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## The New Roaring Twenties: The Progressive Agenda for Antitrust and Consumer Protection Law

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# THE NEW ROARING TWENTIES: THE PROGRESSIVE AGENDA FOR ANTITRUST AND CONSUMER PROTECTION LAW

## INTRODUCTION

Jorge L. Contreras\*

It is an opportune moment to consider the trajectory of antitrust law in the United States. We are witnessing today an inflection point in both federal and state antitrust enforcement and a growing skepticism by courts of the doctrinal orthodoxy that has characterized the antitrust jurisprudence of the last half century.

Enforcement of the antitrust and consumer protection laws in the United States has experienced significant fluctuations over time. While enforcement activity was vigorous from around World War I through the 1950s and '60s, the emergence of the “Chicago School” in the 1970s led to an excessive focus on prices and output that, with a few notable exceptions, resulted in diminished agency enforcement and judicial narrowing of key legal doctrines.

In the 2010s, however, a significant counter-current began to emerge, seeking to link antitrust enforcement to broader social concerns such as wealth inequality, distributive justice, labor equity, corporate size, and individual liberty.

In 2019, the University of Utah organized a conference entitled “A New Future for Antitrust.”<sup>1</sup> The conference developed a set of principles for the reform and refocusing of antitrust law in the era of “big tech” entitled “The Utah Statement.”<sup>2</sup> This statement was a landmark in the development of what has come to be known as the Neo-Brandeisian school of antitrust—a movement that seeks to reinvigorate antitrust law with the pro-consumer, pro-competition principles espoused more than a century ago by Justice Louis Brandeis.<sup>3</sup> It has also come to inform the antitrust and consumer protection philosophy of the current Biden administration in ways that will be discussed in this Issue.

But the University of Utah’s involvement in antitrust reform extends back much further than 2019. A half-century ago, beginning in the 1970s, Professor John J. Flynn of the University of Utah was an outspoken national voice criticizing the

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<sup>1</sup> *A New Future for Antitrust?: Schedule of Events*, U. OF UTAH DEP’T OF ECON. (Oct. 25–26, 2019), <https://econ.utah.edu/antitrust-conference/schedule.php> [<https://perma.cc/UL5V-UZZK>].

<sup>2</sup> Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, MEDIUM (Nov. 18, 2019), <https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7> [<https://perma.cc/4PER-TSXE>].

<sup>3</sup> See generally Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 *TOURO L. Rev.* 227 (2017) (providing an introduction and overview to Brandeis’ thoughts on antitrust and his influence on contemporary antitrust enforcement).

Chicago School principles that were beginning to dominate antitrust analysis by agencies and courts. In 1975, he and Piero Ruffinengo, wrote that:

We have lost a consensus on an ethic of distributive justice in our culture and, as a result, we risk sinking into a new form of feudalism where the rights and dignity of the individual are made subservient to monolithic institutions, a political or economic elite, or a mindless and onrushing technocracy. In grappling with the conundrum of preserving individualism in an ever more complex and interdependent society, which is currently under great economic stress, we need a renewed consensus of justice—one which does not exalt efficiency, meritocracy, or group utility as the primary end of social and economic justice. Rather, we need a consensus which guarantees just institutions capable of restricting inequalities to those inequalities for the reasonable benefit of all, while preserving individual liberty.<sup>4</sup>

These sentiments ring as true today as they did in 1975. When Flynn wrote these words, his perspective was colored by the recent Vietnam Conflict, the Watergate scandal, the disgrace of a President, *Roe v. Wade*,<sup>5</sup> and of course the massive antitrust litigation involving AT&T. Today we face a different—but not too different—set of geopolitical, social, and legal issues. Yet a focus on wealth inequality, distributive justice, labor equity, corporate size, and individual liberty remains just as important today as it was a half-century ago.

The 2022 Lee E. Teitelbaum *Utah Law Review* Symposium, which bore the provocative title “The New Roaring Twenties: The Progressive Agenda for Antitrust and Consumer Protection Law,”<sup>6</sup> provided an opportunity for scholars, legal practitioners, and policy makers to come together to discuss these important issues. This Issue of the *Utah Law Review* includes contributions from several of the symposium speakers.

First, we present the transcript of a wide-ranging dialog between Lina Khan, Chair of the U.S. Federal Trade Commission and Professor Mark Glick of the University of Utah Department of Economics. Chair Khan covers a range of topics relating to the Commission’s positions and plans for the future, including its enforcement authority under Section 5 of the FTC Act,<sup>7</sup> its views about price discrimination actions under the Robinson-Patman Act,<sup>8</sup> the potential for

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<sup>4</sup> John J. Flynn & Piero Ruffinengo, *Distributive Justice: Some Institutional Implications of Rawls ‘A Theory of Justice,’* 1975 UTAH L. REV. 123, 157 (1975).

<sup>5</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>6</sup> *The New Roaring Twenties: The Progressive Agenda for Antitrust and Consumer Protection Law*, U. OF UTAH S.J. QUINNEY COLL. OF L. (Oct. 21, 2022), <https://sjquinney.utah.edu/event/the-new-roaring-twenties-the-progressive-agenda-for-anti-trust-and-consumer-protection-law/> [<https://perma.cc/LVL9-5JJF>].

<sup>7</sup> Federal Trade Commission Act § 5, 15 U.S.C. § 45.

<sup>8</sup> Robinson-Patman Act of 1936, 15 U.S.C. § 13.

enforcement relating to labor and the gig platform economy, the review of mergers in healthcare and other industries, and rulemaking pertaining to online privacy.

The first two articles engage with the underlying goals and premises of antitrust law and how they have evolved over the decades. In *Why Economists Should Support Populist Antitrust Goals*, Mark Glick, Gabriel A. Lozada, and Darren Bush challenge prevailing neoclassical economic conceptualizations of the consumer welfare standard in antitrust law and propose that it be replaced with a more general welfare approach. And in *Textualism as an Ally of Antitrust Enforcement: Examples from Merger and Monopolization Law*, Robert H. Lande argues that textualism, an interpretive approach usually associated with conservatism, can advance progressive goals given the origins of the principal U.S. antitrust statutes during the progressive political movements of the late nineteenth and early twentieth centuries.

The next two essays address consumer protection law in the new progressive era. In *At the Nexus of Antitrust & Consumer Protection*, Luke Herrine closely examines the FTC's authority to police unfair or deceptive acts and practices as a means for protecting consumers. And in *Consumer-Facing Competition Remedies: Lessons from Consumer Law for Competition Law*, Lauren E. Willis critiques existing consumer-facing firm conduct remedies and proposes the introduction to competition law of results-based competition remedies.

The final two essays explore the intersection of antitrust law and intellectual property. In *After eBay: Valid Patents and the Economics of Post-Trial Judicial Options*, J.R. Kearl argues that the Supreme Court's decision in *eBay, Inc. v. MercExchange LLC*<sup>9</sup> has critically distorted the economics of patent remedies and should thus be reversed. And in *Why Is FRAND Hard?*, Michael A. Carrier offers eight rationales why patent holders' commitments to license patents covering industry standards on terms that are "fair, reasonable and nondiscriminatory" (FRAND) have given rise to significant disputes and controversy.

Each of these contributions addresses an important facet of the debate over the progressive agenda for antitrust and consumer protection law in this and coming years.

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<sup>9</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).