to maintain free markets (Mirowski and Plehwe 2009). As Chicago economist George Stigler commented in 1960, the "political process is strongly biased toward collectivism" (quoted in Slobodian 2018, 237). Stigler suggested that one route to success would require "the restriction of the franchise to property owners, educated classes, employed persons, or some such group" (MacLean 2017, 152). At the 1954 meeting of the Mont Pelerin Society, James Buchanan argued that the "maintenance of [a] free society may well depend on the removal of certain decisions from majority-vote determination" (Burgin 2015, 118). Friedman

[18] Antitrust is concerned that higher prices reduce the consumption of preferred commodities by consumers. Concentrated political power has a similar impact. Large firms that capture undue political power will use that power to lower their taxes and other costs, and increase their share of public goods. The classes and groups that are disempowered are left to consume a diminishing share of public goods.

followed this logic by opposing universal suffrage in South Africa, and he established a longstanding relationship with the Pinochet dictatorship in Chile.[19]

Baker argues that LPZ's "capture theory thus implies that the critical threat to democracy today is from a big business-led oligarchy, not from authoritarianism" (Baker 2023). In this way, Baker tries to separate "authoritarianism" from big business. In our view, the two are linked. The political power of finance depends on solving the "conservative dilemma." The conservative dilemma, coined by Hacker and Pierson (2021), is the problem that arises from the need to appeal to the majority of the population while promoting policies that cater to the wealthy minority. As they explain:[20]

> We use "Conservative Dilemma" more specifically to describe the tension facing conservative parties. A century ago, in all countries with expanding franchises, conservative parties struggled to maintain their historical defense of elite privilege in the face of electoral challenges from the masses. When suffrage was restricted, conservative parties could ignore the massive gap between the rich and the rest. But this became a losing game once the working class gained the vote. Relatively quickly, conservative parties found themselves caught between a commitment to economic elites and an expanding electorate. How, they were forced to ask themselves, do we reconcile the needs of our core constituency with the need to win elections? (Hacker and Pierson 2021, 22)

Hacker and Pierson argue that one strategy employed to solve the conservative dilemma is to encourage social divisions within the nonrich population, which (Schaller and Waldman 2024) argue leads to right-wing rural extremism. If such divisions become strong enough, then voters may bypass their economic interests when voting and focus instead on issues related to their group identities, as defined by these divisions (Page and Gilens 2020).[21] In the United States, these divisions historically have been racial, ethnic, and religious. Not all big businesses take this approach to the conservative dilemma. Some favor democracy and concessions to dampen inequality. But others do not. Exacerbating toxic divisions may be necessary in a highly unequal society, but this solution obviously has serious social-welfare-reducing ramifications that are not recognized by the normative theory behind the Consumer Welfare Standard.[22]

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[19] In March 1975, Milton Friedman and Arnold Harberger flew to Santiago. According to Naomi Klein (2007, 98), "Friedman hammered at a single theme: the junta was off to a good start, but it needed to embrace the free market with greater abandon." Klein further documented the relationships that were built between the Chicago economics department and several military dictatorships in Latin America. MacLean (2017) discusses how James Buchanan helped the Pinochet regime draft its constitution, which limited democracy and insured Pinochet's power.

[20] Ezra Klein (2020, 97) also addresses large corporations' need to mobilize voters to support economic policies favoring the corporations.

[21] To quote Page and Gilens: "Economic inequality—the concentration of wealth and income in a few hands, with a big gap between rich and poor—has risen and fallen at various times. And democracy—popular control of government—has tended to move in the opposite direction. When citizens are relatively equal, politics has tended to be fairly democratic. When a few individuals hold enormous amounts of wealth, democracy suffers" (2020, 25).

[22] There is obvious harm to the welfare of the portion of the population that has no effective political power. It may also be the case, however, that a working democracy increases welfare generally through a greater sense of social fairness. David Dorn and his coauthors found "a significant positive relationship between democracy and happiness even when controlling for income and culture measured by language and religion" (Dorn et al. 2007, 512). Loubser and Steenekamp (2017) find a strong relationship between life satisfaction and democracy but only a weak or nonexistent correlation between happiness and democracy. Bruno Frey (2010, 64) summarized the results from several studies of the impact of democracy on welfare as follows: "Overall, these results suggest that individuals living in countries with more extensive democratic institutions feel happier with their lives according to their own evaluation than individuals in more authoritarian countries."

Moreover, even if one rejects our contention that big business can favor authoritarianism, it is still possible—and we argue that it is actually the case—that big business nevertheless is headed down the road to authoritarianism via neoliberalism. Authoritarianism blossoms when democracies are in the throes of economic dislocation and despair, which is exactly the condition neoliberalism has helped create today. To harken back to our earlier Roosevelt quotation, "a democracy is not safe if its business system does not provide employment and produce goods in such a way as to sustain an acceptable standard of living" (Freyer 2006). Now consider the decline of rural US economies. The economy-wide failures of neoliberalism within our democratic system have put pressure on our democracy, even if big business did not intend to cause that pressure.

V. Conclusion

We have shown that the sharp turn in antitrust was because of a corporate alliance dominated by financial interests that arose in the wake of the crisis of the 1970s. This led to an ensemble of new neoliberal policies whose aim was to bolster higher incomes. Part of this project was changing the economics profession into one that supported the Consumer Welfare Standard, hobbling antitrust enforcement, and molding economics into an important ally of the new power bloc, one that would provide theoretical justification for the neoliberal agenda. But the neoliberal revolution failed to deliver on growth, productivity, fair income distribution, and human welfare. LPZ is correct that the shift in the antitrust regime in the 1970s was due to big business and regulatory capture, though they failed to note the leading role of finance in the shift. Jon Baker's model is different: a social contract struck or stumbled upon by big business and other social forces concerning the tradeoff between inequality and growth. This lacks theoretical and historical support.

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