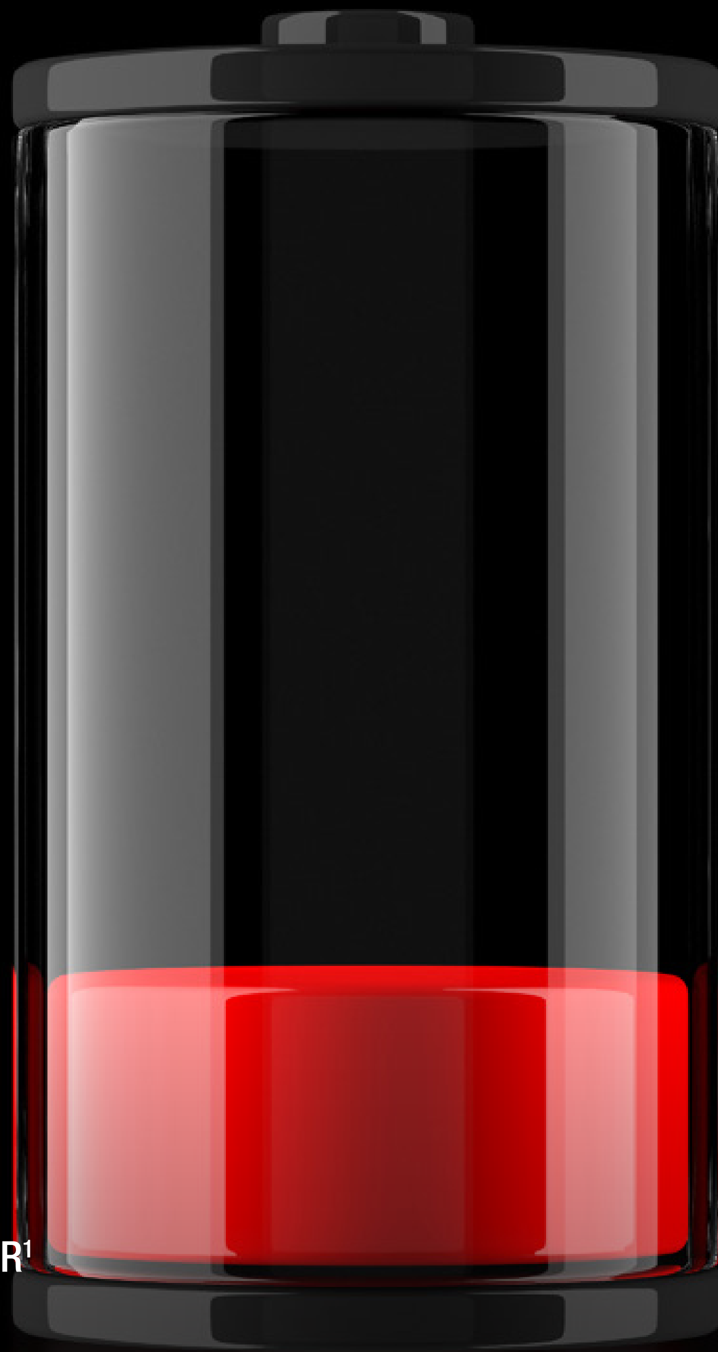

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I. INTRODUCTION

Over the last century and a half, our ability to challenge corporations has been disempowered in two senses: antitrust has lost the power to effectively regulate the power of companies and, relatedly, only a very narrow form of corporate power remains relevant to antitrust liability, with all other forms of economic and political power removed from the analysis. It can be no surprise then that companies are more powerful than ever and plenty of corporate conduct and misconduct slips through the regulatory cracks.

Antitrust has a rich and storied history, from Roman edicts protecting the price of grain to the rules preventing sellers from cornering literal village markets in Medieval England. But as we contemplate how to confront corporate power in the 21st Century, we would do well to consider the equally rich history of the regulation of the subject of our concerns: the corporation. In fact, these parallel histories are deeply intertwined and examining the connections sheds light on how we can regain control over powerful companies. We see, for example, that the recent announcements by groups of state attorneys general bringing cases against Facebook and Google are not a break with the tradition of federal regulation but rather a return to form.

Antitrust did not come into being, *de novo* and fully formed, with the passing of the U.S. Sherman Act in 1890. Not only is regulation of the market almost as old as markets themselves, but what we find from taking a broader view of the regulation of the corporation is that key elements have been removed from our analytical toolbox along the way. Power has all but disappeared from antitrust analysis and antitrust has been left, perhaps unsurprisingly, more or less impotent to contend with corporate power.

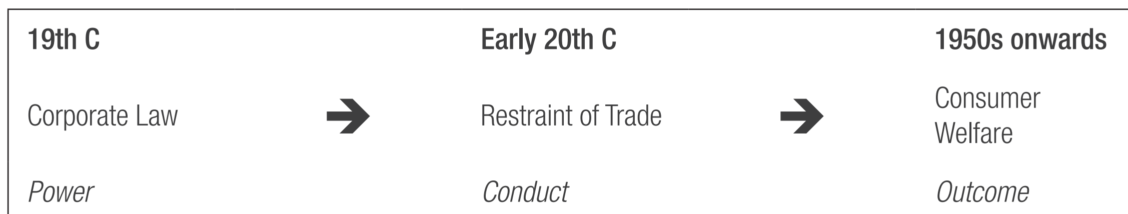
There is ample evidence that despite a growing international technocracy of competition law enforcement, consuming significant administrative resources and corporate and regulatory attention, antitrust is not doing its job. Many economies are characterized by rising industrial concentration, mounting price markups and ballooning corporate profits, with the related economic ills of increasing inequality, floundering productivity, stagnant wages and lackluster innovation. At the same time, the accumulating spillovers of free market competition — the risks to the climate balance of our ecosystems, the threat to our democracies, the unknown path of technology and its impact on human societies — indicate that there are many variants of corporate impact that are not adequately captured by the consumer welfare framework.

It is often assumed that these social and economic costs, bizarrely labelled as "non-economic" by a welfare-based regime that eagerly accounts for efficiencies but not externalities, are best dealt with through regulation — whether environmental law, labor law, tax codes or anti-corruption measures. But what we learn from the early models of antitrust and corporate regulation is that it was well-understood that corporate power left to proliferate would easily be able to evade or subvert such other regulation. Feeding the beast whilst placing faith in the strength of the cage

was, it was thought, a rather naive approach. In fact, taking a look at the circumstances under which the Sherman Act was developed we can see that federal antitrust was largely designed to fill the gaps left by regulation, to contain the power that regulation could not reach. It was meant as a replacement for a more comprehensive model for regulating corporate power — found in early corporate law — even if the implementation failed to fully deliver this.

This article will describe the two phases of antitrust's disempowerment, whereby a central concern for *power* was first adjusted towards a focus on unreasonable corporate *conduct* and then ousted completely by an overriding interest in the *outcome* of efficiency.[2] I will make the case that antitrust should take the role of filling the gaps left by other regulation — catching precisely that residual corporate power that cannot be otherwise confronted. I will end by looking at how we might re-empower antitrust to meet the concerns with corporate power that have never really gone away.

Corporate Power Two Steps Removed



19th C		Early 20th C		1950s onwards
Corporate Law	➔	Restraint of Trade	➔	Consumer Welfare
Power		*Conduct*		*Outcome*

II. POWER

An understanding of the historical regulation of corporate power, especially in the U.S., is critical to appreciating the limitations of the current paradigm. Before the 20th Century, the power of corporations was controlled through corporate law. Individual corporate charters contained various provisions that had as their intended effect the limitation and restriction of the size of industry and the extent of corporate power. At the core of this regime was an attempt to balance the potential for the corporation to act as an invaluable vessel for wealth-creation with the risk that it could end up overwhelming the power of the state.

Corporate law initially appeared to be a powerful weapon for trust-busting.[3] Corporate charters would generally limit which industries a company could operate in; place restrictions on cross-ownership of other commercial entities; or include minimum or maximum requirements in terms of capital deployment and reserves. A canal company charter might contain a detailed schedule of rates to be charged to users, and a bank charter would include a specified ceiling for interest rates. Other provisions, designed to protect investors, we would recognize from modern corporate governance: requirements to publish annual financial statements, rules on indebtedness and dividend payments, rules on electing directors giving minority shareholders disproportionate voting power.[4]

Incorporation was a privilege, which the state was empowered to take away. Chartering often came with a responsibility to complete some form of public works, and also — in the model of letters patent — with the inducement of a limited monopoly to allow recoupment of costs and to incentivize investment. But there was a serious mechanism of accountability: if the privilege was abused or responsibility abdicated the corporation would face dissolution.

Even once general incorporation was introduced, no longer requiring the procurement of a firm-specific corporate charter for most companies, the state could challenge a corporation for exceeding its generic license in a *quo warranto* proceeding — bringing the company before the court and interrogating "by what authority" the company had engaged in the acts under examination. Corporations were regularly dissolved for breach of their public charters, or held subject to an injunction to remedy the breach.

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2 These phases included a significant amount of overlap and cannot be as neatly separated in time as I have presented for simplification. The active antitrust enforcement of the early 20th Century in the U.S. under the restraint of trade model, for example, often attempted to go beyond the consideration of conduct to address the power of firms themselves, with varying degrees of success.

3 Herbert Hovenkamp, *Enterprise and American Law, 1836-1936* (1991), p. 247.

4 Eric Hilt, *Early American Corporations and the State*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), pp. 51-52.

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From the late 19th Century, as corporate power exploded, driven by the rise of capital-intensive industry and the growth of the national American market, the *quo warranto* procedure was increasingly used by state attorneys general as what Daniel Crane has called a "form of crude antitrust law."[5] The procedure was relied upon to resist the blossoming concentration of corporate might engulfing the country. What was at stake was individual freedom and agency. An economy of corporate monoliths threatened to circumscribe entrepreneurial opportunities for the individual and left the disenfranchised employee subject to the machinations of the all-powerful professional manager. Vast swaths of economic resources were subject not to public political democracy nor individual decentralized control but to the consolidated authority of the behemoth business concern.

Indeed, before it was later broken up under the Sherman Act, the Standard Oil Trust was first challenged in a *quo warranto* proceeding.[6] These cases went beyond the relatively more simple analysis of breach of corporate charter and thus, paving the way for modern antitrust, it was necessary for the state enforcers to prove harm to the public interest, although in the case of an established monopoly the public detriment was simply assumed.[7] It was not a slam dunk for enforcers though, because they also had to show that the law had been broken in some way, and companies became very creative in finding ways around the law. The Standard Oil Trust, for example, not to be so easily defeated by an order for dissolution for breach of its Ohio charter, merely reincorporated under the more permissive corporate laws of New Jersey.[8]

III. CONDUCT

The next phase of regulation of corporate power is usually taken as the beginning of antitrust as we know it: the passage of the Sherman Act. The drafters of the Sherman Act drew on the existing common law of restraint of trade and monopolization, with a long lineage at English common law as well, which rendered void any contracts that would create a monopoly or otherwise inflict anticompetitive harm on the public. Critically, the common law restraint of trade paradigm was permissive of *reasonable* restraints.

There was an active debate at the time as to whether the Sherman Act merely codified the common law position or if it superseded the historical precedent and made *any* restriction of competition by private parties a criminal restraint of trade.[9] In 1897, the Supreme Court established the possibility of a broad ban against monopolies and restraints, holding in *Trans-Missouri Freight* that both reasonable and unreasonable restraints were illegal.[10] But then for the next 14 years the court went back and forth, flip-flopping its position, until it finally landed where it remains today. The 1911 *Standard Oil* decision, finally breaking up the company, also restored the common law position.[11] From then on, restraints would be subject to a rule of reason balancing analysis determining whether corporate action restricted competition or had an exclusionary effect.

What this meant in practice was that, as Daniel Crane describes, "the federal government has largely found itself in the position of regulating *conduct* by "corporate persons" rather than creating, structuring, and regulating *corporations themselves*."[12] Antitrust was from that moment hobbled by the need to prove economic harm — it would be assumed only in limited circumstances — and the power of the corporation itself was no longer the primary focus of the law.

5 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 112.

6 Hovenkamp, Herbert J., "The Classical Corporation in American Legal Thought," 76 Geo. L. J. 1593 (1988), p. 1671.

7 Hovenkamp, Herbert J., "The Classical Corporation in American Legal Thought," 76 Geo. L. J. 1593 (1988), p. 1670.

8 Hovenkamp, Herbert J., *The Classical Corporation in American Legal Thought*, 76 Geo. L. J. 1593 (1988), p. 1671.

9 Sklar, M., *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (1988), pp. 127-128.

10 *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

11 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

12 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 110.

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Many thought that the choice by Congress to use the common law restraint of trade approach in the Sherman Act demonstrated a "certain lack of enthusiasm for the entire problem" — a federal incorporation statute for multi-state firms would have been a much stronger regulatory route to deal with the trusts.[13] It was widely considered at the time that *Standard Oil* effectively rendered the Sherman Act redundant and there were immediate calls for fresh legislation to restore the statute to its intended force.[14] Antitrust under the Sherman Act was a much weaker tool for constraining corporate power than corporate law once had been.

IV. OUTCOME

The concept of economic harm under the restraint of trade model was broad enough to capture many variations of corporate power but this was not to be antitrust's fate. From the 1950s to the 1970s the regime underwent a further transformation into its modern form, adopting the consumer welfare model that dominates the discipline today. Instead of viewing corporate power as a fundamental threat to the power of the polity, this transformed antitrust instead treats corporate power as either ephemeral or deserved: either the monopolist warrants their dominance, or it will soon be competed out from under them. Since so few dominant firms are in fact dethroned, their power must, by this logic, be justified.

Although corporate conduct is still relevant to the analysis under the consumer welfare test — it is conduct, after all, that creates anti-competitive harms — the primary focus has shifted to the ultimate *outcome* on the market, in terms of efficiency. This has brought with it an analytical neutrality as to process: efficiency, however achieved, even if by a firm with market power, becomes the goal of antitrust practice.

Others have written extensively on the influence of certain conservative thinkers, particularly Robert Bork, on this evolution of antitrust. Bork catalyzed this fundamental shift in our understanding of corporate power by couching neoclassical economic theory in hardline legal terms that would treat corporate power as benign, often giving disproportionate weight to potential mitigating efficiencies.[15] The process of competition, under the Borkian model, is regarded as valuable only if it produces efficiency and, on the flipside, if efficiency can be achieved without the *inefficiency* of competition then so much the better.

To assess the extent to which this vision has come to capture how antitrust proceeds against the accumulation of corporate power today, we need only consider the much-cited passage from Justice Scalia's opinion in *Verizon v. Trinko*: "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices — at least for a short period — is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth."[16] As Lina Khan writes, this view treats monopoly power as "not just unthreatening but also beneficial" with the "suspicion of concentrated power" replaced with a "reverence for it."[17]

This in fact was Bork's ultimate coup: by importing the neoclassical assumptions of the efficient corporation into the already weakened framework of restraint of trade, Bork was able to turn the concern for corporate power on its head. Instead of the corporate law model of incorporation as a privilege, with the default position being that corporations, as creatures of the state, must be supervised and constrained, the regulation of companies shifted to a default position that corporations, as creatures of the free market, should be left unconstrained, unless efficiency is compromised.

What we are left with is a gaping hole in corporate regulation — what Sanjukta Paul calls the "firm exemption" — which completely reverses the purpose of the law away from tackling corporate power and instead creates a space of amnesty for large, hierarchical firms.[18] The acceptance of efficiencies as a defense opens the door for firms to argue that vertical integration efficiently reduces the transaction costs of contracting for supply or distribution on the market and that horizontal combination efficiently reduces the costs of competition and the redundancy of duplicated efforts. Of course, by this logic, the smaller rival or a cooperative of producers will almost definitionally be less efficient. The analysis is thus rigged in favor of impunity for big firms, regardless of their power.

13 Herbert Hovenkamp, *Enterprise and American Law, 1836-1936* (1991), p. 247.

14 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux & Novak (eds.), *Corporations and American Democracy* (2017), p. 123.

15 For a good discussion of Bork's influence in this regard see Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J. F. 960 (2018).

16 *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

17 Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J. F. 960 (2018), pp. 969-970.

18 Paul, Sanjukta, Antitrust As Allocator of Coordination Rights (February 19, 2019). UCLA Law Review, Vol. 67, No. 2, 2020. Available at https://ssrn.com/abstract=3337861.

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Embedded within modern antitrust law, then, is a fundamental concern not for corporate power but for the potential that antitrust enforcement might compromise the natural efficiency of business with Type I, false positive errors. The typical Type I-phobic commentator thus approaches the question of the appropriate limits on business looking down from the other end of the telescope, asking, as Geoffrey Manne does: "Should we give antitrust enforcers and private plaintiffs more room to operate, or should we continue to cabin their operation [enforcers, not monopolies] in careful, economically grounded ways, aimed squarely at optimizing — not minimizing — the amount of antitrust enforcement?"[19] Not how should we restrict companies, but how should we restrict those who might want to sue them.

V. ANTITRUST FILLS THE GAP

Under a disempowered antitrust it has become evident that if monopoly is permitted by the law, encouraged even, and if dominance comes with no further responsibility, no direct and enforceable accountability to the state, to balance the privilege of corporate power, then the well-capitalized, market-ruling firm is able to fall out of the scope of government regulation and pass out of reach of the public completely.

The stated aims of the Sherman Act went well beyond consumer welfare in terms of increased prices: there was a concern with preventing unjust wealth transfers, protecting social values, promoting equality of opportunity, precluding coercion, and, importantly, curbing the ability of industry "trusts" to leverage their economic power into political power that could compromise the government — with the last certainly being a precipitating factor to the passing of the Act.[20]

The rise of the conglomerate, multi-state "trust" vehicle towards the end of the 19th Century, designed to evade the restrictions of state corporate law, posed a challenge for the corporate law model of regulating corporations just at the time that corporate law was facing its own disempowerment: following examples like the Standard Oil *quo warranto* case, the trusts lobbied for and obtained the watering down of state incorporation laws, triggering a "race to the bottom" as states like New Jersey and Delaware competed to attract corporations into their jurisdictions in order to gain access to registration fees and tax revenues.[21]

This dilution of the power of state attorneys general to directly challenge corporations left a gap in the regulation of corporate power, into which antitrust law was designed to step. The result was the piecemeal regulation of corporations through tax law, labor law, securities regulation and antitrust, split between a multitude of administrative agencies. This model of regulation was "fragmented by administrative topic and institution rather than being comprehensive and seamless" as it could have been if the federal government had been given the authority to prosecute power *per se*.[22]

Given that the regulatory lacuna lay in the weakening of corporate law, it is natural that one of the chief alternatives to regulating corporate power through antitrust and the Sherman Act was actually regulation through a federal incorporation law, reviving the model that had been so diluted by the race to the bottom at the state level. The prospect was seriously debated in the decades before and immediately after the passage of the Sherman Act, when the Act's shortcomings as a tool for controlling corporate power became overtly apparent.[23]

Even the founders of the neoliberal Chicago School, notorious for its hostility towards antitrust, expressed favor for federal corporate regulation. Henry Simons at one point suggested that all corporations should have the amount of property they own limited.[24] Aaron Director, one of Bork's mentors, similarly called for an end to the "unlimited power of corporations," not through antitrust but through corporate law, by limiting the size of corporations, circumscribing the scope of corporate activities, and more.[25]

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19 Geoffrey A. Manne, *A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the U.S. and EU*, Statement Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 19 December 2018, available at https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf.

20 John J. Flynn, *The Reagan Administration's Antitrust Policy, Original Intent and the Legislative History of the Sherman Act*, 33 Antitrust Bull. 259 (1988) p. 281.

21 Hovenkamp, Herbert J., *The Classical Corporation in American Legal Thought*, 76 Geo. L. J. 1593 (1988), p. 1669.

22 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 110.

23 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 116.

24 Van Horn R. 2010, "Chicago's Shifting Attitude toward Concentrations of Business Power (1934-1962)," Seattle University Law Review, volume 34, pp.1532.

25 Rob Van Horn, *Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics*, in Philip Mirowski and Dieter Plehwe (eds.), *The Road From Mont Pelerin: The Making of the Neoliberal Thought Collective* (2015), p. 212.

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It may seem strange that Chicagoans were willing to go further than the Sherman Act to limit corporate activities but it was actually the opposite. Using corporate law as antitrust is like flicking an on and off switch – either the company complies with the restrictions of its corporate charter or it will be dissolved. By contrast, the granular assessment of economic harm and price effects required by modern antitrust could be seen as actually requiring *more* meddling in markets, arbitrary assessments of anticompetitive conduct and more regulatory discretion.

Eventually, however, the broader Chicago agenda of promoting a passive faith in big business came to override any concerns with corporate power, and the possible need for a federal corporate regulator to challenge companies at an existential level similarly faded into the background.

That the matrix of tax, securities, labor and antitrust laws were meant to serve as equivalent to a federal incorporation law, which had the theoretical power to snuff out corporate power through dissolution, suggests that the role of antitrust in this matrix was meant to sweep up any residual political and economic power not adequately captured by the other regulatory arms. Other regulations would deal with subject-specific corporate transgressions but no other law, aside from antitrust, has roots in challenging corporate power itself and no other law was motivated by a desire to curb such power. If antitrust had any role it was to capture the encroachment by private actors on public freedoms in general.

There are other indicators too that federal incorporation and antitrust enforcement under the Sherman Act were seen as alternatives. Concerns with corporate power were specifically cited as the animating driver behind the proposals for federal corporate laws in the early 20th Century — at least for those proposals emanating from the anti-corporate lobby, which was also calling for stronger antitrust enforcement.[26] They ended up getting the latter, or at least the promise of the latter, with the establishment of the Federal Trade Commission in 1914, creating an agency nominally charged with broad powers to investigate companies at a federal level, and the passing on the Clayton Act which included provisions dealing with concerns like interlocking directorates which had been the target of some federal chartering proposals.[27]

VI. EMPOWERING ANTITRUST

Short of reviving the original model of antitrust through corporate law, we can at least go back to the second phase of antitrust, looking at restraint of trade in terms of reasonable conduct, but this time taking seriously antitrust's gap-filling role by importing those "non-economic," "public interest" concerns into antitrust analysis.[28] This would reverse the narrowing of antitrust inquiry, achieved by Bork and others, by recognizing externalities and other forms of corporate power within the restraint of trade framework.

But although Bork and his acolytes played an instrumental role in what Lina Khan calls the "enfeeblement" of antitrust, as we have seen, this was only the second phase of disempowerment which in fact began, ironically enough, with the enactment of the Sherman Act.

There may, however, be some fresh enthusiasm for federal chartering and mandatory corporate responsibility — potentially reverting back to the first phase of corporate regulation. Although not branded as an exercise in antitrust, the call for federal regulation of companies has been renewed by Senator Warren through her draft Accountable Capitalism Act, which would require companies with over $1 billion in revenues to obtain a federal charter and thus subject themselves to considerable public responsibility, regulatory oversight, and stakeholder governance, by the mere fact of their size.

One of the arguments against federal chartering in the 19th Century was that it would revive the old colonial system of those in power parceling out special privileges on a nepotistic basis. General incorporation was meant to make the corporate form available to the masses, although the natural agglomeration of capital that accompanied the second industrial revolution of the 1860s meant that corporate privilege increasingly came with size regardless of the source of the corporate charter. The distinction that must be made is that the monopolies that were handed out before general incorporation generally attached to the completion of public projects that were otherwise undesirable in their scope for risk and unprofitability. By contrast, the sorts of companies targeted by Senator Warren's Bill are engaged in highly profitable businesses, thus placing government in the position of gatekeeper to the untold market opportunities that would lie beyond the bar of federal regulation.

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26 Hutchison, Camden, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, Columbia Business Law Review 1017 (2017), pp. 1032, 1035. Available at https://ssrn.com/abstract=2944637.

27 Lipton, Ann, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure,* Yale Journal on Regulation, Forthcoming (August 10, 2019), p. 45. Available at https://ssrn.com/abstract=3435578 or http://dx.doi.org/10.2139/ssrn.3435578.

28 See for example Lianos, Ioannis, Polycentric Competition Law (September 1, 2018). Current Legal Problems (2018). Available at https://ssrn.com/abstract=3257296; and Simon Holmes, *Climate Change is an Existential Threat: Competition Law Must be Part of the Solution and Not Part of the Problem* (2019), available at https://www.law.ox.ac.uk/sites/files/oxlaw/simon_holmes.pdf.

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The Accountable Capitalism Act takes as its trigger corporate size, but in fact we might update the federal incorporation model, moving from a "crude" to a more nuanced form of antitrust, by tying responsibility to corporate power more directly. At the legendary Chicago Trusts Conference of 1899, one-time Presidential candidate William Jennings Bryan set out one proposal for federal chartering that would have prevented a chartered company from holding a monopoly in any line of business.[29] Actually we should do the opposite and regulate more heavily, and impose more public responsibility on companies in possession of significant corporate power, in recognition that, even with much-reinvigorated antitrust enforcement, there will always be some powerful companies.

It is less important whether this regulation happens at a federal or state level rather that it happens in earnest. National regulation of corporations in other jurisdictions, such as through the "enlightened shareholder value" principle embedded within the UK Companies Act, has been no more successful in creating corporate responsibility, in the absence of enforceable responsibilities and any authority empowered to enforce them. By contrast, in the antitrust sphere, monopolies in Europe are already subject to a "special responsibility" not to distort competition and various reform proposals contemplate categories of "strategic market status" or expanding the notion of "super dominance" for companies with systemic importance.[30] This could be a bridge to a form of chartering for such companies.

A newly-formed corporations regulator could be made responsible for regulating companies according to their chartered responsibilities while antitrust is used to identify which corporations are most in need of regulation on the basis of an assessment of power. Again, the public's "non-economic" concerns would be relevant — presence of externalities and evidence of the sabotage of economic democracy could be used as indicators of power. And these corporate charters might be quite different from those of old, reflecting modern realities of dispersed shareholding and globalization as well as concerns for society and the environment.

To avoid embedding monopolies into the infrastructure of national government, more radical proposals for limiting firm size absolutely, as once accompanied federal chartering proposals in the past, should be considered — Elizabeth Warren's $1 billion threshold triggering responsibility could be capped with a maximum limit on firm size. Zephyr Teachout, for example, has proposed that firms should lose limited liability beyond a firm value of $10 billion.[31]

As Herbert Hovenkamp has explained, the corporate law model had its defects, in particular the binary nature of much of the enforcement which avoids the bias towards efficiencies by leaving no room at all for their consideration.[32] Going beyond the welfare model, which still takes as a given the right for the company to exist, assuming that the overall effect is beneficial, we could instead incorporate elements of the corporate law model into antitrust, making the "right" of companies to incorporate conditional on serving the public interest once they have achieved some level of power.

The current debate over the consumer welfare standard has focused on that framework's preoccupation with price. But even the most radical of reformers suggests only regulating powerful companies or breaking them up, or sometimes both. Dissolution is not on the table, although the state attorneys general retain the authority to bring a *quo warranto* procedure.[33]

29 Hutchison, Camden, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, Columbia Business Law Review 1017 (2017), p. 1037. Available at https://ssrn.com/abstract=2944637.

30 See for example, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (known commonly as the "Furman Review") (2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

31 Teachout, Zephyr, Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform (January 23, 2014). Fordham Law Legal Studies Research Paper No. 2384182. Available at https://ssrn.com/abstract=2384182 or http://dx.doi.org/10.2139/ssrn.2384182.

32 Herbert Hovenkamp, Enterprise and American Law, 1836-1936 (1991), p 247.

33 See for example in Delaware: 8 DE Code § 284 (2016), available at https://law.justia.com/codes/delaware/2016/title-8/chapter-1/subchapter-x/section-284.

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Regulation of the corporate form has always, at its heart, been about containing the power of the corporation vis-a-vis the state. The states that eventually controlled corporations through corporate law had themselves been subject to *quo warranto* proceedings: early U.S. states were formed as regional corporations with charters granted in England by the King.[34] The state government of Massachusetts, for example, was governed according to its corporate charter, and the charter acted as a protection against sovereign intervention — as long as they stuck to the powers granted by the charter, they were unlikely to attract the wrath of the colonial power for straying *ultra vires*. These corporate charters eventually became the model for the individual state constitutions. The governmental power to grant the privilege of private power is fundamental to the authority of the state, with the *quid pro quo* of state regulation of the corporate entity. Unless we take notice of power within antitrust, and account for the varied ways that the empowered corporation can shape markets and compromise society, that power will suffuse the system and there will be no stopping it.

34 Bowie, Nikolas, *Why the Constitution Was Written Down* (2019). 71 Stan. L. Rev. 1397. Available at https://ssrn.com/abstract=3248450.

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