

# All I Really Need to Know About Antitrust I Learned in 1912

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## I. INTRODUCTION

Herbert Hovenkamp has indisputably earned the deanship of contemporary antitrust scholarship. One could point to many different attributes by which he has earned his laurels: fantastic scholarly productivity; clarity and precision in the craft of writing; analytical depth in both law and economics; moderation in a field apt to polarization; and custodianship of the influential Areeda treatise.<sup>1</sup> In this Essay, I hope to honor another quality that has contributed significantly to Herb’s tremendous success as an antitrust scholar—his engagement with history.

Much contemporary antitrust scholarship bursts with excitement at the discovery of new phenomena or theories that in all actuality have long shelf

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1. See Rebecca Haw Allensworth, *The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919 (2015); Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039 (2015).

lives in earlier epochs in the antitrust cycle. Though antitrust scholars often speak as though economic analysis began with the structuralist school of the 1950s, Herb has frequently reminded everyone that antitrust proponents and opponents have never faced a shortage of economic theories.<sup>2</sup> Through his insights as a legal historian, Herb has helped make the antitrust community aware of the resonances of current debates with the debates and resolutions of earlier generations.

Two years ago, Herb and I tried unsuccessfully to organize a symposium on the centennial anniversary of the 1912 United States presidential election. In this Essay, I hope to share some of the insights that we planned to explore in the centennial year of that momentous campaign. The 1912 election was, by far, the most consequential for U.S. competition policy to date. As I shall argue, with apologies to Robert Fulghum<sup>3</sup> and some degree of dramatic overstatement, all that we really need to know about antitrust was debated at length, by strong expositors, in 1912. Through their speeches, correspondence, and writings, the candidates laid out a broad range of positions available on the three historically persistent questions about antitrust policy: (1) Do we want a competitive economy or a managed one?; (2) Is antitrust necessary to a competitive economy?; and (3) What sort of institutional arrangements produce the best antitrust enforcement?

## II. 1912: A BRIEF RETROSPECTIVE

The four-way presidential race of 1912 between Woodrow Wilson, William Taft, Theodore Roosevelt, and Eugene Debs was arguably the most melodramatic in American history. Framed around the unraveling friendship of Roosevelt and Taft—with Roosevelt calling Taft a “fathead” and “puzzlewit” and Taft calling Roosevelt a “dangerous egoist” and “demagogue”<sup>4</sup>—the race involved a momentous succession of dramatic and perilous interludes: Roosevelt was shot in the chest in Milwaukee and then brushed off his friends and doctors to continue giving a political speech before collapsing and nearly dying; Taft lost one of his closest advisers, Archie Butt, in the sinking of the *Titanic*, and then Taft’s running mate,

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2. Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 259 (“Contrary to a common perception, the Chicago School was hardly the first time that United States antitrust law confronted economic theory. Antitrust in the United States has seldom suffered from a shortage of economic theories suggesting why certain behavior should be unlawful.”); Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 1, 1–3 (Antonio Cucinotta et al. eds., 2002) (arguing that courts have long relied on prevailing economic theories). See generally Herbert Hovenkamp, *Fact, Value and Theory in Antitrust Adjudication*, 1987 DUKE L.J. 897 (examining various economic theories that have exerted a significant influence on antitrust doctrine).

3. See generally ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS (1988).

4. DEBORAH DAVIS, GUEST OF HONOR: BOOKER T. WASHINGTON, THEODORE ROOSEVELT, AND THE WHITE HOUSE DINNER THAT SHOCKED A NATION 259 (2012) (internal quotation marks omitted).

James Sherman, died of illness only days before the election; and just two days before the election, Wilson received a four-inch scalp cut in a motor vehicle accident.<sup>5</sup>

But the election was significant for far more than its oversized characters and personal narratives. The race was momentous because of the vital domestic and foreign policies at stake, contestation over the role of state in economic and social regulation, and the fracturing of the two-party political system which opened the door to a far wider range of ideological expression than usual in the general election. Further, the fact that Roosevelt and Wilson (and to a lesser extent Taft) were public intellectuals whose rhetorical contributions came not merely in campaign speeches but in articles, tracts, and books makes 1912 rich fodder for examination of political, ideological, and legal contestations during the rise of Progressivism; America's entry onto the world stage;<sup>6</sup> and the economic, social, and political upheavals that would mark the 20th century.

Antitrust policy played a critical role in the 1912 election—arguably for the last time. Debs, himself a victim of the assertion of antitrust law against the labor movement,<sup>7</sup> argued for complete nationalization of trusts. Teddy Roosevelt, widely characterized as a “trustbuster” for his assertive role as President against J.P. Morgan, John D. Rockefeller, and the other “Robber Barons,” was reconsidering the role of antitrust law and business regulation in controlling the rise of corporate power. Privately unhappy with the break-up of Standard Oil in 1911,<sup>8</sup> Roosevelt asserted the inevitability of the rise of the trusts, the foolishness of trying to break them up, and the need for executive branch regulatory control over large interstate corporations rather than through ad hoc antitrust interventions.

Roosevelt's *New Nationalism*<sup>9</sup> gave rise to charges of socialism—a charge that both Roosevelt and Debs brushed off as ludicrous (although for different reasons).<sup>10</sup> As for Taft, the incumbent shifted during the campaign

5. BRETT FLEHINGER, *THE 1912 ELECTION AND THE POWER OF PROGRESSIVISM: A BRIEF HISTORY WITH DOCUMENTS* 3–4 (2003).

6. The turn of the 20th century saw the United States emerge as a world power, as highlighted, for example, by the Spanish ceding of the Philippines, Puerto Rico, and Guam to the United States after the Spanish–American War; the American establishment of protectorates in Cuba and Hawaii; the global circumnavigation of the Great White Fleet; and Theodore Roosevelt's winning of the Nobel Peace prize in 1906 for brokering an end to the Russo–Japanese War the previous year.

7. *See* *United States v. Debs*, 64 F. 724, 763–66 (C.C.N.D. Ill. 1894).

8. *See* Letter from President Theodore Roosevelt to Arthur B. Farquhar (Aug. 11, 1911), in *THEODORE ROOSEVELT: LETTERS AND SPEECHES* 652, 652 (Louis Auchincloss ed., 2004) [hereinafter Letter from Theodore Roosevelt].

9. *See* *THEODORE ROOSEVELT, THE NEW NATIONALISM* 21–39 (William E. Leuchtenburg & Bernard Wishy eds., Prentice Hall, Inc. 1961) (1910).

10. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916*, at 344–46 (1988).

toward a staunch defender of the common law, favoring courts rather than expert agencies and preferring a case-by-case method to decide antitrust cases.<sup>11</sup> His anti-Wall Street rhetoric grew so shrill at points that the business elite began to wonder whether they should prefer the ostensibly conservative and pro-business Taft, rather than Roosevelt.<sup>12</sup> Supported intellectually by Louis Brandeis, Wilson staked a ground somewhere between Roosevelt's regulatory nationalism and Taft's common-law incrementalism, stressing the need for antitrust reform and an expert-commission model but a continued place for judicial review and ultimate judicial control over antitrust law.<sup>13</sup>

Wilson's victory in 1912 paved the way for the 1914 reforms—the Federal Trade Commission and Clayton Acts. But the contestation of ideas that peaked in 1912 set the stage for continued debate about the regulation of competition in the New Deal, the post-War era, and for decades to follow. Even today, most of the big questions in antitrust policy shadow the debates of 1912.

### III. THE CANDIDATES ON THE BIG QUESTIONS OF COMPETITION POLICY

At some level, all big issues of antitrust policy come down to three broad questions. First, do we even want a competitive economy, or is a regulated and managed economy preferable? Second, assuming that we want a competitive economy, what rule, if any, does antitrust need to play in securing competitive market conditions? Finally, assuming we want a competitive economy and believe that antitrust is necessary to promote it, what sort of institutional arrangements will best advance that objective? The candidates of 1912 did not have comprehensive or always fully consistent answers to each of these questions, but they succeeded in articulating a rich and deep range of perspectives on each of the questions.

#### A. COMPETITIVE OR MANAGED ECONOMY?

A striking and often misunderstood fact about the 1912 election is that, although all four major candidates generally agreed that *something* needed to be done about the trusts, only two of them—the conservative Taft and the progressive Wilson—thought that anything like antitrust law, as we currently think of it, was the solution. The two other candidates—Roosevelt and Debs—favored either regulation taking the place of antitrust or complete nationalization of industry. Thus, the question in 1912 was not merely what kind of antitrust law to have, but whether a competitive economy should exist at all.

Roosevelt is often misunderstood as a strong proponent of antitrust. Certainly, his administration initiated a number of important antitrust cases,

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11. *Id.* at 364–82.

12. *Id.* at 375.

13. *See id.* at 383–430.

such as actions against the Northern Securities Company, American Tobacco, Standard Oil, and U.S. Steel, with Roosevelt himself taking the lead in advocating such action to Congress.<sup>14</sup> But even while his administration was bringing antitrust actions in federal court, Roosevelt was becoming increasingly convinced of the need for federal “supervision and control” over large interstate corporations,<sup>15</sup> not efforts to disband the trusts or instill competitive norms. Increasingly over the first decade of the 20th century, Roosevelt came to the conclusion that industrial organization in large corporations was inevitable and permanent. Efforts to restore markets to classical conceptions of atomistic competition would be futile or destructive of society.

As Roosevelt argued, “[b]usiness cannot be successfully conducted in accordance with the practices and theories of sixty years ago unless we abolish steam, electricity, big cities, and, in short, not only all modern business and modern industrial conditions, but all the modern conditions of our civilization.”<sup>16</sup> The problem was not just limitations in the current text or judicial interpretations of the Sherman Act, but also that the antitrust approach was a fool’s errand: “The Anti-Trust Law cannot meet the whole situation, nor can any modification of the principle of the Anti-Trust Law avail to meet the whole situation.”<sup>17</sup> As Roosevelt looked back on his administration’s enforcement actions after leaving the White House, he began to argue that the only success of the antitrust actions he had initiated was in teaching the captains of industry “that they were subject to the law, and that they would not be permitted to be a law unto themselves.”<sup>18</sup> The actual relief secured was inconsequential, perhaps even counterproductive.

By 1912, Roosevelt was staking a position against any trustbusting at all. Far from honoring his “trustbuster” moniker, Roosevelt argued for just the opposite—the legality of large combinations of capital, nonetheless subject to pervasive governmental regulation. In private correspondence, arguing against the dissolution of the Standard Oil Trust, he explained his position succinctly:

I do not myself see what good can come from dissolving the Standard Oil Company into forty separate companies, all of which

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14. Special Message from President Theodore Roosevelt to the Senate and House of Representatives (May 4, 1906), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=69667> (last visited May 14, 2015) (detailing to Congress findings of the Bureau of Corporations that by “unfair or unlawful methods, [Standard Oil] crushed out home competition”).

15. EDMUND MORRIS, *THEODORE REX* 30 (2001) (emphasis omitted) (quoting Theodore Roosevelt) (internal quotation marks omitted).

16. Theodore Roosevelt, Editorial, *The Trusts, the People, and the Square Deal*, *OUTLOOK*, Nov. 18, 1911, reprinted in *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* 107, 112 (Daniel A. Crane & Herbert Hovenkamp eds., 2013).

17. *Id.* at 111.

18. *Id.* at 110.

will still remain really under the same control. What we should have is a much stricter governmental supervision of these great companies, but accompanying this supervision should be a recognition of the fact that great combinations have come to stay and that we must do them scrupulous justice just as we exact scrupulous justice from them.<sup>19</sup>

Debs also argued against the existing antitrust laws, calling the Sherman Act “silly” and “puerile” and merely a “flintlock” against the power of the trusts.<sup>20</sup> For Debs, monopolistic consolidation of industrial power was inevitable and desirable: “Monopoly is certain and sure. It is merely a question of whether we will be collectively owned monopolies, for the good of the race, or whether they will be privately owned for the power, pleasure and glory of the Morgans, Rockefellers, Guggenheims and Carnegies.”<sup>21</sup>

The socialists had long believed that the consolidation of capital might be strategically useful in nationalizing industry, since industries with a small number of firms might be easier to nationalize than industries with many firms.<sup>22</sup> Debs ratified this view, urging his supporters to seize the historical turn toward industrial consolidation as a moment that enabled the course of socialism.

Over the course of his administration, Taft underwent a transformation from a supporter of a federal regulation model in line with Roosevelt’s to a defender of an individualistic, competitive economy bolstered by aggressive, executive antitrust enforcement.<sup>23</sup> Taft thus set himself against Roosevelt’s regulatory statism and argued for the status quo in legal frameworks and institutions. Taft pointed to his administration’s antitrust cases against U.S. Steel, American Sugar, General Electric, the meat packers, and the transcontinental railways as proof that the existing system was working.<sup>24</sup>

In an October 1911 speech to the Chamber of Commerce in Pocatello, Idaho, entitled *We Must Get Back to Competition*, Taft laid out the case for a competitive economy administered by existing antitrust principles.<sup>25</sup> He argued that the only real choices facing the country were “legitimate and independent” competition and socialism.<sup>26</sup> Taft declared his favoritism for competition, and argued that the existing antitrust laws and precedents,

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19. Letter from Theodore Roosevelt, *supra* note 8, at 652.

20. FLEHINGER, *supra* note 5, at 54 (discussing Debs’s views on antitrust laws).

21. *A Study of Competition*, APPEAL TO REASON, May 28, 1910, at 2.

22. See generally Henry Rand Hatfield, *The Chicago Trust Conference*, 8 J. POL. ECON. 1 (1899) (reporting that socialists favored consolidation as a means to nationalization).

23. SKLAR, *supra* note 10, at 364–65.

24. Daniel Crane, *Progressivism and the 1912 Election*, in THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES, *supra* note 16, at 104, 105.

25. “*We Must Get Back to Competition*,” *Declares Mr. Taft*, 61 TELEPHONY 447 (1911), reprinted in THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES, *supra* note 16, at 118, 118.

26. *Id.*

properly interpreted and enforced, were adequate to meet the trusts. He noted his previous challenge to William Jennings Bryant to cite any instance of a combination in restraint of trade that would not be declared illegal under the Supreme Court's 1911 *Standard Oil*<sup>27</sup> and *American Tobacco*<sup>28</sup> decisions, and observed that his challenge had gone unanswered. Finally, Taft threw a sop to business, asserting that antitrust enforcement was not an attack on either legitimate business arrangements or a desire to make money, and should not become an excuse for class warfare or jealous intermeddling with successful businesses. Anticipating almost verbatim a distinction drawn by Learned Hand three decades later,<sup>29</sup> Taft argued that antitrust enforcement should not turn into an attack on "wealth earned by thrift and gathered by foresight, attention and industry."<sup>30</sup>

During the election cycle, Wilson cribbed heavily on competition policy from his antitrust braintrust, Louis Brandeis. Drawing a contrast with the man most likely to beat him, Wilson argued that Roosevelt proposed "to 'regulate monopoly' whereas Wilson aimed to 'regulate competition.'"<sup>31</sup> In Wilson's view, the Rooseveltian model of direct federal regulation of corporations was a recipe for government-created monopoly. Wilson feared that direct federal regulatory power over corporations would lead to industrial monopolies as the corporations captured their regulators and turned regulation to their advantage.<sup>32</sup> Further, Wilson distinguished between prohibitory regulation—for example, a law against anticompetitive behavior by trusts—which he found to be proper and "direct administrative regulation"—for example, structuring corporations to facilitate competition—which he equated with socialism.<sup>33</sup>

On issues of antitrust, the principal difference between Wilson and Taft was seemingly over whether the existing antitrust statutes and judicial interpretations of them were sufficient to control anticompetitive behavior

27. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

28. *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

29. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*.").

30. "We Must Get Back to Competition," *Declares Mr. Taft*, *supra* note 25, at 119.

31. WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 269 (1965).

32. Wilson's concerns were not frivolous. Although much of the external momentum for direct federal control of corporations came from populist voices, much of the proposed legislation was shaped by corporate interests, as was the Sherman Act itself. For instance, the House of Morgan apparently drafted the Hepburn Bill. GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916*, at 134 (1963).

33. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *ANTITRUST L.J.* 1, 42 (2003) (internal quotation marks omitted). For a discussion on Wilson's aversion to ceding antitrust power to economic experts, see *id.* at 45-47.

by the trusts. Whereas Taft stoutly defended the Supreme Court's *Standard Oil* decision, the 1912 Democratic Party platform lamented that the opinion deprived the Sherman Act "of much of its efficacy" and proposed legislation to "restore to the statute the strength of which it has been deprived by such interpretation."<sup>34</sup> Wilson's argument against Taft was essentially empirical—the Republican administrations had not sufficiently enforced the antitrust laws, and the federal courts, stocked with Republican appointees, had weakened the reach of those laws through judicial construction. Nonetheless, Wilson and Taft concurred in supporting an economy regulated through competition and the importance of antitrust in spurring competitive markets.

B. *HOW IMPORTANT IS ANTITRUST TO A COMPETITIVE ECONOMY?*

Only Debs seriously proposed abolishing antitrust law altogether. Indeed, Roosevelt envisioned radically modifying the Sherman Act in a stronger regulatory direction, Taft favored continuing the executive enforcement status quo, and Wilson favored strengthening antitrust enforcement through a quasi-regulatory commission. None of the candidates took a strongly *laissez faire* position on competition, as was characteristic of some then-existing and later ideological movements. But in debating questions of antitrust policy, the candidates recognized that the degree of antitrust protection necessary for a competitive economy was inextricably intertwined with other regulatory interventions and market conditions. In particular, the parallel issue of tariffs on foreign goods presented the candidates with an opportunity to explore the linkages between antitrust enforcement and conditions in the wider economy.

The two central economic questions of the 1912 election were the continuation of tariffs on imported goods and how to respond to the growing power of the trusts. The politics of the tariff were as tricky as any other issue in the early years of the 20th century. The Republicans, supported by a manufacturing base in the Northeast, generally favored a high tariff rate, evidenced by McKinley's campaign on increasing the tariff to promote local industry and the Dingley Tariff Act of 1897 that boosted most tariff rates to the 50%-level.<sup>35</sup> The Republican Party platform in 1908 pledged tariff reduction, and upon assuming the presidency in 1909, Taft had styled himself a "tariff revisionist."<sup>36</sup> But in 1909, Taft signed into law the Payne–Aldrich tariff reform bill that lowered some tariffs modestly and

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34. NATIONAL PARTY PLATFORMS: 1840–1960, at 169 (Kirk H. Porter & Donald Bruce Johnson eds., 2d ed. 1961).

35. Tariff (Dingley) Act of July 24, 1897, ch. 11, 30 Stat. 151; see JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 17 (2004).

36. President William Taft, Address on the Tariff Law of 1909 (Nov. 17, 1909), available at <http://millercenter.org/president/taft/speeches/speech-3781>.



increased others.<sup>37</sup> Taft thus angered insurgent and reformist Republicans, mostly from the West, who favored dramatically lowering the tariff. Taft's hardening on the tariff and association with the Northeastern establishment wing of the party caused an early party fissure that expanded into full schism with Roosevelt's nomination challenge in 1912.

On the tariff, Roosevelt and Wilson advocated for a downward revision, whereas Taft essentially endorsed the status quo. Roosevelt had done nothing to lower tariff rates during his presidency and seemed uneager to commit strongly to any particular direction during the 1912 race. In his *New Nationalism* speech, he called for assignment of the matter to an expert commission for case-by-case decision.<sup>38</sup> What is particularly interesting to antitrust policy is the degree to which the candidates linked the issues of trade policy and domestic antitrust law. "The tariff and the trusts" became a standard reference during the campaign.

The relationship between the tariffs and the trusts was widely debated in the political-economy literature of the early 20th century, as many academics argued that high tariff levels enabled the formation and monopolistic preservation of the trusts by insulating them from foreign competition.<sup>39</sup> For example, the Harvard economist Charles Beardsley argued that the trust problem was almost entirely the creation of the 1890 Tariff Act<sup>40</sup> (supplemented by the 1897 Tariff Act). He noted that in 1890 there were relatively few trusts and that those that existed were weak.<sup>41</sup> He showed that almost all of the powerful trusts created since then were in industries subject to high protective tariffs and that there were very few trusts in markets with low or no tariffs.<sup>42</sup> For Beardsley, the trust problem was, at its core, a trade problem.

Woodrow Wilson was the candidate that most fully articulated a theory on the linkage between the tariff and the trusts. Wilson largely accepted Beardsley's argument when he tackled the linkage between the tariff and the trusts in a series of public addresses in early 1912, including a keynote address at Nashville entitled, *The Tariff and the Trusts*.<sup>43</sup> Wilson asserted that

37. FLEHINGER, *supra* note 5, at 182.

38. Theodore Roosevelt, The New Nationalism: Speech at Osawatomie, Kansas (Aug. 31, 1910), in THEODORE ROOSEVELT: LETTERS AND SPEECHES, *supra* note 8, at 799, 806.

39. See generally GEORGE L. BOLEN, THE PLAIN FACTS AS TO THE TRUSTS AND THE TARIFF: WITH CHAPTERS ON THE RAILROAD PROBLEM AND MUNICIPAL MONOPOLIES (1902); FRANKLIN PIERCE, THE TARIFF AND THE TRUSTS (1909); Charles Beardsley, *The Tariff and the Trusts*, 15 Q.J. ECON. 371 (1901); F.W. Taussig, *The Iron Industry in the United States*, 14 Q.J. ECON. 475, 496-97 (1900) (arguing that tariffs did not necessarily promote trusts).

40. See Beardsley, *supra* note 39, at 371.

41. *Id.* at 372-73.

42. *Id.* at 378.

43. Woodrow Wilson, The Tariff and the Trusts: Address Delivered at Nashville, Tennessee (Feb. 24, 1912), in 2 WOODROW WILSON, COLLEGE AND STATE: EDUCATIONAL, LITERARY AND POLITICAL PAPERS (1875-1913) 405, 405 (Ray Stannard Baker & William E. Dodd eds., 1925)

the tariff issue—not antitrust legislation—was the defining issue of the campaign because of its relationship to the trust problem.<sup>44</sup> Wilson then offered a historical perspective on the trust problem, beginning with the constitutional design for interstate free trade and leading up through the passage of protectionist tariffs. Under the original constitutional design, Wilson asserted the guarantee of competitive markets because of a vast free-trade zone among the states.<sup>45</sup> The Framers expected that “prices would be kept down by internal competition.”<sup>46</sup> However, with the rise of industrialization in the late 19th century and the increasing turn to combination, “[t]he old time of individual competition is probably gone” and “[w]e will do business henceforth when we do it on a great and successful scale, by means of corporations.”<sup>47</sup> Industrialization had brought about scale economies and hence a diminution in competitiveness. Importantly, however, many of these large combinations had already reached their maximum efficient scale, and any further increases would lead to diseconomies of scale.<sup>48</sup> Absent the tariff, the economy would consist of large and efficient domestic corporations competing against large and efficient foreign corporations. Because of the tariff, Wilson argued that the trusts were insulated from foreign competition and thus effectively in a position of a protected monopoly. For Wilson, the key to maintaining the efficiencies brought about by industrialization and preserving competition was not so much strengthening antitrust enforcement, which he did support, but by opening the door to foreign competition by lowering the tariff.

Before pressing for the antitrust reforms that would materialize in the Federal Trade Commission and Clayton Acts of 1914, Wilson secured tariff reductions through the Underwood Tariff Act of 1913<sup>49</sup> (in tandem with the introduction of the first federal income tax, made lawful by the ratification of the Sixteenth Amendment) to compensate for the loss of tariff revenues

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[hereinafter Wilson, *The Tariff and the Trusts*]; see also Woodrow Wilson, *Efficiency: Address to Real-Estate Men of Boston* (Jan. 27, 1912), in 2 WILSON, *supra*, at 354, 354 [hereinafter Wilson, *Efficiency*]; Woodrow Wilson, *The Tariff: Address Before the National Democratic Club* (Jan. 3, 1912), in 2 WILSON, *supra*, at 325, 325 [hereinafter Wilson, *The Tariff*].

44. Wilson, *The Tariff and the Trusts*, *supra* note 43, at 406 (“[W]e all of us agree that the central issue in the next campaign will probably be, as so often before, the question of the tariff.”); see also Wilson, *Efficiency*, *supra* note 43, at 355–56 (“Almost every time public questions are discussed in this day somebody asks the question: ‘What is the leading question of the approaching political campaign?’ Now, I don’t know what is the leading question, but I know what is the central question, or at least I think I do, because I find that every road leads to that question, and that is the question of the tariff.”).

45. Wilson, *The Tariff*, *supra* note 43, at 329; Wilson, *The Tariff and the Trusts*, *supra* note 43, at 406–07.

46. Wilson, *The Tariff*, *supra* note 43, at 329.

47. Wilson, *The Tariff and the Trusts*, *supra* note 43, at 410–11 (emphasis omitted).

48. Wilson, *The Tariff*, *supra* note 43, at 337–38.

49. Tariff (Underwood Tariff) Act of Oct. 3, 1913, ch. 16, 38 Stat. 114 (codified as amended in scattered sections of 46 U.S.C.).

and dealt a blow to the “money trust” through the Federal Reserve Act of 1913.<sup>50</sup> He thus ratified the claim he made during the campaign in linking the trusts and the tariffs.

### C. WHAT INSTITUTIONS?

The final frontier in the candidates’ contestation, both for competition policy and for larger questions of democracy, concerned institutional arrangements. In particular, the candidates sharply clashed over the power of the federal courts as contrasted to the executive or legislative branches or the possibility of independent regulatory agencies, which were rising in the Progressives’ consciousness. While Debs and Roosevelt derided the courts, Taft rushed to their defense and Wilson—as on many issues—tried to stake an intermediate ground.

On the left flank, the socialists reacted to the specter of *Lochner*<sup>51</sup> and the use of the federal injunctive power to quash labor unions in the name of the Sherman Act. Sounding a radical anti-judicial note, Debs’s Socialist party platform called for the wholesale abolition of judicial review, the lower federal courts, and “the immediate curbing of the power of the courts to issue injunctions.”<sup>52</sup>

To Taft’s dismay, Roosevelt joined the attack on the judiciary. Consistent with his “pure democracy” program first announced in February of 1912, Roosevelt advocated a variety of popular reforms including the direct party primary, the initiative referendum, less burdensome means of constitutional amendment, and the recall. Like Debs’s reaction to *Lochnerism*, Roosevelt laid particular emphasis on the recall of judicial decisions and darkly hinted that the entire concept of judicial review might need reconsideration.

On antitrust, Roosevelt was harshly critical of the prevailing executive/judicial enforcement modality, arguing that “a succession of lawsuits is hopeless from the standpoint of working out a permanently satisfactory solution.”<sup>53</sup> Specifying an institutional framework for his new nationalism, Roosevelt argued in favor of a greatly expanded Bureau of Corporations with regulatory power over the trusts. Roosevelt desired sharp curtailing of judicial review of the Bureau’s decisions.

It fell to Taft, the former judge and future Chief Justice, to ride to the defense of the federal judiciary and the executive mode of antitrust enforcement. Over the course of the campaign, Taft articulated with increasing urgency the defense of the constitutional order, and in particular,

50. Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.).

51. *Lochner v. New York*, 198 U.S. 45 (1905).

52. *The Socialist Party Platform of 1912*, SAGE AM. HIST. (Aug. 14, 2013), <http://www.sageamericanhistory.net/progressive/docs/SocialistPlat1912.htm>.

53. Roosevelt, *supra* note 16, at 110–11.

of the sanctity of the judiciary. “I love judges and I love courts,” he proclaimed. “They are my ideals on earth that typify what we shall meet . . . in heaven under a just God.”<sup>54</sup>

As Marvin Sklar has written, “Wilson’s position . . . may be regarded as a synthesis of Roosevelt’s and Taft’s: the establishment of a federal administrative commission charged with policing the market against unfair business methods, but limited in its powers by statute and judicial review.”<sup>55</sup> Although a Progressive, Wilson did not share the Progressive-era infatuation with government by experts. Reacting to a proposed antitrust commission in 1912, he caustically remarked: “I don’t want a smug lot of experts to sit down behind closed doors in Washington and play providence to me.”<sup>56</sup> Wilson resisted any expert commission model that would have the commission prospectively blessing the activities of the trusts, arguing that this was just an expression of Roosevelt’s model of an unholy partnership between the Government and the trusts. Wilson declared that although “the opinion of the country” supported a commission, “[i]t would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible.”<sup>57</sup> Wilson also insisted on a continued role for the courts in antitrust enforcement, an insistence that would ultimately bear fruit in the appellate review provisions of the Federal Trade Commission Act.<sup>58</sup>

#### IV. THE SHADOWS OF 1912

The 1912 election had immediate consequences for competition policy, both through Wilson’s victory and through broad consensus themes that emerged from the candidates’ interactions. At a broad level, the election served to ratify regulated corporate capitalism as the primary modality of economic organization.<sup>59</sup> Although Taft and Wilson thought some level of deconcentration was possible and Debs advocated nationalization, all of the candidates essentially accepted the inevitability—and perhaps the efficiency—of industrial organization on a large scale. Concurrently, the candidates all accepted that a great degree of governmental intervention—ranging from Debs’s nationalization to Roosevelt’s heavy-handed regulation to Taft’s unapologetic trustbusting—was necessary for management of the trusts. Thus, despite the candidates’ bitter contestation on a range of issues concerning competition policy, the overlaps in their positions—mirroring

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54. “We Must Get Back to Competition,” *Declares Mr. Taft*, *supra* note 25, at 118.

55. SKLAR, *supra* note 10, at 420.

56. Woodrow Wilson, A Campaign Address in Sioux City, Iowa (Sept. 17, 1912), *in* 25 THE PAPERS OF WOODROW WILSON 148, 154 (Arthur S. Link et al. eds., 1978).

57. Woodrow Wilson, An Address on Antitrust Legislation to a Joint Session of Congress (Jan. 20, 1914), *in* 29 THE PAPERS OF WOODROW WILSON, *supra* note 56, at 156.

58. SKLAR, *supra* note 10, at 325–32.

59. *Id.* at 403–08.

emerging national consensus—served to legitimize corporate capitalism with enduring effect.

Wilson's victory also had immediate, and to some extent enduring, effects on the shape of U.S. competition policy. 1913 saw immediate pushes for banking and tariff reform designed to increase the competitiveness of the U.S. economy and diminish the power of the trusts. The 1914 statutes—the Federal Trade Commission (“FTC”) and Clayton Acts—reflected the compromises between technocratic Progressive and conventional executive/judicial models of antitrust that Wilson had advocated during the campaign.

From the hindsight perspective of the subsequent century, however, the debates of 1912 remained alive and kicking for generations to come. The relationship between competition, trade policy, and conditions in the wider economy remained a central question, even if less cleanly articulated than by Wilson in 1912. The rebuilding of tariffs during the 1920s, culminating in the disastrous Smoot–Hawley Tariff Act of 1930,<sup>60</sup> deepened the Great Depression, and set the stage for the early New Deal's experiment with replacing competition with regulatory management.<sup>61</sup> The Brandeisians would have their revenge in the mid-New Deal era with a return to a pro-competition policy.<sup>62</sup>

In the post-War Era, the rise of the free trade movement allowed testing of the claim advanced by Wilson that the trust problem was largely a function of trade barriers. The Chicago School arose at a time when foreign competition was flooding the U.S. market as never before.<sup>63</sup> Its generally *laissez faire* policy recommendations for antitrust resonated with realities that many markets were becoming intensely more competitive as a result of foreign entry. The automobile market, for example, went from complete domination and oligopolistic coordination by the Big Three to one in which a bevy of foreign entrants began cleaning Detroit's clocks.<sup>64</sup> Nonetheless, the case for antitrust revived as evidence mounted on the prevalence of global cartel agreements. As even Beardsley acknowledged decades earlier, removal of the protectionist tariffs “should not be regarded as the complete or final solution of the trust problem,” since “international competition might

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60. Tariff (Smoot–Hawley) Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.).

61. See CHARLES P. KINDLEBERGER, *THE WORLD IN DEPRESSION: 1929–1939*, at 125–226 (rev. ed. 1986).

62. ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 37 (1995).

63. See generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

64. *A Crowded Car Industry: From Big Three to Magnificent Seven*, *ECONOMIST* (Jan. 13, 2011), <http://www.economist.com/node/17902837> (noting that the Big Three were Chrysler, Ford, and GM).

sooner or later lead to international combinations.”<sup>65</sup> And, sooner or later, it did.

The institutional questions contested so fiercely in 1912 did not evaporate either. The courts weathered the early 20th century backlash against Lochnerism, Roosevelt’s later court-packing plan, and desires by some Progressives to replace judicial and expert management with technocratic administration. Although some areas of regulation moved much more in the Progressive-technocratic direction that Roosevelt advocated, antitrust did not.<sup>66</sup> The FTC and Justice Department’s Antitrust Division continued to work in parallel, ultimately subject to the will of the courts. Then, in the post-War era, private litigation began to soar and eventually eclipsed the work of the agencies in driving antitrust policy. Dissatisfaction with the systemic effects of an antitrust system predominantly driven by private enforcement and Article III judges has led to renewed interest in technocratic solutions to antitrust problems. The debates of 1912 have never been finally settled, and continue to pervade antitrust scholarship.

## V. CONCLUSION

1912 was a magnificent year for antitrust because its prime contestants posed and debated so eloquently the foundational questions about a competition law system and its regulatory alternatives. Antitrust has diminished dramatically in political salience since that time; candidates for higher office pay it precious little attention. However, the set of questions posed and debated in 1912 persist to this day. Natural experimentation over the last century has given us more data with which to debate the questions, but no better framing of the questions.

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65. Beardsley, *supra* note 39, at 387.

66. See generally Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. (forthcoming 2015).