



## TRUSTBUSTERS

# The Warren Court: A Distant Mirror?

## Part III—“So we beat on, boats against the current”<sup>1</sup>

BY WILLIAM KOLASKY

ON THE MORNING OF JANUARY 20, 1961, the city of Washington, DC lay in a white blanket of freshly fallen snow. By noon, the sun was shining in a bright blue sky, but with a wind chill making the temperature feel near zero. When Chief Justice Earl Warren administered the oath of office to John F. Kennedy shortly after noon, the new president—who at age 43 was a quarter century younger than Warren—stood erect before the Chief Justice with his hand raised to take the oath, dressed elegantly with only a morning coat and striped trousers to protect him from the chill winds. After taking the oath, Kennedy declared in his inaugural address that “the torch has been passed to a new generation of Americans.” Photographs of the ceremony show the outgoing president, Dwight Eisenhower—who had just turned 70, making him the oldest president to serve up to that time—seated behind Kennedy, bundled in a black overcoat, with a white scarf around

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his neck and a top hat on his knee, seeming to underscore Kennedy’s message of generational change.<sup>2</sup>

John F. Kennedy’s inauguration came shortly before the midpoint of Earl Warren’s 15-year tenure as Chief Justice. Over the remainder of Warren’s time on the Court, Kennedy and, after his assassination, President Lyndon B. Johnson, would appoint four new justices to the Court: Byron White, Arthur Goldberg, Abe Fortas, and Thurgood Marshall. These four new justices solidified a liberal majority on the Court and provided further support for strong antitrust enforcement. As a result, during the last four years of Warren’s tenure as Chief Justice, the Court decided every single antitrust case it heard in favor of the plaintiffs—23 consecutive cases in all.

In this final article of our three-part series on the Warren Court, we will first look at the backgrounds of the two new justices who had the greatest impact on the antitrust record of the Warren Court: Byron White and Abe Fortas.<sup>3</sup> We will then step back to examine what lessons we can take from the Warren Court’s antitrust decisions that may inform the current debate over antitrust policy in what many have termed a new Gilded Age.<sup>4</sup>

### The Two New Justices: Byron White and Abe Fortas

**Byron White:** “*The ideal New Frontier judge.*”<sup>5</sup> Prior to John F. Kennedy’s inauguration, a split had already developed on the Warren Court between the five progressive justices who supported strong antitrust enforcement—the Chief, Hugo Black, William O. Douglas, Tom Clark, and William Brennan—and the four more conservative justices—Felix Frankfurter, John Marshall Harlan II, Potter Stewart, and Charles Evans Whittaker. Justice Whittaker was the first of these more conservative justices to retire, doing so early in 1962.

To replace Whittaker, Kennedy chose Byron White, who was then serving as the Deputy Attorney General under the president’s younger brother, Bobby Kennedy.<sup>6</sup> When he nominated White to the Court, President Kennedy described him “the ideal New Frontier judge.”<sup>7</sup> Byron White, indeed, seemed almost a Lancelot-like figure in Kennedy’s modern-day “Camelot.”<sup>8</sup> At the University of Colorado, White had been a star in all three major sports—football, basketball and baseball—earning the nickname “Whizzer” (which he hated) during his sophomore year.<sup>9</sup> Not only was White the first Colorado player to be named an All-American in football, but the National Invitational Tournament, played in Madison Square Garden, was created in part to give White a chance to showcase his basketball skills to New York sports writers.<sup>10</sup>

After graduating as student body president, class valedictorian, and a star athlete in three sports in 1938, White won a Rhodes scholarship, which he deferred for a semester to play for the NFL’s Pittsburgh Pirates (now the Steelers) for a then-record salary of \$15,800, which he used to fund his legal education.<sup>11</sup> After his first season in the NFL, White studied at Oxford for a short time, until the outbreak of World War II in September 1939 forced him to return to the United States. It was in England that White first met Jack Kennedy, whose father was then serving as

the U.S. ambassador to the Court of St. James.<sup>12</sup> After returning to the United States, White enrolled in Yale Law School while continuing to play football in the NFL, now for the Detroit Lions, where he led the league in rushing in 1940 and 1941. White was inducted into the College Football Hall of Fame in 1954.

After Pearl Harbor, White enlisted in the Navy, serving as a naval intelligence officer in the South Pacific where he met his future fellow justice, John Paul Stevens, who was serving there as well.<sup>13</sup> While serving in the Navy, White became reacquainted with Jack Kennedy when he was assigned to write a report on the sinking of PT-109, a torpedo boat Kennedy had commanded, in which he nearly lost his life.<sup>14</sup>

White returned to finish his law degree at Yale after the war, where he again graduated as the valedictorian of his class, this time with the highest grade point average at the school in more than two decades, a remarkable achievement for someone who had played professional football during most of his time there. White went on to clerk for Chief Justice Fred Vinson, making him the first Supreme Court justice to have served as a clerk on the Court.<sup>15</sup>

After his clerkship, White returned to Colorado in August 1947 to practice law in Denver. He joined a four-lawyer firm that eventually grew to become Davis Graham & Stubbs—now the third largest firm in Denver, with over 141 lawyers.<sup>16</sup> White's practice there was mostly as a transactional lawyer. He tried only a handful of cases, almost all minor criminal matters, by appointment of the court.<sup>17</sup> White was active in local Democratic politics, but mostly only at the neighborhood level.<sup>18</sup> He did, however, support Jack Kennedy's campaign for president from the beginning, and ended up helping to run his campaign in Colorado. White ultimately became the national chairman of Citizens for Kennedy, a nonpartisan group seeking to attract support from independents and Republicans. White's efforts on Jack Kennedy's behalf led to his appointment to serve as Deputy Attorney General.<sup>19</sup>

From the day Justice Whittaker informed the president in March 1962 that he wished to retire from the Court because of mental exhaustion, Byron White was JFK's first choice to replace Whittaker.<sup>20</sup> Bobby Kennedy was heavily reliant on White to help manage the Department of Justice, and initially resisted White's nomination.<sup>21</sup> The younger Kennedy, therefore, sought to suggest other candidates. He was particularly enamored of the idea of appointing Judge William Hastie of the Third Circuit so that his brother could become the first president to appoint an African-American to the Supreme Court. But Bobby was chastened when he met with Chief Justice Warren to seek his advice. He later recalled that Warren "was violently opposed to having Hastie on the Court," because he was "not a liberal" and would be "opposed to all the measures that we are interested in."<sup>22</sup> With Hastie eliminated from consideration, President Kennedy quickly nominated his own first choice, Byron White.

The President's nomination of White was widely praised, both by lawmakers and editorial writers across the country.<sup>23</sup> His nomination sailed through the Senate Judiciary Committee after a hearing that lasted only 90 minutes, with Senator Philip Hart setting the tone by observing that "this is the first appointment of

a player for the Detroit Lions to the Supreme Court."<sup>24</sup> The full Senate confirmed White by a voice vote on a motion for unanimous consent. The entire process took less than a month from the day Whittaker informed the president of his wish to retire.

**Abe Fortas: The Washington Insider.**<sup>25</sup> When Felix Frankfurter retired a few months later in 1962, Kennedy appointed his Secretary of Labor, Arthur Goldberg, to what at the time was viewed as the "Jewish seat" on the Court.<sup>26</sup> Goldberg had earned Kennedy's gratitude by successfully mediating a labor dispute between U.S. Steel and the steelworkers union, in which he pressured the union to agree to a "non-inflationary" wage increase with an implicit understanding that the steelmakers would also hold prices steady.<sup>27</sup> When U.S. Steel announced a 3.5 percent price hike two weeks later, quickly followed by the other major steel producers, President Kennedy had Bobby Kennedy convene a grand jury to investigate the steel executives. Acting at the Attorney General's direction, FBI agents called executives at their homes at 3 a.m., tapped their phones, and subpoenaed their bank accounts and tax records. Under the threat of criminal prosecution, the steelmakers "capitulated and agreed to rescind the price increase[s]."<sup>28</sup>

For Goldberg, the first in his family to go to college, an appointment to the Supreme Court was the dream of a lifetime. Unfortunately, his tenure on the Court proved to be short. After Lyndon B. Johnson became president on November 22, 1963, following Kennedy's assassination, LBJ wanted to find a place on the Court for his long-time friend and consigliere, Abe Fortas.<sup>29</sup> Believing the country was not ready for a Supreme Court with two Jewish justices, Johnson felt the only way to put Fortas on the bench was to push Goldberg off it. Johnson therefore offered Goldberg the UN ambassadorship with Adlai Stevenson's death in July 1965. In trying to persuade Goldberg to accept, Johnson appealed to his sense of patriotic duty as a former OSS officer during World War II and led Goldberg to think he might pick him to be his running mate in 1968.<sup>30</sup> The tactic worked: Goldberg agreed to make room for Fortas, hoping that by doing so he might be able to persuade Johnson not to get too deeply enmeshed in Vietnam—something he was unable to do.

Fortas, like White, had graduated from Yale Law School, where he had compiled a record almost as impressive as White's, finishing near the top of his class and serving as editor-in-chief of the *Yale Law Journal*.<sup>31</sup> While a student, Fortas caught the eye of three of the school's best-known professors: Jerome Frank, William O. Douglas, and Thurman Arnold, all of whom went on to hold senior positions in New Deal agencies and played important roles in advancing Fortas's career.

After Fortas graduated from Yale in June 1933, Jerome Frank brought him to Washington to work with him at the Agricultural Adjustment Administration.<sup>32</sup> Two years later, Fortas returned to New Haven to teach at Yale, where his new wife and future law partner, Carolyn Agger, was still a student.<sup>33</sup> While there, Fortas commuted back and forth to Washington to work on a study with his former professor, William Douglas, who was then serving as an SEC commissioner. When Douglas became the chair of the Commission in 1937, he brought Fortas back to Washington full-

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time to serve as assistant director of the SEC's Public Utilities Division.<sup>34</sup> Then, in 1939 when he was appointed to the Court, Douglas helped Fortas find a new position at the Department of Interior, where he stayed until the end of World War II, serving for the last five years as the Department's Under Secretary.<sup>35</sup>

After he left Interior, Fortas reunited with the third of his Yale professors, Thurman Arnold, to form a new law firm, Arnold & Fortas, which became Arnold, Fortas & Porter when Paul Porter joined them one year later.<sup>36</sup> For the next two decades, Fortas served as the de facto managing partner of the firm.<sup>37</sup> Over this period, Fortas developed a reputation both as a quintessential Washington insider and as a skilled litigator with a remarkable record of success in litigating against the government, particularly in antitrust cases.

In 1965, when President Johnson offered to name him to the Court to replace Goldberg, Fortas tried to decline the offer—in part because it represented a substantial cut in salary.<sup>38</sup> After spending weeks trying to convince Fortas to reconsider, Johnson finally forced Fortas's hand by asking him to come to the White House for a press conference Johnson had called to announce that he was sending 50,000 more troops to Vietnam. When Fortas arrived, Johnson told Fortas he was also going to announce that he was appointing Fortas to the Court, telling him “if those fifty thousand individuals could sacrifice for their country, Fortas could too.”<sup>39</sup> Feeling he had no choice, Fortas accompanied Johnson to the press conference, although he later claimed, “To the best of my knowledge and belief, I never said yes.”<sup>40</sup>

As things turned out, Fortas might have been better off had he said no. Just three years later, when Earl Warren wrote to Johnson in June 1968 that he intended to resign from the Court, Johnson insisted—against the advice of his advisers—on nominating Fortas to replace Warren as the Chief Justice and an old Texas crony, Homer Thornberry, to fill Fortas's seat as an associate justice.<sup>41</sup> Confident of their ability to retake the White House in the fall election, Republican senators objected to a lame duck president filling two seats on the Court during his last few months in office. They mounted a serious effort to block Fortas's nomination, in which they were joined by most Democratic senators from southern states, who were upset at the Warren Court's civil rights record.<sup>42</sup>

During the Labor Day recess, the opponents to Fortas's nomination uncovered evidence contradicting his testimony at his nomination hearings denying that he had continued serving as an adviser to LBJ while on the Court.<sup>43</sup> They also found that Paul

Porter had helped Fortas supplement his Supreme Court salary by securing funding from their firm's large corporate clients to pay Fortas the “exorbitant sum” of \$25,000 annually for teaching a summer law seminar at American University.<sup>44</sup> Armed with this evidence, the opponents threatened to filibuster when Fortas's nomination reached the Senate floor. Realizing they did not have the votes to override a filibuster, Johnson and Fortas agreed to withdraw his nomination.<sup>45</sup>

Seven months later, revelations emerged that, as a justice, Fortas had received \$20,000 for speeches from the family foundation of a former client under investigation for stock fraud. Facing potential criminal prosecution for not disclosing these payments during his confirmation hearings, Fortas resigned from the Court in May 1969.<sup>46</sup> To compound his disgrace, the younger partners at the firm he had founded refused to take him back and dropped his name from the firm, which then became simply Arnold & Porter.<sup>47</sup> President Johnson summed it up well when he said, following Fortas's resignation: “I made him take the justiceship. In that way I ruined his life.”<sup>48</sup>

**“The Best and the Brightest.”** It may be unfair, but in terms of their resumes and the antitrust opinions they wrote for the Warren Court, one cannot help but be reminded of David Halberstam's classic book about the Kennedy-Johnson foreign policy team (in particular, Robert S. McNamara and McGeorge Bundy) whose brilliance and hubris resulted in the U.S. stumbling into an unwinnable war in Vietnam to which he gave the ironic title, *The Best and the Brightest*.<sup>49</sup> While Byron White and Abe Fortas had always seemed the best and the brightest in all they had done, they managed to write what many now view as four of the worst U.S. antitrust opinions ever.<sup>50</sup>

***Utah Pie v. Continental Baking Co.***<sup>51</sup> In *Utah Pie*, the Court, in an opinion by Justice White, held that the three defendants—all large national companies—had violated the Robinson-Patman Act by selling frozen pies at discriminatorily low prices in Salt Lake City, as compared to their other markets. The Court's decision provoked an immediate round of criticism.

The first to weigh in was Ward Bowman, an economist who taught with Robert Bork at Yale.<sup>52</sup> In an article appearing shortly after the *Utah Pie* decision was issued, Bowman accused the Court of converting the antitrust laws, which were “designed to promote competition,” into laws that “hamper the competitive process.”<sup>53</sup> Bowman explained that the local price cuts in question had been a response to the entry of a new competitor, Utah Pie, which had substantially undercut the defendants' prices. While the defendants' price reductions had initially enabled them to recapture a large share of the market, Utah Pie's share had later rebounded and its sales and profits actually increased after it further reduced its own prices in response.<sup>54</sup> To Bowman, this was just the type of price competition the antitrust laws should encourage because it had served to increase output and reduce prices to the benefit of consumers.

So what happened after the Court's decision? As those of us who were practicing law at the time can remember, *Utah Pie* engendered more than two decades of antitrust litigation in which plaintiffs rushed to court accusing their larger rivals of

“predatory pricing.” This, in turn, led to an equally large wave of scholarly articles proposing that the courts use a cost-based test under which a plaintiff would be required to show that a defendant’s allegedly predatory prices were below some measure of its costs in order not to chill price competition altogether.<sup>55</sup>

Over the next 20 years, the lower courts struggled with these issues until the Supreme Court finally put this debate to rest in 1993 with its decision in *Brooke Group*, in which it essentially overruled *Utah Pie*.<sup>56</sup> Since that decision, no plaintiff has been able to win a predatory pricing case and what had been a flood of litigation was reduced to a trickle before drying up altogether.

But what happened on the ground in Salt Lake City? Well, the decision in *Utah Pie* outlived the plaintiff. Despite having won in the Supreme Court, *Utah Pie* began to lose sales again after its victory until it went out of business in 1972.<sup>57</sup> The frozen pie market in Salt Lake continued, however, to be highly competitive, with two of the three defendants continuing to be active, and with at least four local frozen pie makers and several other large national frozen pie makers entering the market after the Supreme Court’s decision.<sup>58</sup>

***Albrecht v. Herald Co.***<sup>59</sup> In *Albrecht*, another opinion by Justice White, the Supreme Court held vertical maximum resale price maintenance agreements per se illegal. The case arose when one of the two daily newspapers in St. Louis, *The Globe-Democrat*, terminated a dealer because it had violated the ceiling the paper had set on the prices its distributors—each of which had an exclusive territory—could charge their customers.<sup>60</sup>

Again, the Court’s decision was criticized almost from the day it was decided, this time for not having recognized that “a newspaper had a legitimate interest in subscribers not being overcharged by local monopoly deliverers.”<sup>61</sup> These criticisms continued for three full decades until 1998, when the Supreme Court finally overruled *Albrecht* in *State Oil v. Khan*,<sup>62</sup> holding that maximum resale price maintenance could no longer be treated as per se unlawful, but needed to be evaluated under the rule of reason.

Over those three decades, *Albrecht* had perverse, but entirely predictable, real-world consequences. It caused many newspapers to move away from their pre-existing system of independent distributors and replace them with agents who would sell the papers at whatever price the publisher set.<sup>63</sup> To the extent the decision was driven by a desire to protect the freedom of the distributors, it had the opposite effect—putting many of the distributors out of business or forcing them to become mere agents of the newspapers.

***United States v. Arnold Schwinn & Co.***<sup>64</sup> In *Schwinn*, the Court, in an opinion by Justice Fortas, held that the vertical territorial restraints Schwinn had imposed on the resale of its bicycles by its distributors were per se illegal, while holding that identical restraints imposed on distributors who were acting as its agents in the direct sale of its products were not. In explaining this difference in treatment, Fortas pointed to what he referred to as “the ancient rule against restraints on alienation,”<sup>65</sup> but made no effort to explain why this distinction still made sense from an antitrust perspective.

As with Justice White’s opinions in *Utah Pie* and *Albrecht*, Justice Fortas’s opinion in *Schwinn* was harshly criticized almost from the day it was issued, with the critics arguing that vertical non-price restraints are generally procompetitive because they provide an incentive for distributors to promote a manufacturer’s products and should therefore be evaluated under the rule of reason, not condemned as per se unlawful.<sup>66</sup> Citing several of these articles, the Supreme Court, in an opinion by Justice Lewis Powell, overruled *Schwinn* just ten years later in *GTE Sylvania*,<sup>67</sup> making it “perhaps the shortest lived Supreme Court precedent in the century-plus history of the Sherman Act.”<sup>68</sup>

Unfortunately, before the Court’s decision in *GTE Sylvania*, Schwinn had already stopped selling bicycles through independent distributors and had constructed four regional warehouses from which bicycles could be sent to local distributors acting as its agents.<sup>69</sup> As a result, many former Schwinn distributors went out of business and others began distributing other brands. These new warehouses and distribution systems cost Schwinn millions of dollars at a time when it faced growing competition from foreign manufacturers. For that and other reasons, Schwinn saw its market share continue to shrink over the next two decades, until it declared bankruptcy in 1992.<sup>70</sup>

***United States v. Sealy, Inc.***<sup>71</sup> Decided the same day as *Schwinn*, *Sealy* involved what we would today view as an efficiency-enhancing joint venture. Since the beginning of the 20th century, Sealy had built a national footprint by licensing independent mattress manufacturers to make and sell mattresses under the Sealy name and trademark, while also making them shareholders.<sup>72</sup> By the time the government filed its action, Sealy had 30 manufacturer-licensees who collectively owned almost all of the company’s stock. Sealy’s license agreements required its licensees to follow standards promulgated by Sealy and assigned each one an exclusive territory in which they were allowed to sell Sealy brand mattresses at specified resale prices but prohibited them from selling outside that territory. The licensees were free, however, to make and sell mattresses not bearing the Sealy name without any such restrictions.

The government challenged this arrangement, alleging that it was a per se illegal horizontal price fixing and market allocation agreement because the licensees could have, but for these restrictions, competed with one another in selling Sealy mattresses. In a short opinion by Justice Fortas, the Court agreed, holding the restraints per se illegal because “they gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions.”<sup>73</sup>

In *The Antitrust Paradox*, then-Yale law professor Robert Bork argued that the record showed that the primary purpose of this entire arrangement was to enable geographically dispersed mattress manufacturers to create a uniform product they could advertise and sell nationally.<sup>74</sup> The restraints Sealy imposed on its licensees, he argued, were designed to give them an incentive to make the investments necessary to manufacture mattresses to Sealy’s specifications and to promote the sale of its mattresses without fear that another licensee would free ride on their efforts

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by undercutting them on price.<sup>75</sup> Their purpose, he maintained, could not have been to charge monopoly prices because there were many competing brands of mattresses and Sealy had only a small share of the market.<sup>76</sup> Therefore, he concluded, the alleged restraints should have been reviewed under the rule of reason, not condemned as per se illegal.<sup>77</sup>

Again, it is revealing to look at what happened after the Court's ruling in *Sealy*. After losing in the Supreme Court, Sealy revised its licensing agreement in 1968. The new licensing agreement gave each licensee an "area of primary responsibility," but permitted them to sell Sealy mattresses outside that area so long as it paid a higher royalty to Sealy on those sales.<sup>78</sup>

Sealy's largest licensee, the Ohio Mattress Company, filed an antitrust suit against Sealy in 1971, alleging that Sealy's revised licensing agreement still operated as a per se illegal horizontal market allocation agreement. The lower courts agreed, awarding Ohio Mattress \$77 million in damages and enjoining Sealy from enforcing its challenged license restraints.<sup>79</sup> Unable to come up with the \$77 million award, Sealy agreed to be acquired by Ohio Mattress.<sup>80</sup> Once more, it is hard to see how forcing Sealy to be restructured in this manner, with all its smaller licensees forced to sell their interests to Sealy's largest licensee, increased competition or otherwise protected either small business or local ownership.

### **"Boats Against the Current"**

We discuss these four cases not to disparage Justices White and Fortas for having written the opinions, but as a reminder of what could happen if we were to depart from the consumer welfare standard the courts have used to decide antitrust cases for the last four decades, since the Supreme Court first endorsed that standard in 1979 in *Reiter v. Sonotone*.<sup>81</sup> What is most striking about all four opinions is the complete absence of any discussion of the issues from an economic perspective. Instead, these four opinions reflected what until then had been the usual approach of the courts in antitrust cases of deciding them in the common law tradition, in which what mattered most was how courts had decided similar cases in the past, without engaging in any serious analysis of the likely effects of the conduct at issue on competition.

As a further example of this failure to consider the likely economic effects of the conduct at issue, we examine in this section what happened as a result of the highly restrictive policy the Warren Court adopted toward horizontal and vertical mergers in its decision in *Brown Shoe* in 1962,<sup>82</sup> and its later merger decisions over the rest of Earl Warren's tenure as Chief Justice.<sup>83</sup> What we find is that despite the Warren Court's highly restrictive merger decisions, the 1960s experienced what one historian has called "the third and greatest merger movement to that time in U.S. history," during which 9,400 corporations were absorbed into other companies.<sup>84</sup> But, whereas most mergers during the period when the Celler-Kefauver amendments were adopted in 1950 had been either horizontal or vertical, the vast majority in the 1960s were conglomerate mergers in which there was no direct horizontal or vertical overlap between the merging firms.<sup>85</sup>

This conglomerate merger wave led to an increase in economic concentration much greater than that which had led to the enactment of the Celler-Kefauver amendments to Section 7. By 1968, nearly half of all manufacturing assets were controlled by only 87 companies.<sup>86</sup> This conglomerate merger wave often created companies that were too large and too diverse to be managed efficiently, but not too large to fail. As measured by stock market returns, conglomerate firms, in general, badly underperformed the market as a whole in the late 1970s and early 1980s.<sup>87</sup> Therefore, during the 1980s there was a reverse "wave of deconglomeration."<sup>88</sup> The general view now is that the conglomerate merger wave was "'almost certainly the biggest collective error ever made by American business,' a 'colossal mistake' that had left American industry uncompetitive relative to international rivals."<sup>89</sup>

For me, this unintended consequence of the Warren Court's too-restrictive merger policy is personal. My hometown, Springfield, Vermont, was a victim of the conglomerate merger wave.

Springfield sits on the west bank of the Connecticut River, which separates Vermont and New Hampshire, midway between Brattleboro and White River Junction. When I grew up there in the 1950s and 1960s, Springfield was a prosperous machine tool center in what was then known as Precision Valley.<sup>90</sup> A town of just 10,000, it was home to three successful machine tool companies: Jones & Lamson, Fellows Gear Shaper, and Bryant Chucking Grinder. All three were locally owned; together, they produced nearly 10 percent of all machine tools manufactured in the United States, employing more than 3,000 people. In addition to a large unionized blue-collar work force, Springfield also had a large white-collar community made up largely of engineers and executives at the three factories and had excellent schools that produced nearly as many National Merit Finalists as the high schools in Burlington, Vermont—a city more than six times its size.<sup>91</sup>

That all began to change in 1958, when the smallest of the three companies, Bryant Chucking Grinder, was acquired by a large national conglomerate, Ex-Cell-O, based in Highland, Michigan.<sup>92</sup> Six years later, in 1964, Jones & Lamson, the largest of the three, was acquired by another large conglomerate, Textron, headquartered in Providence, Rhode Island.<sup>93</sup> Ten years later, in 1974, the last of the three, Fellows Gear Shaper, was acquired by Emhart Corporation, a multinational conglomerate headquartered in Farmington, Connecticut.<sup>94</sup>

When sales started declining in the mid-1970s, all three conglomerates stopped investing in R&D and instead began moving production lines out of Springfield to non-union states in the South.<sup>95</sup> By 1990, the three companies had largely ceased machine tool production in Springfield, leaving their large facilities as decaying remnants of what had once been a thriving industry. Today, Springfield's population is less than half what it was in 1960, and it has among the highest unemployment, poverty, and opioid addiction rates in the state.<sup>96</sup>

### **Reflections from a Distant Mirror**

So what can we learn from looking back a half-century later on the Warren Court? The main lesson is the one D.H. MacGregor,

an early disciple of Alfred Marshall, tried to teach us more than a century ago in 1906: “If there are economic tendencies, the state cannot prevent, although it can harass, them.”<sup>97</sup> For that reason, trying to use the antitrust laws to resist powerful economic trends is, as F. Scott Fitzgerald wrote in the final sentence of *The Great Gatsby*, like “boats against the current, borne ceaselessly back into the past”—a past that can never be recaptured.

As we have already seen, the Warren Court’s efforts to use the antitrust laws to preserve an “economic way of life” with “fragmented industries and markets” and “viable, small, locally owned” businesses would probably have been futile even if Robert Bork had never been born.<sup>98</sup> The economic forces pushing towards larger business units and greater concentration in the middle of the last century were just too strong. Much of what the Warren Court accomplished by its effort to use the antitrust laws to resist these trends was to force companies into alternative arrangements, some of which—such as conglomerate mergers—turned out to be affirmatively harmful to the American economy. Using the antitrust laws to try “to preserve a way of life” composed of small businesses with local owners proved to be as futile as King Canute trying to hold back the waves, and may have ended up doing more harm than good. Not unlike Gatsby’s efforts to win Daisy back from Tom Buchanan.

This is not to say that we should not be worried about the growing concentration in our economy and the evidence that it is causing Americans to pay higher prices for goods and services, slowing down innovation and new entry, and contributing to increased inequality, as well as to the hollowing out of towns like Springfield.<sup>99</sup> We now have several recent reviews of merger retrospectives that have raised serious questions about whether our merger policy has become too relaxed.<sup>100</sup> We should take these studies seriously, but in deciding how to address this issue, we also need to learn from the Warren Court experience so that we do not over-correct. ■

*Started the Legend of JFK ‘Camelot’*, WALL ST. J. (Nov. 22, 2013), <https://www.wsj.com/articles/jackie-started-the-legend-of-jfk-8216-camelot8217-1385176031>. The musical’s closing song ends with a lyric many of us who were alive when Kennedy was assassinated still often sing to ourselves before we go to sleep: “Don’t let it be forgot, that once there was a spot, for one brief, shining moment, that was known as Camelot.” *Id.*

<sup>9</sup> See HUTCHINSON, *supra* note 5, at 35, 85.

<sup>10</sup> See Charles Lane & Bart Barnes, *Longtime Justice Byron White Dies*, WASH. POST (Apr. 16, 2002), <https://www.washingtonpost.com/archive/politics/2002/04/16/longtime-justice-byron-white-dies/a5c2335a-81d8-4eb4-8696-1cc061a8b9f0/>.

<sup>11</sup> See HUTCHINSON, *supra* note 5, at 85.

<sup>12</sup> See Lane & Barnes, *supra* note 10.

<sup>13</sup> See *id.*

<sup>14</sup> The event was later made into a movie, entitled *PT-109*, starring Cliff Robertson as the future president, *PT-109* (Warner Bros. 1963), [https://en.wikipedia.org/wiki/PT\\_109](https://en.wikipedia.org/wiki/PT_109). The movie was released in June 1963, just five months before Kennedy’s assassination in November of that year.

<sup>15</sup> See Greenhouse, *supra* note 6. Justice John Paul Stevens clerked on the Court for Justice Wiley Rutledge two terms later, in 1947–48, giving the two of them something else in common. JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE* 58 (2014). Not surprisingly, the two became each other’s closest friends on the Court. *Id.* at 98.

<sup>16</sup> See HUTCHINSON, *supra* note 5, at 224–26; see also James Rodriguez, *2019 Largest Denver-Area Law Firms*, DENVER BUS. J. (Dec. 10, 2019), <https://www.bizjournals.com/denver/subscriber-only/2019/01/25/2019-largest-denver-area-law-firms.html>.

<sup>17</sup> The only antitrust case White worked on was *Loew’s v. Cinema Amusements* in 1954, in which he represented local plaintiffs in a nationwide antitrust suit brought by Thurman Arnold on behalf of independent movie theater operators who alleged that the major studios were channeling premium films to affiliated exhibitors. See HUTCHINSON, *supra* note 5, at 26.

<sup>18</sup> See *id.* at 232–33.

<sup>19</sup> For an excellent account of White’s time as Deputy Attorney General, see *id.* at 232–62; see also NICHOLAS KATZENBACH, *SOME OF IT WAS FUN: WORKING WITH RFK AND LBJ* 29–48 (2008).

<sup>20</sup> See HUTCHINSON, *supra* note 5, at 311.

<sup>21</sup> See *id.* at 316.

<sup>22</sup> *Id.* at 314.

<sup>23</sup> *Id.* at 322–23.

<sup>24</sup> *Id.* at 330.

<sup>25</sup> For an excellent book-length biography of Abe Fortas, see LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990).

<sup>26</sup> The only Jewish Supreme Court Justices prior to Goldberg were Louis Brandeis, appointed by President Wilson; Benjamin Cardozo, appointed by President Hoover; and Felix Frankfurter, appointed by President Roosevelt.

<sup>27</sup> Theodore P. Kovaleff, *The Two Sides of the Kennedy Antitrust Policy*, 37 ANTITRUST BULL. 35, 45 (1992).

<sup>28</sup> Carl Hittinger & Tyson Herrold, *Presidential Powers and Antitrust Politics: Part One*, LEGAL INTELLIGENCER (July 28, 2017), <https://www.antitrustadvoocate.com/2017/07/31/presidential-powers-and-antitrust-politics-part-one/>.

<sup>29</sup> In his successful race for the Senate in 1948, Johnson, who was a New Deal liberal, fought a bitter contest for the Democratic nomination with a conservative former governor of Texas, Coke Stevenson. After Johnson’s narrow victory in the Democratic primary, Stevenson obtained a temporary restraining order from a district judge in Texas forbidding the Democratic Party from placing Johnson’s name on the ballot as the Democratic nominee because of Johnson’s alleged “vote stealing.” After failing to persuade the Fifth Circuit to stay the district court’s TRO, Fortas, with help from several other former New Dealers, persuaded Justice Hugo Black to grant a stay, after which the Fifth Circuit set aside the injunction altogether, opening the way for Johnson to win the general election easily in what was then a heavily Democratic state. From that point on, Fortas remained a close friend and advisor to Lyndon Johnson, up to and after Johnson became president. See KALMAN, *supra* note 25, at 200–02.

<sup>1</sup> F. SCOTT FITZGERALD, *THE GREAT GATSBY* 193 (Scribner 2018) (1925) (“So we beat on, boats against the current, borne back ceaselessly into the past.”).

<sup>2</sup> Kennedy, too, had worn a top hat to the ceremony, but had removed it before taking the oath of office and delivering his Inaugural Address.

<sup>3</sup> The other two justices the two Democratic Presidents appointed, Arthur Goldberg and Thurgood Marshall, both served on the Warren Court only briefly, during which neither wrote any opinions in antitrust cases.

<sup>4</sup> See, e.g., SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE* (2013); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

<sup>5</sup> For an excellent book-length biography of Byron White, see DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998).

<sup>6</sup> See Linda Greenhouse, *Byron R. White, Longtime Justice and a Football Legend, Dies at 84*, N.Y. TIMES (Apr. 16, 2002), <https://www.nytimes.com/2002/04/16/us/byron-r-white-longtime-justice-and-a-football-legend-dies-at-84.html>.

<sup>7</sup> HUTCHINSON, *supra* note 5, at 322.

<sup>8</sup> See, e.g., ROBERT DALLEK, *CAMELOT’S COURT: INSIDE THE KENNEDY WHITE HOUSE* 422 (2013). The comparison is generally attributed to President Kennedy’s widow, Jacqueline Kennedy, who was a fan of the Lerner & Loewe musical then playing on Broadway, entitled *Camelot*. See Ben Zimmer, *Jackie*

- <sup>30</sup> See BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* 87 (2006).
- <sup>31</sup> See KALMAN, *supra* note 25, at 23–25.
- <sup>32</sup> *Id.* at 27–28.
- <sup>33</sup> *Id.* at 47–48.
- <sup>34</sup> *Id.* at 61.
- <sup>35</sup> *Id.* at 91.
- <sup>36</sup> *Id.* at 125–26; William Kolasky, *Thurmond Arnold: An American Original*, ANTITRUST, Summer 2013, at 89, 94–95.
- <sup>37</sup> See NORMAN DIAMOND, *A PRACTICE ALMOST PERFECT: THE EARLY DAYS AT ARNOLD, FORTAS & PORTER* 89 (1997).
- <sup>38</sup> See KALMAN, *supra* note 25, at 244.
- <sup>39</sup> *Id.*
- <sup>40</sup> *Id.*
- <sup>41</sup> *Id.* at 327–28.
- <sup>42</sup> *Id.* at 329–33.
- <sup>43</sup> *Id.* at 337–39, 351.
- <sup>44</sup> *Id.* at 326–27, 351–53. That annual stipend would be the equivalent of nearly \$68,000 in current dollars. At the time, \$25,000 was the equivalent of two-thirds of his annual salary as a Supreme Court Justice and was nearly as much as a U.S. senator's salary of \$30,000. *Judicial Compensation*, United States Courts, 2019, <https://www.uscourts.gov/judges-judgeships/judicial-compensation>; *Senate Salaries Since 1789*, United States Senate, 2019, [https://www.senate.gov/artandhistory/history/common/briefing/senate\\_salaries.htm](https://www.senate.gov/artandhistory/history/common/briefing/senate_salaries.htm).
- <sup>45</sup> KALMAN, *supra* note 25, at 355–56.
- <sup>46</sup> *Id.* at 370–76.
- <sup>47</sup> *Id.* at 380–82; see also DIAMOND, *supra* note 37, at 281–82.
- <sup>48</sup> KALMAN, *supra* note 25, at 376.
- <sup>49</sup> DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972); see Frank Rich, *The Brightest Are Not Always the Best*, N.Y. TIMES (Dec. 6, 2008), <https://www.nytimes.com/2008/12/07/opinion/07rich.html>.
- <sup>50</sup> See, e.g., ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 210 (1978); James Clasper, *Worst US Antitrust Decisions . . . Ever—Part Two*, GLOBAL COMPETITION REV. 19, 23 (2005).
- <sup>51</sup> 386 U.S. 685 (1967).
- <sup>52</sup> Ward Bowman was also the co-author with Robert Bork of an article that appeared in *Fortune* magazine in 1963 entitled *The Crisis in Antitrust*. See Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138. The article was highly critical of the Warren Court's antitrust decisions and later became the first chapter in *The Antitrust Paradox*.
- <sup>53</sup> Ward S. Bowman, Jr., *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 70 (1967).
- <sup>54</sup> See *id.* at 71.
- <sup>55</sup> See, e.g., Phillip E. Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 715 (1967).
- <sup>56</sup> See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In *Brooke Group*, the Court adopted a price-cost test, in which a plaintiff must prove both that (1) the defendant's prices were below its average variable cost and (2) the defendant was likely to be able to recoup any losses it suffered during the alleged period of predation. *Id.* at 222–24.
- <sup>57</sup> See Kathleen E. McDermott, *Whatever Happened to . . . Utah Pie*, ANTITRUST, Fall 1994, at 42, 44; Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson Patman*, 21 J.L. & ECON. 427, 428 (1978).
- <sup>58</sup> See McDermott, *supra* note 57, at 44.
- <sup>59</sup> 390 U.S. 145 (1968).
- <sup>60</sup> *Id.* at 147–48.
- <sup>61</sup> Clasper, *supra* note 50, at 23.
- <sup>62</sup> 522 U.S. 3, 3 (1997).
- <sup>63</sup> See, e.g., *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 694 (8th Cir. 1984) (en banc) (reversing district court order enjoining the *Kansas City Star* from terminating its contract carriers and replacing them with its own delivery agents); *Newberry v. The Washington Post Co.*, 438 F. Supp. 470, 483–84 (D.D.C. 1977) (denying injunction seeking to prohibit the *Washington Post* from converting its distribution from a system of independent distributors to a system of sales agents on which it could impose territorial, customer, and price restraints).
- <sup>64</sup> 388 U.S. 365 (1967).
- <sup>65</sup> *Id.* at 380.
- <sup>66</sup> See Warren S. Grimes, *From Schwinn to Sylvania to Where? Historical Roots of Modern Vertical Restraints*, in ANTITRUST STORIES 145, 158 (Eleanor M. Fox & Daniel A. Crane eds., 2007). See, e.g., Donald Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537, 537, 543 (1975); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 295 n.50 (1975); Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 331 (1968).
- <sup>67</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). For an excellent article on the factors that contributed to the Court's decision to overrule *Schwinn* so soon after it was decided, see Andrew Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 8.
- <sup>68</sup> Grimes, *supra* note 66, at 145. Justice White, who had not participated in *Schwinn*, presumably because the case was brought by the Justice Department while he was Deputy Attorney General, concurred in the Court's decision. He agreed that Sylvania's territorial restraints should be upheld under the rule of reason, but disagreed that this decision required overruling *Schwinn*, arguing that the two cases could be distinguished because Sylvania had "an insignificant market share" when it adopted those restraints, whereas *Schwinn* still had a leading share of bicycle sales in the United States. *GTE Sylvania*, 433 U.S. at 59 (White, J., concurring).
- <sup>69</sup> See Grimes, *supra* note 66, at 160.
- <sup>70</sup> See *id.*
- <sup>71</sup> 388 U.S. 350 (1967).
- <sup>72</sup> *Id.* at 351–52.
- <sup>73</sup> *Id.* at 356.
- <sup>74</sup> See BORK, *supra* note 50, at 270.
- <sup>75</sup> *Id.* at 273.
- <sup>76</sup> *Id.* at 274; see RICHARD A. POSNER, *ANTITRUST LAW* 187–88 (2d ed. 2001) (estimating that Sealy's share was only about 20%).
- <sup>77</sup> Bork had an opportunity to make similar arguments to the Supreme Court a year after *The Antitrust Paradox* was published, in an amicus brief in *Broadcast Music, Inc. v. CBS*, 421 U.S. 1 (1979), defending the blanket licenses offered by BMI and ASCAP. This time, the Court accepted those arguments. In an opinion by Justice White, the Court held that restraints that are ancillary to an efficiency-enhancing joint venture—as the restraints in *Sealy* were—cannot be condemned as per se illegal, but should be reviewed under the rule of reason. *Id.* at 24.
- <sup>78</sup> This royalty was calculated on the basis of the lost sales of the licensee assigned the territory in which the sales were made.
- <sup>79</sup> See *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 496 (7th Cir. 1982).
- <sup>80</sup> See *Major Mattress Manufacturers—Top 20*, THE MATTRESS UNDERGROUND (Feb. 9, 2019), <https://www.themattressunderground.com/our-articles/major-mattress-manufacturers-top-15.html>. Under its new ownership, Sealy grew to become the world's largest bedding manufacturer by sales, but its share of mattress sales in the U.S. still remains only about 10%. See Andria Cheng, *Casper, with Competition Growing, Wants to Be More Than a Mattress Company*, FORBES (May 7, 2019), <https://www.forbes.com/sites/andriacheng/2019/05/07/casper-facing-growing-competition-wants-to-take-care-of-your-entire-sleep-business/#3e07f139fb11>.

- <sup>81</sup> 442 U.S. 330, 343 (1979) (stating that the floor debates on the Sherman Act in 1890 “suggest that Congress designed the Sherman Act as a ‘consumer welfare prescription’”) (quoting BORK, *supra* note 50, at 66).
- <sup>82</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (holding that the merger of two vertically integrated shoe manufacturers violated Section 7 in any city in which they had a 5% or greater share of the local retail market).
- <sup>83</sup> See, e.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (holding that a merger giving the parties a 5.8% share of the national market for beer violated Section 7); *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966) (holding that a merger giving the parties a 7.5% share of the Los Angeles market for grocery stores violated Section 7).
- <sup>84</sup> See JAMES R. WILLIAMSON, *FEDERAL ANTITRUST POLICY DURING THE KENNEDY-JOHNSON YEARS* 80 (1995).
- <sup>85</sup> See, e.g., George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J.L. & ECON. 225, 232 (1966) (finding that of all mergers, the percent that were horizontal had dropped from 31% during period 1948–1953 to just over 12% during the period from 1960–1964, while the percentage of conglomerate mergers had risen dramatically to 71%); see also Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1524–35 (1984) (arguing that the Warren Court’s “[s]trict bans on horizontal acquisitions . . . turned business incentives toward conglomeration”).
- <sup>86</sup> See WILLIAMSON, *supra* note 84, at 24.
- <sup>87</sup> See Gerald F. Davis et al., *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form*, 59 AM. SOC. REV. 547, 548 (1994).
- <sup>88</sup> *Id.*
- <sup>89</sup> *Id.* (quoting *The Ebb Tide: A Survey of International Finance*, THE ECONOMIST, Apr. 27, 1991, at 44).
- <sup>90</sup> See WAYNE G. BROEHL, JR., *PRECISION VALLEY: THE MACHINE TOOL COMPANIES OF SPRINGFIELD, VERMONT* (1959); Barney Crosier, *Springfield in World War II: The Linchpin of the Arsenal of Democracy*, THE SUNDAY RUTLAND HERALD AND THE SUNDAY TIMES ARGUS, May 25, 1980, § 3, at 1; Paul Hogarth, *The Connecticut Valley, Where American Industry Began*, FORTUNE, Dec. 1963. These sources are all on file with Hughes Hubbard & Reed.
- <sup>91</sup> See Lynn Barrett & Christine Rolland, *Springfield Retools: A Mill Town Looks to the Past to Create Its Future*, VERMONT ARTS & LIVING (Fall 2015), <http://Vermontartsliving.com/?P=2038>.
- <sup>92</sup> See BROEHL, *supra* note 90, at 231.
- <sup>93</sup> See *Vanished Tool Makers: Jones & Lamson, Springfield, Vermont* (Apr. 21, 2017), <http://progress-is-fine.blogspot.com/2017/04/vanished-tool-makers-jones-lamson.html>.
- <sup>94</sup> See Anna Claire Howard, *Allen Adams Shaper Services, Inc.*, GEAR SOLUTIONS (Jan. 15, 2015), <https://gearsolutions.com/company-profile/company-profile-allen-adams-shaper-services-inc/>; ARCHIVES CTR NAT’L MUSEUM OF AM. HIST., SMITHSONIAN INSTITUTION, *FELLOWS GEAR SHAPER RECORDS 3* (2004) (citing BROEHL, *supra* note 90).
- <sup>95</sup> See Peter Osterlund, *Saving a Sinking Factory; Investors in Springfield, Vt., Hope to Put Plant Back in Local Hands, Boost Economy*, CHRISTIAN SCI. MONITOR (Aug. 2, 1984), <https://www.csmonitor.com/1984/0802/080245.html>; *The Jones & Lamson Textron Machine Tool Company Will Move . . .*, UPI ARCHIVES (Sept. 9, 1983), <https://www.upi.com/Archives/1983/09/09/The-Jones-Lamson-Texton-machine-tool-company-will-move/4247431928000/>. See generally David Finegold, et al., *The Decline of the U.S. Machine-Tool Industry and Prospects for Its Sustainable Recovery*, RAND, 11–12, 131 (1994), [https://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2006/MR479.1.pdf](https://www.rand.org/content/dam/rand/pubs/monograph_reports/2006/MR479.1.pdf); Kirk Kardashian, *The Rise and Fall of Springfield, Vermont’s First ‘Tech Hub’*, SEVEN DAYS: VERMONT’S INDEPENDENT VOICE (Oct. 21, 2015), <https://www.sevendaysvt.com/vermont/the-rise-and-fall-of-springfield-vermonts-first-tech-hub/Content?oid=2962208>.
- <sup>96</sup> See “Springfield, Vermont (VT) Poverty Rate Data,” <https://datausa.io/profile/geo/springfield-vt>; Jordan Cuddemi, *New Hampshire, Vermont Officials Work to Halt Opioid Deaths*, VALLEY NEWS (Apr. 20, 2019), <https://www.vnews.com/A-Look-at-Twin-State-s-Opioid-Related-Fatalities-Per-Capita-24760514>.
- <sup>97</sup> See GEORGE STIGLER, *THE ECONOMIST AS PREACHER* 42 (1982) (quoting D.H. MACGREGOR, *INDUSTRIAL COMBINATION* 231–32 (1913)).
- <sup>98</sup> The quoted phrases are from Chief Justice Warren’s opinion in *Brown Shoe*, 370 U.S. at 333, 344.
- <sup>99</sup> See, e.g., Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications* (Nov. 15, 2019), <http://www.janeeckhout.com/wp-content/uploads/RMP.pdf>; Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 10–13 (2015). But see Chad Syverson, *Macroeconomics and Market Power: Faces, Potential Explanations and Open Questions*, ECONOMIC STUDIES AT BROOKINGS (Jan. 2019) (arguing that “the case for large and general increases in market power is not yet dispositive”), <https://www.brookings.edu/research/macroeconomics-and-market-power-facts-potential-explanations-and-open-questions/>; Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018, at 74, 74 (same).
- <sup>100</sup> See, e.g., JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* 158 (2015); Orley Aschenfelder, Daniel Hoskin, & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S79, S94 (2014). But see Malcolm B. Coate, *A Retrospective on Merger Retrospectives in the United States*, J. COMPETITION L. & ECON. 209, 209 (2016); Gregory J. Werden, *Inconvenient Truths on Merger Retrospective Studies*, J. ANTITRUST ENFORCEMENT 287, 288 (2015).