

ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

Episode 49: The Antitrust Revolution: The Evolution of Antitrust | July 13, 2021

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Intro: Welcome to Porter Wright's Antitrust Law Source.

Jay: Welcome to Porter Wright's Antitrust podcast. Good morning. This is Jay Levine, the host of the antitrust law source podcast, and the editor of the blog. And I am thrilled to be joined by my colleague Carrie Garrison, one of our fine lawyers in Pittsburgh. Morning, Carrie.

Carrie: Morning, Jay, thanks so much for having me.

Jay: So Carrie is new to the firm having come in January. And, you know, there's a couple of fun facts that I'll let her tell you about herself. But you know, just why don't you tell us a little bit about you, Carrie, and some of your interests.

Carrie: Definitely J. So I graduated from Duquesne Law School last May about a year ago. And so I'm fresh out of law school starting my career at Porter Wright. And my former life, fun factoid about me as my former life is in violin performance and journalism. And I bring a lot of my practice as an artist and a performer into my practice of law. And my background, as a journalist also has lent itself to writing articles and participating in this podcast with you. So I'm really happy to bring my experiences into my practice.

Jay: Well, and Carrie is probably too modest, but she is an excellent violinist. And I, I do encourage people to Google her performances, which can be found on YouTube. And maybe at some point, we'll be able to arm twist her into giving us a performance here on the podcast. So this is a series on sort of the antitrust revolution that seems to be going on in our country right now. And I'm just curious on your thoughts carry of being sort of new to this, having done a lot of research and, you know, obviously written these articles with me. And so what is your perspective on the development and what's going on with antitrust right now from a sort of 30,000 foot perspective?

Carrie: Definitely, Jay. So to give you an understanding of how I came into these articles, and my study of antitrust law, I really didn't have any background in this, I actually didn't take the antitrust course at my law school, which is a great regret of mine. But my view of the history and this impending revolution that's coming upon antitrust law, is really that the theme that repeats itself. And it's interesting, because I've heard this theme in other areas of life and history, but never in the practice of law. And antitrust is one of those areas where you really see societal implications, economic implications, and even political thought permeating this area of law. So that's been really interesting to read and study.

Jay: Yeah I couldn't have said it better. I have always maintained the belief that antitrust sort of reflects what's going on and listen to our economic thinking reflects what's going on generally in society, and generally in our political perspectives. And there's a reason why political perspectives and economic perspectives kind of line up and as those change, so do, the laws that depend on them, and antitrust law is obviously very economics oriented.

So the antitrust laws were enacted, the first laws and the Sherman Act was enacted in the 1890s. And was really to try to break up big business, right, the trust's. It's interesting, they had the railroad trusts, you had the oil trust. And that's why the statutes are known as the antitrust laws, because they were to break up these trusts that were essentially dominating these industries, keeping prices high, and the like. But it took sort of a few more years until we got to the golden age, and then sort of after the depression, and after World War I, issues persisted. And so what was happening during the golden era of antitrust, which I think people think started in the 30s, or 40s.

Carrie: Right, Jay, so the golden era of antitrust is really when we have between the 1940s and the 70s. We have this restoring of antitrust enforcement. And we really see President Roosevelt appointing Thurman Arnold to run the United States Justice Department's antitrust division, and we see just a flourishing of antitrust enforcement. Where there's a growing of the caseload. There is implementation of anti-monopoly policies. And we see again, this theme that big is bad and breaking up these large monopolies and these trusts really. So we see a recurrence of that theme. And another area of this history that I found interesting is when the Sherman Act was enacted, and big was bad, we see the market fluctuating with this policy. So when the enforcement, the antitrust laws, were trying to break up these big monopolies, we see companies trying to work their way around this enforcement mechanism. So there in the 1900s, they were moving to have more mergers and acquisitions, that were working their way around this antitrust laws. So it's really interesting to see and we see this all throughout history where the government will step in and have certain antitrust enforcement. And then we'll see companies work their way around that. And it's always this constant shifting of enforcement, and then companies trying to work their way around. So it's interesting to see how that's played out throughout history.

Jay: Yeah, I dare say any tax lawyer will say that always happens. You revise the tax code, close loopholes, and people will find others. But you're right. They can no longer "collude." They just bought each other and became bigger and bigger. And that neither response, what I always found incredibly interesting about that bad era was it wasn't simply that it Yeah, big was bad. But they tied it to a more esoteric or to a more higher goal. It wasn't simply the issue that biggest bad because they tend to charge higher prices in the light. But it was also seen that when big is bad. economic power means political power. You know, President Roosevelt, FDR, at the Democratic National Convention, talked about an industrial dictatorship. I mean, he really wanted to give power back to the little guy, he wanted small businesses to flourish, because he sort of saw political power mirroring economic power, or vice versa. And the more economic power was held by a few, he saw that as many political power was held by a few and that was obviously something he wanted to do away with.

Carrie: Definitely. Jay. Yeah, it's really interesting to see how it's permeated its way into politics again, and we see now, legislators are seeing market power in the hands of few. And they're seeing that as really detrimental to even social justice issues like social inequality and equity. And it's interesting, this theme of antitrust laws and how they play into society and politics. So and I mean, that's what makes this area of the law so interesting. It's constantly in fluctuation

with the political party that's in power and the view of economics. So it's, it's a really interesting area.

Jay: Yeah, and like most things, in certainly in politics, you know, you're gonna have a period of time where some political party or some political philosophy is invoked, and then you're sort of going to go the other way. And that kind of happened in antitrust to come the 1940s 50s 60s especially biggest bad going after IBM and the like, and in the 70s. But now in the 70s, there starts to create what they call the Chicago School, where, you know, it's laws a fairs, like get the government out of our lives. And that starts to dominate in academia and starts to move its way through, into sort of the political arena into the antitrust arena. And you know, in our next broadcast, we're going to talk a lot about the Chicago School and the like, but I always find it the sports analogy, of a coach comes in, he's a real player's coach, and then after a while, they fire the coach, because he has won four Super Bowls in a row or whatever. And you always get a coach that's like sort of the opposite end of the spectrum, some kind of dictator, you have him for a while, and then you go back to a player's hyper coach and, and the 70s to 90s and early 2000s really seems to have moved away from that kind of FDR vision of antitrust. Right?

Carrie: Yeah, definitely. It's really interesting to see that that big shift, like you said, I mean, the 1940s and 70s. They really see this players type of coach, but on the big business side. So the Chicago School really endorsed this market correcting philosophy where we don't see as much antitrust enforcement except only in the cases have real true and egregious monopoly power. So it's really this other end of the spectrum, where maybe big is not bad, but we're redefining what competition really means and what economic and market power really looks like when it's in need of antitrust enforcement and breaking up.

Jay: Exactly. And as I said, our next podcast will deal with the intricacies of the of this and to where we are today. But I wanted to just get your perspective, you're several years younger than me, you're an avid reader, you're an avid consumer of the news. Is it at all was striking to you that antitrust is getting as much play in the media, as it seems to? Or is it just my perspective, because I'm an antitrust geek? And that's what I read. So I'm biased to thinking that everybody's talking about antitrust, give me your unbiased view?

Carrie: Well, I'll start by saying I don't think your bias is clouding your view here. I definitely think and antitrust has come more into play. And it's been a really rapid increase. But I think if we look at this, from a different perspective, since we know that antitrust law really feeds off of social and political views, we've seen a social justice movement happening for quite the last few years and really come to a peak during the pandemic. And I think that antitrust law just feeds off of that. And I think especially my generation is really looking for laws to enhanced enhance and enforce social equality and social justice. And I think antitrust law has been seen as one of the ways to do that. So I don't think it's totally out of the blue, that antitrust would come more into the public view and become more of a news headline. But I think it's definitely one of the ways that we can enforce and especially my generation can enforce its values. So it's definitely a new perspective at looking at some of these issues that have been in the rearview mirror and coming up for a while.

Jay: Interesting that that makes obviously perfect sense. And, you know, what, over our next few podcasts, we can talk about and even debate sort of what considerations should antitrust take into account? Are there other mechanisms that should be doing it other than antitrust? Or maybe they're not? I know, there's a lot of debate on both sides of it. But, you know, I think there is no question that there is a desire from, frankly, both sides of the aisle and from a lot of the population to do something about antitrust and to make antitrust, a much bigger part of our

domestic economic agenda. And I guess it's up to you and me to kind of tease that out for our readers and listeners, right?

Carrie: Definitely. Yeah, I think one of the most fascinating things about antitrust law currently is this redefining of competition and redefining of exactly what antitrust laws are set out to remedy. And, as we said, I mean, this really fluctuates with the different political parties. But we're seeing a time where we really have a view on both sides of the aisle that's lining up where we're going to have more ad trust enforcement and possibly this impending revolution. So really excited to speak more about this revolution and in the upcoming podcast episodes.

Jay: I think that'll do for now. Again, this is Jay Levine, the host of your antitrust law source podcast in the editor of its blog. Please let us know your thoughts on the podcast or any other topics you'd like us to discuss or write about. You can reach me at jlevine@porterwright.com and I'm Twitter, at @JayLLevine, including my middle initial and also on LinkedIn. Carrie, if anybody wants to get in touch with you, how can they do so?

Carrie: Yeah, definitely feel free to reach out to us with your feedback or questions you can reach me at cgarrison@porterwright.com. I'm also on LinkedIn and you can find me on Twitter at @CGarrisonEsq.

Jay: Thank you very much for listening and stay tuned. Porter Wright Morrison author LLP offers this content for informational purposes only as a service for our clients and friends. This content is not intended as legal advice for any purpose and you should not consider it as such. It does not necessarily reflect the views of the firm as to any particular matter or those of its clients. All rights reserved.

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