

## ANTITRUST LAW SOURCE PODCAST

### WITH JAY LEVINE

#### Episode 49: The Antitrust Revolution: The Chicago School and antitrust enforcement from 1990s to the present | July 21, 2021

*The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.*

**Intro:** Welcome to Porter Wright's Antitrust Law Source.

**Jay:** Welcome to Porter Wright antitrust law source. Good morning. This is Jay Levine, your host of the antitrust law source podcast and the editor of its blog. And I'm once again joined by my colleague, Carrie Garrison. How you doing, Carrie?

**Carrie:** Hey, Jay. I'm doing well. Thanks for having me on this second episode in our antitrust law series.

**Jay:** You know, we have a cute name for it: "The antitrust revolution is coming. The antitrust revolution is here?" I guess it doesn't play as well in as a podcast as it does in writing. But, you know, the series is all about where we have been in antitrust in where we're going. And I think let's just sort of dive right into it. We promise at the end of the last podcast, we're going to get more into the sort of the Chicago School and then take us up to the present. So I think, though, and as we discussed before, antitrust is very influenced by social, political thinking of the time and in the 70s 80s. And 90s. People really wanted the government out of their lives. In always, this was post-Vietnam. This is post one of the worst recessions, and stagflation. I mean, it's just that sort of what Reagan ran on, right? I mean, he ran on less government is better government. And I think that trickle through sort of the Chicago School, which is kind of a opposite to the Harvard School, which is an interventionist that government needs to step into correct markets. Chicago School, felt that markets just do fine on their own right.

**Carrie:** Yeah, definitely. Jay, it's really interesting to see this transition from big as bad that we saw before the 1990s to this 1970s view, that inefficiency is now the evil. So we're seeing market power and this view that if as long as the markets allowed to work and is efficient, then we'll be doing our job in that way. And we don't need government to step in, because all they do is allow for this inefficiency, that is really viewed as what antitrust laws are meant to guard against.

**Jay:** Yeah, I remember back. So I graduated law school in 1990. So I remember, I was a summer associate at a big New York law firm, and they'd give me an offer, and I was petting them. So they, a senior partner and senior associate invited me to lunch to kind of make sure I'd say yes, which I did. And, we're talking, I decided I wanted to go into the antitrust department there. And, I was asking them about sort of antitrust, and whether it's a dying field, as some had said, because during the Reagan years there was this perception that it wasn't being enforced. And they said, No, not at all. I mean, and they said, it's being enforced, it's just enforced differently, and on different things, which I think you alluded to, they didn't feel they needed to

get involved as much as its predecessors, but where there was market breaking of conduct like price fixing, and cartels, and whatever, they definitely stepped in because they wanted markets to work. And I still remember a big theme in from my antitrust teachers, and even in one of my antitrust papers for law school, allocative efficiency, making sure that our resources are allocated efficiently, that's what the antitrust laws wanted to do. And they wanted it to go to the people who valued it the most and so that seemed to be almost as if Moses came down with that term, from the mountain, and that governed a lot of things. But, there was another thing, Judge Bork wrote this fairly well known and pretty breakthrough at the time called the antitrust paradox.

**Carrie:** Yeah, definitely. Yeah. This this consumer welfare standard is, is really interesting. It views the purpose of antitrust laws as ensuring that prices are as low as possible, which is a really interesting way to look at competition and exactly what it is that antitrust laws should guard against and how the market should work.

**Jay:** You know, it's interesting, sometimes, you know, you sort of you look at symptoms, and then sometimes you try to look at the disease and I guess maybe this is a good analogy, but I think consumer welfare says let's look at the symptoms. If prices are low, then we're going to assume everything behind that is working properly, right? Because otherwise, why would prices be low?

**Carrie:** Right? Yeah, that's a really interesting way to way to put it on. It's kind of this whole chicken in the egg scenario where we're saying, you know, do antitrust law enforcement causes prices to be low, or are prices that are low evidence that these laws are working? And yeah, so it's a really interesting way to just view enforcement and, and the role of antitrust in the market.

**Jay:** The Chicago School plays great faith in axioms, the axiom is that everybody's a profit Maximizer everybody acts rationally. I'm pretty sure my wife would dispute that. But you know, but everybody is going to act rationally in their self-interest. And if everybody does that, then the markets, they will clear they will be efficient, as long as there's no artificial barrier to entry that, you know, that will prevent competition, or there's nothing artificial, like a price fixing agreement. Ultimately, the markets will take care of itself, just chill out and let the markets work. And let's just look over time, our prices good. Are the consumers doing? Well, and that seemed to be a reasonable way of viewing things. Of course, we were taking, I guess, an idealistic view of how markets work and imposing it on reality, though, right. I mean, does everybody act rationally? I don't know. You told me.

**Carrie:** I mean, I don't think so. I I definitely agree that this is really a more of an idealistic view of the market. And I think if we look at the news headlines, and really the, the general views today, I mean, most people would push back against this idea. I mean, really, the headlines we're seeing today are companies are out of control, like they're becoming way too big. So I think this whole rational consumer and the consumer welfare standard are really being rejected.

**Jay:** Yeah, no, I wholeheartedly agree. I even remember, thinking as a economics as part of my undergrad thinking, these kinds of assumptions, these axioms, they're good to work with in terms of developing theory. But if we're relying too much on it, to the extent reality differs and is distinct from these axioms, we're not really going to be able to get at some of the root causes. And I guess, that's sort of morphed into the post Chicago School, which realized, maybe we have to incorporate a little bit more realism into our thinking, right?

**Carrie:** Definitely. Yeah. And it's interesting to see how this post Chicago School really morphs its way into the generation of today, which is really the new Brandeisian theory. And that was a product of Justice Brandeis who has this great quote, he said, I have considered and do consider that the proposition that mere bigness cannot be an offense against society is false, because I believe that our society which rests upon democracy cannot endure under such conduct conditions. So the new Brandeisians really embody this projection of the Chicago School and post Chicago School and really see, you really see today with this new Brandeisian theory and view that recent administrations aren't enforcing antitrust laws enough. And companies have become so big that we need the government to step in. So it's really interesting to see how we've moved away from the Chicago School and really this rejection of theory as the basis for enforcement.

**Jay:** Yeah, it's interesting. It's not like, this stuff isn't coming. These aren't para dynamic shifts, it has been a movement. And it's not as if even under President Obama, it's not as if there was wildly different theories of antitrust from his predecessor. And, you know, Chicago School still sort of dominated in terms of the foundation. But they did bring into account more reality more behavioral economics, Game Theory, that kind of approach and I do think they worried a little bit more about market power than maybe the predecessors in the 90s. They just didn't worry about it to the exclusion of everything else. The focus still was if prices are low, there can't be anything wrong with market power. If in fact it's allocating things appropriately, and prices are low, and I think it's that point that the new Brandeisians, which is the name sort of given to the current more progressive school of antitrust, that's what they fundamentally disagree with. And I think they fundamentally disagree, that you can't look at pricing and saying, All everything on the back end must be fine. But rather, market power in and of itself is an evil that must be done away with, irrespective of how and what price levels look at right now.

**Carrie:** Absolutely, yeah, it's, it's really interesting, your point about how there really hasn't been a dramatic shift. It's really been over time. And I think that really lends to the theme of our series. And really, why we have these question marks is an antitrust revolution coming because we've been seeing it kind of happen in the rearview mirror. And it seems like maybe the peak is upon us with this new legislation that's been enacted. And the upcoming just shifts, but it's really still a question, because I mean, we've seen these small shifts between administrations, and the rule that antitrust is playing. And it's also really interesting to see that, really the social view, and the headlines that we're seeing today is that antitrust enforcement is at an all-time low, and it's really lax, but from some of the research we've done, we've seen that there are some studies that really don't line up with that view. Can you tell us a little bit about that Jay?

**Jay:** It is very interesting, you know, what is it there's lies, damned lies, and statistics. I mean, I guess numbers can support whatever position you want. But each side sort of has their own way of looking at the numbers to support their position. So those who have felt that there's far too lax enforcement in the past couple years. I mean, how could you have let a lot of these companies get to a market capitalization of whatever it is, and how could you have let all of these mergers go? There was one study that said, over 75% of us industries have experienced an increase in concentration levels. And it went on to say that we find that firms and industries with the largest increases in product market concentration, have enjoyed higher profit margins, and more profitable M&A deals. At the same time, we do not find evidence of a significant increase in operational efficiency, which suggests that market power is becoming an important source of value, which meaning that market power in and of itself is not causing efficiency, which would tend to keep prices well, but rather, is keeping prices higher than they otherwise should be. Yet, if you look at the statistics that the enforcement agencies keep, there was a study done that really showed that agency enforcement and merger policy has been fairly

consistent almost from the the Hart Scott Rodino act that forces merging parties to notify the antitrust authorities was enacted in 76. If you look at almost from 1980, to the present, it really is fairly consistent from 97 to 2017. Enforcement was between one and 4.5% of all recorded filings, you don't see a lot of peaks and valleys, which is sort of the what you get the sense from hearing new Brandeisians that you would think that it used to be lots of merger enforcement. And then under the Republicans, it just went down to zero. And now they're trying to ratchet it up. It's much more of a flat line than it seems. Now, again, whether that tells the whole story or not, who knows. And it's entirely possible that more "anti-competitive" deals have been done in the past couple of decades. So that maybe consistent merger enforcement is actually lax merger enforcement. But, you know, that's where the argument lies. And it is clear that at least from a political perspective, the democrats are going to push for a much more robust enforcement because they do believe that market power in and of itself, don't talk to me about prices is an evil and for all the reasons we've talked about whether it's not giving people enough chance, whether it's gender or racial inequality, or anything else, I mean, it does look like where we are in for maybe another Thurman Arnold, like, you know, era. I mean, is that your impression?

**Carrie:** Definitely, Jay Yeah, that's a great way to put it. I mean, we're seeing mass legislation And antitrust I think just in the past month or few months. We've seen many, many antitrust bills, most notably, and this is a great time to tease our next article. Amy Klobuchar's bill on antitrust enforcement. And really this redefining of what competition means and what antitrust laws should reflect and address. And we're really seeing this theme of big as bad comeback. And it's going to be really interesting to see where this legislation takes us. And if we are on the heels of a great revolution, or if this is just really just a phase or just the new way of thought. So it's a really exciting time to be in antitrust line to be looking at these regulations.

**Jay:** Yeah, I'm like every good journalist, Carrie, teased our next article on podcasts. And I just want to add to that teaser, Senator Klobuchar, the name of her legislation is competition and Antitrust Law Enforcement Reform Act. So even the name sort of gives away sort of the view it's not it's not just simply moving further on the on the spectrum. I do believe that those in that political and philosophical and economic camp believe a reformation is needed not simply progression. And as you said, it'll be interesting, but that legislation will be the topic of our next podcast and article and I look forward to continuing the discussions with you Carrie.

**Carrie:** Definitely me as well.

**Jay:** So I guess we'll hold it here. Again. I am Jay Levine, the editor of Antitrust Law Source and the host of its podcast I'm joined by with my partner in crime Carrie garrison and a lawyer in our Pittsburgh Office. You can reach me at the [jlevine@porterwright.com](mailto:jlevine@porterwright.com), on Twitter @JayLLevine and also on LinkedIn. Carrie, how can people reach you?

**Carrie:** Yeah, you can reach me at [cgarrison@porterwright.com](mailto:cgarrison@porterwright.com). I'm also on LinkedIn and Twitter. My handle is @CGarrisonEsq and we welcome all feedback and comments so please reach out to us.

**Jay:** Absolutely. Have a great day and stay tuned.

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