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# Did We Avoid Historical Failures of Antitrust Enforcement During the 2008-2009 Financial Crisis?

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## DID WE AVOID HISTORICAL FAILURES OF ANTITRUST ENFORCEMENT DURING THE 2008–2009 FINANCIAL CRISIS?

DANIEL A. CRANE\*

As an introduction to this Symposium, I offer an overview of the history of U.S. antitrust enforcement during economic crises. Having previously written an essay about the history of antitrust enforcement during wars and economic downturns,<sup>1</sup> I will keep this historical narrative brief, and add some modest observations about how things have gone this time around.

### I. HISTORY'S LESSONS

During both economic crises and wars, times of severe national anxiety, antitrust has taken a back seat to other political and regulatory objectives. Antitrust enforcement has often been a political luxury good, consumed only during periods of relative peace and prosperity.

In 1890, the Sherman Act's adoption kicked off the era of national antitrust enforcement. Barely three years later, the panic of 1893 provided the first major test to the national appetite for antitrust enforcement. Speculative overexpansion in the railroad industry was to blame for the crisis—a steep recession—and the Robber Barons quickly rose to fix the problem. Financier J.P. Morgan and his chief rival, the Kuhn, Loeb finance house, snapped up bankrupt railroads out of receivership.<sup>2</sup> By the turn of the century, the nation's railroads had been consol-

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\* Professor of Law, University of Michigan. I am very grateful to Marina Lao and Marc Winerman for excellent editorial comments.

<sup>1</sup> Daniel A. Crane, *Antitrust Enforcement During National Crises: An Unhappy History*, GLOBAL COMPETITION POL'Y, Autumn 2008 (Vol. 12, No. 1), <https://www.competitionpolicyinternational.com/antitrust-enforcement-during-national-crises-an-unhappy-history/>.

<sup>2</sup> RON CHERNOW, *THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE* 67 (1990).

idated into six large systems, primarily controlled by the houses of Morgan and Kuhn, Loeb.<sup>3</sup>

Perhaps 1893 should not be included in the story: antitrust was still young, and it was not even clear that the Sherman Act applied to mergers. However, by Teddy Roosevelt's "trustbusting" days in the first decade of the 20th century, the reach of the Sherman Act to exactly the kind of railroad mergers the 1893 crisis enabled had become clear.<sup>4</sup> So the panic of 1907—the bursting of another financial bubble—would provide a fair test case for antitrust's mettle in the face of political pressures to allow consolidation.<sup>5</sup> There was no central bank yet—except at the House of Morgan—and J.P. used the crisis to extend his influence over the banking system. Roosevelt watched impotently as Morgan consolidated the banks, but was forced to a point of decision when Morgan proposed to rescue the Moore & Schley brokerage house by having U.S. Steel buy up a large interest in Tennessee Coal and Iron.<sup>6</sup> Now Morgan would extend his already substantial influence over both banking and steel.<sup>7</sup> Eager to avoid a "general industrial smashup," Roosevelt expressed approval of the deal within twenty minutes, giving Morgan reason to believe that he would enjoy antitrust immunity for the transaction.<sup>8</sup>

The three-way 1912 election, in which antitrust was one of the defining issues, and the election of Woodrow Wilson, saw a period of substantial antitrust enforcement.<sup>9</sup> Then 1914 brought the Clayton and FTC Acts, steered in large part by Louis Brandeis, Wilson's regulatory brain-

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<sup>3</sup> *Id.* at 68.

<sup>4</sup> See *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

<sup>5</sup> A comprehensive account of the 1907 crisis appears in Marc Winerman, *Antitrust and the Crisis of '07*, ANTITRUST SOURCE, Dec. 2008, <http://www.abanet.org/antitrust/at-source/08/12/Dec08-Winerman12-22f.pdf>.

<sup>6</sup> EDMUND MORRIS, *THEODORE REX* 499 (2001).

<sup>7</sup> Economic historians Thomas McCraw and Forest Reinhardt argue that the Tennessee Iron and Coal acquisition was motivated more by stabilizing the steel industry than by expanding U.S. Steel's market power. Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901-1938*, 49 J. ECON. HIST. 593, 604 (1989).

<sup>8</sup> *Id.* See generally Winerman, *supra* note 5 (providing full account of Roosevelt's interaction with Morgan over the Moore & Schley affair). Roosevelt's deal with Morgan became the subject of a condemnatory report by the Congressional Stanley Committee and deepened a wedge between Roosevelt and his former protégé, William Howard Taft. *Id.* The Supreme Court ultimately vindicated Roosevelt in its 1920 *U.S. Steel* decision. *United States v. United States Steel Corp.*, 251 U.S. 417, 446-47 (1920).

<sup>9</sup> The Taft administration had already been active in antitrust enforcement, perhaps even more active by some measures than Wilson's. See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L.J. 1, 28-30 (2003).

trust and the author of *The Curse of Bigness*. But U.S. entry into World War I contributed to the termination of the Progressive experiment with antitrust enforcement. In 1918, Attorney General Thomas Gregory opined that antitrust law would be an impediment to the war effort, and most major antitrust cases were suspended until the end of the war.<sup>10</sup>

The Republican administrations of the Roaring Twenties continued what Richard Hofstadter has called, perhaps unfairly, the “the era of [antitrust] neglect.”<sup>11</sup> Franklin Roosevelt’s election created hopes for a change in direction. Here is the part of the historical narrative that is most discussed today. Instead of reinvigorating antitrust enforcement, during the first half of the New Deal, from 1933–35, Roosevelt suspended antitrust law through the National Industrial Recovery Act (NIRA) and put in its place a system of industry-sponsored codes and controls on prices and output levels.<sup>12</sup> The NIRA probably prolonged the Depression.<sup>13</sup>

After the Supreme Court invalidated key portions of the NIRA in 1935 and sentiment within the New Deal coalition turned against the NIRA system, the Roosevelt administration abruptly turned toward renewed antitrust enforcement.<sup>14</sup> The antitrust divisions of Robert Jackson and Thurman Arnold greatly reinvigorated antitrust activity between the late 1930s and 1940, but the revival was short lived.

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<sup>10</sup> See Richard M. Steuer & Peter A. Barile, III, *Antitrust in Wartime*, ANTITRUST, Spring 2002, at 71, 71–72; Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921–1933: An Early Phase of a Continuing Issue*, 74 IOWA L. REV. 1067, 1068 (1989); Thomas K. Fisher, *Antitrust During National Emergencies*, 40 MICH. L. REV. 969, 996 (1942).

<sup>11</sup> Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS: AND OTHER ESSAYS* 188, 193 (1965).

<sup>12</sup> See generally ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (1966). Between 1933 and 1935, roughly the dates of the NIRA experiment, GDP increased about 28 percent and unemployment dropped by about 2 million. *Id.* at 131. Although these figures show improvement in the national economy compared to the preexisting state of affairs, the experiment was roundly considered a failure, particularly in light of the fact that “[o]ver ten and a half million workers were still unemployed, approximately twenty million people were still dependent upon relief, basic industries were still operating at little more than half their capacity, and the real income of the average family was still thirteen percent below that of 1929.” *Id.* at 131–32.

<sup>13</sup> See Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779 (2004) (using multi-sector general equilibrium model to argue that the cartelization permitted by New Deal policies prolonged the Great Depression).

<sup>14</sup> See Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTITRUST STORIES 91 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

In 1940, while head of the Antitrust Division, Thurman Arnold published *The Bottlenecks of Business*,<sup>15</sup> a book that defended reinvigorated antitrust enforcement. He entitled Chapter IV, “A Free Market in Times of National Emergency or War.” Arnold wrote that “[t]he antitrust laws must constantly defend the ideal of industrial democracy against all sorts of pressures.”<sup>16</sup> With the prospect of war on his horizon, Arnold observed that “[t]hese pressures increase when the government is suddenly forced to buy huge quantities of defense materials from closely controlled sources of supply.”<sup>17</sup> He further noted that “[t]he temptation to exploit consumers and the government through the domination of a suddenly expanding market is almost irresistible, and usually prevails unless it is curbed.”<sup>18</sup>

Arnold turned out to be writing his own political obituary. He soon began to face the “wholesale repeal or practical nullification of antitrust in the face of the war planning and production leading up to the U.S. entry into World War II.”<sup>19</sup> Consistent with the themes laid out in *Bottlenecks*, Arnold continued to push aggressive antitrust enforcement as an aid, rather than obstacle, to the war effort. But the handwriting was on the wall. In 1942, when Arnold tried to indict Averell Harriman, the chairman of the Union Pacific Railroad, for price fixing, he was quietly forced out of the Justice Department and onto a seat on the federal court of appeals for the D.C. Circuit. Thereafter, the Roosevelt administration implemented formal policies allowing immunization from antitrust prosecution, issued guidelines for industry collaborations, permitted pooling of small firms, and gave the Secretaries of War and the Navy the power to toll antitrust cases until the termination of the war.<sup>20</sup> Over thirty cases were tolled.<sup>21</sup>

A clear pattern emerges in the historical narrative from the promulgation of the Sherman Act until at least the end of World War II. Antitrust enforcement consistently gave way to greater political forces in the face of large-scale war or economic crises.

Carl Shapiro has characterized my historical narrative as “gloomy” and taken consolation from the fact that “much of Crane’s discussion relates to reduced antitrust enforcement during times of war rather

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<sup>15</sup> THURMAN ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940).

<sup>16</sup> *Id.* at 60.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* 106 (2005).

<sup>20</sup> Steuer & Barile, *supra* note 10, at 72–73.

<sup>21</sup> *Id.*

than economic distress.”<sup>22</sup> I am not so sure that consolation is justified. Excluding the 1893 panic as an aberration during antitrust’s primordial era, from 1890 until the end of World War II we have antitrust recessions during an equal number of wars and economic crises—the two World Wars and the 1907 panic and Great Depression.

Of course, not all wars and economic downturns are created equal. The 1907 panic was a short-lived financial crisis with immediate effects on only a limited number of industries, whereas the Depression was a multi-year drain on activity throughout the economy. More significantly, with the exception of Robert Jackson’s and Thurman Arnold’s relatively short-lived and ultimately unsuccessful efforts to revive and sustain antitrust enforcement at the tail of the Depression and beginning of the war, we have no counterexamples of antitrust institutions standing up to political pressures for antitrust retrenchment.

Perhaps we can take consolation from the fact that the historical narrative breaks off with the revival and then normalization of antitrust enforcement following World War II. In my earlier essay, I offered some very limited evidence of pressures for antitrust retrenchment during the Korean and Vietnam wars,<sup>23</sup> but there is no pattern of overall antitrust retrenchment during those conflicts or in the more recent Persian Gulf, Afghan, or Iraqi wars. Then again, those wars did not cause nearly the domestic economic dislocations of the two World Wars. In their peak years, World War I and World War II consumed 13.6 percent and 35.8 percent of GDP, respectively.<sup>24</sup> No war in the second half of the 20th century or early 21st century consumed more than 5 percent of GDP in its peak year, and most were closer to 2 percent or less.<sup>25</sup> Whatever their human, social, political, and moral tolls, the post-World War II wars did not rise nearly to the economic level of the great wars or economic crises and hence would not likely have exerted political pressures on arcane areas of regulation like antitrust.

Of course, there were also economic crises of various sorts in the second half of the 20th century, and no correlative pattern of antitrust laxity. But, like the wars of the same period, the economic dislocations were probably just too small to count. The 1981–82 recession, 1987

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<sup>22</sup> Carl Shapiro, Deputy Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Competition Policy in Distressed Industries, Remarks at ABA Antitrust Section Symposium: Competition as Public Policy (May 13, 2009), available at <http://www.justice.gov/atr/public/speeches/245857.htm>.

<sup>23</sup> Crane, *supra* note 1, at 8.

<sup>24</sup> STEPHEN DAGGETT, CONG. RES. SERV., RS 22926, COSTS OF MAJOR U.S. WARS 2 (2008), available at <http://fas.org/sgp/crs/natsec/RS22926.pdf>.

<sup>25</sup> *Id.*

stock market crash, and 1997 Asian financial crisis did not resemble the 1907 panic or the Great Depression, which were (or felt like it at the time) existential threats to the economic order. The runaway inflation of the late 1970s certainly occasioned political pressures on antitrust enforcement, but in the opposite direction from depressions or panics. President Carter vowed to use *more strenuous* antitrust enforcement to fight inflationary pressures.<sup>26</sup>

The tight historical narrative of inevitable antitrust retrenchment during depressionary crises and wars fades away during the second half of the 20th century, but arguably because the United States did not experience any triggering events of sufficient magnitude. Until recently, that is. Given the general consensus that the 2008–09 crisis was the most severe since the Depression, we may now ask whether history recurred or was overcome by modern conditions.

## II. AND HOW DID WE DO THIS TIME AROUND?

I will begin by cheating and saying that it is just too early to tell. There is a noble tradition of writing history as it unwinds, but I will resist the impulse to join it. Richard Posner wrote *A Failure of Capitalism* in late 2008, announcing that, whatever else others might call it, we were in the middle of a depression.<sup>27</sup> He observed that “[s]ome might think it premature to write about a depression before it ends and indeed before it has reached bottom . . . [b]ut when it ends, hindsight will rewrite history.”<sup>28</sup> Less than two years later, with stocks rallying around 60 percent from their lows, unemployment apparently leveling off to a little lower than 10 percent, and GDP continuing to grow (albeit sluggishly),<sup>29</sup> it seems like the howls that might have prompted the “D” word in 2008 have abated without the appearance of the monster. At the risk of rewriting history, I will wait until there is a sufficient time cushion from the recent events to declare what actually happened.

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<sup>26</sup> Jimmy Carter, The State of the Union Address Delivered Before a Joint Session of the Congress (Jan. 23, 1979), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=32657>.

<sup>27</sup> RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* x–xi (2009).

<sup>28</sup> *Id.* at xvi.

<sup>29</sup> The Dow Jones Industrial Average bottomed out at 6,547 on March 9, 2009, and had rallied 61 percent to 10,564 a year later. *Stocks Rise on Upbeat Economic Outlook*, LA TIMES, Mar. 10, 2010. The U.S. economy grew at an annualized rate of 2.7 percent in the first quarter of 2010 and 1.6 percent in the second quarter. U.S. Dep’t of Commerce, Bureau of Economic Analysis, U.S. Economy at a Glance: Perspective from the BEA Accounts, <http://www.bea.gov/newsreleases/glance.htm>. In August 2010, the unemployment rate was 9.6 percent. U.S. Dep’t of Labor, Bureau of Labor Statistics, Employment Situation Summary (Sept. 3, 2010), <http://www.bls.gov/news.release/empsit.nr0.htm>.

One reason that it is premature to diagnose whether antitrust retrenchment occurred during the recent crisis is that antitrust enforcement has changed in one important particular since 1945—today, most antitrust enforcement is private. There are roughly ten private cases for every government case. Hence, total antitrust enforcement is less directly responsive to political pressures during an economic crisis than it was in the days in which a private deal between Teddy Roosevelt and J.P. Morgan meant effective antitrust immunity for a big corporate deal or a tolling decision by the Secretary of War meant that the cases would largely go away.

Private antitrust may be responsive to economic crises in several conflicting ways. One empirical study suggests that private antitrust enforcement may be counter-cyclical, with shocks to inflation, output, and consumption having a positive effect (in varying degrees) on antitrust enforcement.<sup>30</sup> The economic crisis could actually cause an increase in private litigation. On the other hand, judges are responsive to external political and economic conditions, as the Supreme Court clearly was in its 1933 *Appalachian Coals* decision, immunizing a coal cartel from antitrust liability during the Depression.<sup>31</sup> Even if it takes more time for the judiciary to put the brakes on antitrust enforcement, private plaintiffs may calculate that the expected value of their lawsuits has gone down if they anticipate increasing conservatism (in the sense of a greater reluctance to apply antitrust law) by judges in response to desperate economic circumstances.

The effects of the recent crisis on private antitrust enforcement are difficult to isolate from other factors, such as the Supreme Court's 2007 *Twombly* decision,<sup>32</sup> although the financial crisis does seem to have had some effect on civil antitrust filings. Data from the Administrative Office of the U.S. Courts show a sharp decline in civil filings from late 2008 to late 2009:<sup>33</sup>

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<sup>30</sup> See Lance Bachmeier et al., *The Volume of Federal Litigation and the Macroeconomy*, 24 INT'L REV. L. & ECON. 191 (2004).

<sup>31</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

<sup>32</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>33</sup> Admin. Office of the U.S. Courts, Caseload Statistics, Table C2, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2009.aspx>.

CIVIL ANTITRUST FILINGS IN FEDERAL COURT, FY ENDING IN  
SEPTEMBER 2005–2009

2005	2006	2007	2008	2009
818	986	1039	1318	812

Although the 38 percent decline from year ending in September 2008 to the year ending September 2009 is dramatic, and the two periods are separated almost exactly by the beginning of the financial crisis, it advisable to keep the overall trends in context before leaping to conclusions.

And what about public antitrust enforcement? Thus far, we have seen little indication of the expansion of antitrust enforcement that President Obama trumpeted on the campaign trail and Christine Varney promised when she became Assistant Attorney General. Apart from the Justice Department's intervention in Google Books<sup>34</sup>—a case that the DOJ did not originate—there have not been major, headline-grabbing antitrust filings from the Antitrust Division. Further, there are possible signs that more senior administration officials are containing the Antitrust Division's activities until the economy improves. In July 2009, Ms. Varney publicly opposed Continental's joining the Star Alliance, a measure that the Department of Transportation (DOT) approved. A *New York Times* story reported that the dispute between the Antitrust Division and the DOT became so heated that White House Economic Council director Larry Summers had to mediate, with the DOT getting much of what it wanted.<sup>35</sup> The article further reported that some senior administration officials "fear that the crackdown is coming at a bad time, as corporate America reels from the recession,"<sup>36</sup> and hinted that the White House may be muzzling the Antitrust Division's efforts at an antitrust revival.

It is still far too early to tell whether the Justice Department's eagerness to get back into the game of vigorous trustbusting has been suppressed by higher political forces until the economy improves or whether the Antitrust Division is just taking its time to develop a suite of big cases. On the other hand, economic conditions did not deter the FTC from bringing a blockbuster case against Intel.<sup>37</sup> But, even there, the effects of the recession are difficult to determine. As an indepen-

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<sup>34</sup> Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Author's Guild, Inc. v. Google, Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Sept. 18, 2009), available at <http://www.justice.gov/atr/cases/authorsguild.htm>.

<sup>35</sup> Stephen Labaton, *Cracking Down, Antitrust Chief Hits Resistance*, N.Y. TIMES, July 26, 2009, at A1.

<sup>36</sup> *Id.*

<sup>37</sup> Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmt.pdf>.

dent agency, the FTC is perhaps less quickly responsive to external political forces than the Antitrust Division.<sup>38</sup> Had the parties not settled, the FTC might have run up against a hostile appellate court. Many of the markers of antitrust retrenchment during previous crises were cases that were filed but then tolled, abandoned, or rejected by the courts.

Let me conclude my noncommittal review of the present by circling back to the question of what counts as a sufficiently grave economic downturn or war to trigger the previously observed retrenchment impulses. It may turn out that the Great Recession did not last long enough to have discernable effects on antitrust enforcement. With hindsight, any apparent antitrust retrenchment may seem like nothing other than the tail end of a political administration that had little appetite for blockbuster antitrust cases and the transition months of a more aggressive administration that needed time to develop its big cases. A deep but short recession in the middle of that narrative may turn out to be a footnote to the broader antitrust story. Time will tell.

### III. CONCLUSION

In her first major speech as the new Assistant Attorney General in May 2009, Christine Varney vowed that the new administration would not forget the lessons of history.<sup>39</sup> She identified those lessons as follows: “First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government’s response to economic crises to ensure that markets remain competitive.”<sup>40</sup>

Are those really the lessons of history? “History” does not speak directly. It is up to us to draw out the “lessons,” if there are lessons to be drawn. Although everyone loves to quote Santayana’s observation that “[t]hose who cannot remember the past are condemned to repeat it,”<sup>41</sup>

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<sup>38</sup> The FTC is undoubtedly responsive to external political will, particularly of Congress. See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in *PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION* 63 (Robert J. Mackay, James C. Miller III & Bruce Yandle eds., 1987). But its response time may be slower than that of the Antitrust Division, which is more immediately accountable to the elected branches of government (particularly the executive).

<sup>39</sup> Christine A. Varney, Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Vigorous Antitrust Enforcement in This Challenging Era*, Remarks Prepared for the Center for American Progress (May 11, 2009), available at <http://www.justice.gov/atr/public/speeches/245711.htm>.

<sup>40</sup> *Id.*

<sup>41</sup> GEORGE SANTAYANA, *Reason in Common Sense*, in 1 *THE LIFE OF REASON; OR THE PHASES OF HUMAN PROGRESS* 284 (1905).

there is some danger in trying to extrapolate specific morals from history. Historian David Hackett Fischer warns against a "didactic fallacy" of attempting "to extract specific 'lessons' from history, and to apply them literally as policies to present problems, without regard for intervening changes."<sup>42</sup> Given that the richest instances of the interaction between crises and antitrust occurred during a fifty-some-year period that ended sixty-some years ago, Fisher's admonition is particularly pertinent.

Assuming that we are to draw lessons, it is far from clear what they should be. On the one hand, a repeated pattern of antitrust failures during major economic crises could lead to the normative conclusion that antitrust institutions must steel their nerves and make a more vigorous stand in the face of countervailing political pressures. But one could draw a very different historical lesson. Perhaps antitrust retreat during major crises is inevitable, and standing up in the brave tradition of Thurman Arnold, only to be sent packing, is a noble but futile gesture. Perhaps antitrust officials should quietly ride out the political-economic storms, doing incremental work at the margins of the public eye, preserving capital so that they can move in quickly to clean up the wreckage once the storm subsides.

I am not ready to commit to either of these morals as the true lesson of history. In a few years, we will be able to look back at the recent crisis and undertake a more objective evaluation with the benefit of distance and data.

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<sup>42</sup> DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 157 (1970).