

The Antitrust Books You Should Have Read in 2019

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The past year was an exceptionally good one when it comes to the publication of antitrust books. New editions of authoritative textbooks were published, including the 7th edition of Jones & Sufrin¹ (the 9th edition of Whish & Bailey was released in 2018)². New entrants also dared challenge the incumbents: Lianos, Korah & Siciliani released their own competition law tome.³ Given that all of these textbooks were published with Oxford University Press, intra-brand competition seems stronger than inter-brand competition.

However, 2019 also saw the growth of a slightly different market (or at least sub-market): that of antitrust books *aimed at a wider audience*. The charge was led by authors that are well-known in antitrust circles such as Tim Wu, but also includes less familiar names such as Thomas Philippon. It is striking that the great majority of these books come from the US, where an antitrust revival appears to be ongoing. This article takes a closer look at this category of books, which—despite appealing to a wider audience—make outstanding reading for even the most seasoned antitrust experts.⁴

‘The Curse of Bigness: Antitrust in the New Gilded Age’ by Tim Wu

In short: While technically a November 2018 release, Columbia Law Professor Tim Wu’s *The Curse of Bigness*⁵ cannot be omitted from this list. In this short book, Wu makes perhaps the most elegant argument to date for an antitrust revival in the United States. He starts by chronicling how greats such as Justice Brandeis and President Roosevelt spurred effective antitrust enforcement at the height of the Gilded Age (late 19th – beginning of 20th century). In the 1960s and 70s, however, the original intent of antitrust law was distorted by the Chicago School, which led to a period of consolidation. At least in part due to weakened antitrust enforcement, we are currently living in a New Gilded Age, with various industries being dominated by a handful of companies. The big tech companies in particular offer an example of such dominance—and the anticompetitive conduct it can lead to. To address these ills, a return to antitrust’s original aims and methods—a so-called ‘Neo-Brandeisian Agenda’—is necessary. In particular, antitrust needs to exhibit a true concern for ‘bigness’, which comes with not only economic but also political power. To do so effectively, antitrust will need new tools and remedies, including a return to breakups. Undoing Facebook’s acquisition of Instagram would be a good place to start.

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¹ Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin’s EU Competition Law: Text, Cases, and Materials* (7th ed.) (Oxford University Press 2019), 1352 p.

² Richard Whish and David Bailey, *Competition Law* (9th ed.) (Oxford University Press 2018), 1152 p.

³ Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases, & Materials* (Oxford University Press 2019), 1784 p.

⁴ This article is a consolidated and adapted version of a duo of blog posts of the author: ‘The antitrust books you should’ve read in 2019 [part 1]’ (*CoRe Blog*, 10 January 2020) <<https://coreblog.lexxion.eu/antitrust-books-2019-part-1/>> and ‘The antitrust books you should’ve read in 2019 [part 2]’ (*CoRe Blog*, 23 January 2020) <<https://coreblog.lexxion.eu/antitrust-books-2019-part-2/>>.

⁵ Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018), 170 p.

Favourite chapter: As is clear from his previous books, *The Master Switch* (Vintage 2011) and *The Attention Merchants* (Knopf 2016), Wu is a gifted storyteller, in particular when it comes to legal history. This talent is on full display in chapter 3 on ‘The Trustbuster’, Theodore Roosevelt.

Quotable: ‘The law that the Supreme Court once called a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition” no longer condemns monopoly, but has grown ambivalent, and sometimes even celebrates the monopolist—as if the “anti” in “antitrust” has been discarded.’ (pp. 16-17)

Further reading: Wu takes a legal-historical approach to the evolution of antitrust enforcement. A similar topic has been covered from different angles, notably—from a more political angle—by Matt Stoller in his book *Goliath* (Simon & Schuster 2019) and—from an economic angle—by Jonathan Tepper in *The Myth of Capitalism* (Wiley 2018). *Big is Beautiful* (MIT Press 2018) by Robert Atkinson and Michael Lind is worth reading for its opposing perspective.

‘The Great Reversal: How America Gave Up on Free Markets’ by Thomas Philippon

In short: In *The Great Reversal*,⁶ Thomas Philippon summarizes the thesis of his book in three points: ‘First, US markets have become less competitive: concentration is high in many industries, leader are entrenched, and their profit rates are excessive. Second, this lack of competition has hurt US consumers and workers: it has led to higher prices, lower investment, and lower productivity growth. Third, and contrary to common wisdom, the main explanation is political, not technological: I have traced the decrease in competition to increasing barriers to entry and weak antitrust enforcement, sustained by heavy lobbying and campaign contributions.’ (p. 205) Philippon actually goes beyond diagnosing the problem, but also offers solutions, taking inspiration from a comparable economy that is more competitive: the EU.

Favourite chapter: Every chapter overflows with interesting data, from Philippon’s own research as well as many other sources, and challenges widespread assumptions. Chapter 13, in which he asks whether the top firms—Google, Amazon, Facebook, Apple and Microsoft (‘GAFAM’)—are really ‘different’, is particularly interesting. He disproves two assumptions, first, that ‘tech firms are somehow thoroughly different from dominant companies of previous generations’ and, second, ‘that the GAFAMs are so integral to the health of the US economy that they must be protected’. (p. 252) While there is certainly room for disagreement, Philippon thus offers a valuable contribution to a raging debate.

Quotable: ‘The reason EU consumers are better off than American consumers today is because the EU has adopted the US playbook, which the US itself has abandoned.’ (p. 289)

Further reading: As with *The Curse of Bigness*, readers may appreciate books such as *The Myth of Capitalism* and *Goliath*.

‘United States v. Apple: Competition in America’ by Chris Sagers

In short: *United States v. Apple*⁷ is ostensibly about the famous eBooks case, in which Apple was found to facilitate a cartel between the large trade publishers regarding the price of eBooks. The target of the cartel was the increasingly dominant Amazon, but—as with any cartel—consumers were bound to be the real victim. However, Chris Sagers actually just uses the eBooks case as an

⁶ Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets* (Harvard University Press 2019), 368 p.

⁷ Chris Sagers, *United States v. Apple: Competition in America* (Harvard University Press 2019), 336 p.

effective narrative device to write something fundamental about the broader book industry and competition law generally. Along the way, he addresses some tough questions. One such question running through the book is whether there are any goods we should exempt from the forces of competition, to which his answer is negative. He also asks whether it is a good idea to let undertakings fight a monopoly with a cartel, answering that '[t]he fact that Amazon may be an anticompetitive danger itself does not really provide any support for a supplier cartel, but it most definitely supports improvement in doctrinal antitrust. Specifically, the plaintiff's burden in single-firm monopolization cases should be made easier.' (p. 235) This last answer may both please (a stronger section 2 of the Sherman Act!) and displease (no supplier cartels?) Neo-Brandeisians, which only goes to show the nuances of the book.

Favourite chapter: Chapter 7, in which Sagers gives the reader a rundown of 'The Old Business of Books', makes for particularly enjoyable reading.

Quotable: Sagers puts much of the blame for the current state of the book industry with the publishers themselves and does not mince his words: 'The destruction of traditional literary commitments in favour of short-term profits is the deepest regret express in the many recent memoirs by industry veterans. In its wake, the leading trade publishers' lists are now devoid of contemporary poetry, serious academic works in science, social science, or the humanities, and political work other than polemical, current-events potboilers written by celebrity pundits.' (p. 96)

Further reading: The book is a great introduction (and actually a lot more than that) to the publishing industry, just like *Rockonomics* (see below) is a great book to learn more about the music industry. In times of renewed antitrust interest in the film industry,⁸ an up-to-date guide to its inner workings would be welcome.

'The Antitrust Paradigm: Restoring a Competitive Economy' by Jonathan Baker

In short: In *The Antitrust Paradigm*,⁹ Jonathan Baker makes a strong case for an overhaul of US antitrust enforcement. He argues that such an overhaul is necessary because both enforcers and courts have become too permissive when it comes to anticompetitive (and in particular exclusionary) conduct. This laxness is traced back to the Chicago School, which instilled a fear of chilling procompetitive conduct (false positives or type I errors), but ended up giving a free pass to various types of anticompetitive conduct (false negatives or type II errors). Baker is poised to change this status quo with 'the sort of arguments that can convince the [Supreme] Court: economic ones.' (p. 197) He argues for a recalibration of the error-cost framework that shapes contemporary antitrust law through the adoption a new set of presumptions, inter alia regarding algorithmic coordination, exclusionary conduct by dominant platforms, innovation competition, and harms to suppliers.

The book has a lot in common with the books discussed above, but is also markedly different. Baker agrees with Philippon that market power is holding back the US economy, but—in a footnote—disagrees with him as to the reason why. (p. 242) Baker shares Wu's concern for the political power that comes with market power, but argues that this problem can be addressed more effectively by non-antitrust approaches (although antitrust enforcement does indirectly have a

⁸ See e.g. Matt Stoller, 'It's Time to Break Up Disney' (*BIG*, 5 November 2019) <<https://mattstoller.substack.com/p/its-time-to-break-up-disney-part>>, which follows Disney's acquisition of Twenty-First Century Fox (the Department of Justice documents as well as the final judgment are available via <<https://www.justice.gov/atr/case/us-v-walt-disney-company-and-twenty-first-century-fox-inc>>).

⁹ Jonathan Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019), 368 p.

positive effect). (pp. 57-61) As in Sagers' book, Amazon serves as a protagonist, or rather, antagonist (in particular in chapter 7), but Baker does not 'endorse the broad charges raised by critics', i.e. Neo-Brandeisians such as Lina Khan. (p. 125) In the end, one can only agree with Dennis Carlton's back-cover blurb: 'Even readers who disagree will be challenged to re-examine the reasons for their views.'

Favourite chapter: Baker is at his best when he dives into the weeds of theoretical and empirical economic evidence to redesign current standards and burdens of proof. In chapter 4, he elegantly and succinctly introduces his weapon of choice: the error-cost framework (or decision theory). The chapter also includes Baker's (perhaps controversial) observation that '[i]n comparison to their U.S. counterparts, EU enforcers have struck a better error-cost balance.' (p. 72)

Quotable: 'The antitrust question is not whether these [Internet platforms] benefit us; it is whether some aspects of their conduct limit competition, thereby preventing consumers, workers, and the economy as a whole from benefitting even more.' (p. 149)

Further reading: Baker walks a fine line between antitrust conservatives (Chicagoans) and progressives (Neo-Brandeisians), staking out a position in the centre that is commendable in these times of polarization. Readers interested in learning more about the former school can pick up Robert Bork's *The Antitrust Paradox* (Free Press 1978), while those more interested in the latter are well-served by *The Curse of Bigness* discussed above.

'Radical Markets: Uprooting Capitalism and Democracy for a Just Society' by Eric Posner and Glen Weyl

In short: Just when you thought the era of big new ideas in economics was over, Eric Posner and Glen Weyl publish *Radical Markets*,¹⁰ proving those fears wrong. Their ideas cannot easily be categorized. They agree with the Right (in that 'markets must be strengthened, expanded, and purified') but also find it flawed (in that 'it has been timid and unimaginative in its vision of the social changes necessary to make markets flourish'). (preface) They have ideas in common with the Left (namely that 'existing social arrangements generate unfair inequality and undermine collective action') but also see its defects ('its reliance on the discretionary power of government bureaucratic elites to fix social ills'). (preface) Combining the best of both worlds, they thus seek to decentralize power while spurring collective action, and to replace Market Fundamentalism with Market Radicalism. Their weapon of choice is the auction, which they introduce—in one form or another—to solve issues of property (everything literally has a price), democracy (you get tokens to vote when/how you like), workers (individuals rather than firms sponsor foreign workers), and data (you sell it to the highest bidding tech company). With each of their solutions comes a detailed explanation of how exactly it would reduce inequality and at the start of each chapter you're treated to a short story of what their solution would look like, which makes for great reading.

Favourite chapter: Chapter 5 on 'Data as Labor' ties in well with the current debate on whether tech giants should pay consumers for their data. The discussion here goes a lot deeper than the op-eds supporting such a regime.

Quotable: The only not particularly auction-based remedy Posner and Weyl propose—for the anticompetitive effects of horizontal shareholding—can be captured in one line: 'ban institutional

¹⁰ Eric Posner and Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press 2018), 368 p. An attentive reader will notice that, like the *The Curse of Bigness*, this book was also published in 2018, but that is no excuse not to have read in 2019 at the latest.

investors from diversifying their holding *within* industries while allowing them to diversify *across* industries’. (p. 191)

Further reading: Posner and Weyl pay a lot of attention to how their intellectual ancestors laid the groundwork for the solutions they propose, so a reader hungry for more has plenty of guidance on where to satisfy herself.

‘Rockonomics: A Backstage Tour of What the Music Industry Can Teach Us About Economics and Life’ by Alan Krueger

In short: While *Rockonomics*¹¹ is not strictly an antitrust book, it’s not a bad idea to understand the music industry in times of *Spotify v Apple*.¹² The perfect guide is offered by Alan Krueger, the former Chair of President Obama’s Council of Economic Advisers—a role that Jason Furman (of Furman Report fame)¹³ also served in. While the book covers the music industry, its scope is actually wider—as hinted at by the subtitle. For one, Krueger shows how ‘the music business is an ideal laboratory for witnessing economics.’ (p. 6) He also offers great insights about digital disruption—after all, ‘[t]he music business serves as the canary in the coal mine for innovations.’ (p. 6) Intellectual property law also gets an insightful treatment (in chapter 9). Economics, digital disruption, and intellectual property... Does that not sound an awful lot like antitrust anno 2020?

Favourite chapter: Chapter 4 on ‘The Economics of Superstars’ provides an intriguing discussion of the growing ‘winner takes all’ dynamic in the music industry as well as in the broader economy. It includes such observations as: in the US, a ‘whopping two-thirds of all income gains [since 1980] have gone to the top 1 percent’ and ‘the top 1 percent of artists increased their percentage of total concert revenue from 26 percent in 1982 to 60 percent in 2017’. (p. 79 and 84)

Quotable: ‘Spotify’s long-run existential challenge is exacerbated by the fact that Amazon Music and Apple Music can sustain losses because they generate large complementary benefits for their parent companies, and because YouTube is a close substitute that can operate under different rules [of intellectual property].’ (p. 201)

Further reading: Of all entertainment industries, music seems to be producing the best books. Works that helped deepen the author’s understanding of this industry include *Streaming, Sharing, Stealing* (MIT Press 2016), *Spotify Teardown* (MIT Press 2019) and *The Final Days of EMI* (Omnibus Press 2019). Of course, Donald Passman’s *All You Need to Know About the Music Business* (10th ed., Simon & Schuster 2019) remains an indispensable guide.

Coming soon to a bookstore near you

The market for antitrust books for a wider audience appears far from saturated, with various releases already planned for 2020. February will see the publication of Anu Bradford’s *The Brussels Effect: How the European Union Rules the World* (OUP 2020)—spoiler: it’s through regulatory standards (including on competition). In March, Maurice Stucke and Ariel Ezrachi—of *Virtual Competition* fame—will release *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to*

¹¹ Alan Krueger, *Rockonomics: A Backstage Tour of What the Music Industry Can Teach Us About Economics and Life* (Currency 2019), 336 p.

¹² Foo Yun Chee, ‘EU wants to hear from Apple over Spotify complaint’ (*Reuters*, 3 June 2019) <<https://www.reuters.com/article/us-eu-apple-antitrust/eu-wants-to-hear-from-apple-over-spotify-complaint-idUSKCN1T41TZ>>.

¹³ Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley and Philip Marsden, ‘Unlocking digital competition’ (Report of the Digital Competition Expert Panel) March 2019.

Market Servants (Harper Business 2020), in which they set out how there can be such a thing as too much competition. In May, Zephyr Teachout's *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* (All Points Books 2020) will come out. The challenge will thus not be where to find great antitrust books, but rather where to find the time to read them.