established the one-man, one-vote principle, expanded the rights of criminal defendants, bolstered free speech, and protected the right to disseminate and access birth control information. Without the Warren Court, the United States would be a very different place than it is today, with Americans having far fewer rights than they now do.

During Warren’s tenure, in the area of antitrust, the Supreme Court continued down the path it had pursued since the end of World War II under the leadership of his two immediate predecessors, Harlan Fiske Stone and Carl Vinson. Under both Chief Justices, the Court established a record of voting consistently in favor of both the government and private plaintiffs in antitrust cases. The most notable of the Court’s post-World War II decisions in support of strong antitrust enforcement were its 1946 ruling in American Tobacco, finding the country’s leading tobacco producers guilty of a criminal violation of Section 2 of the Sherman Act for conspiring to raise cigarette prices despite declining demand; its 1948 rulings in Griffith and Paramount Pictures, requiring the restructuring of the movie industry after finding that vertical integration by filmmakers into theatre ownership was an act of monopolization in violation of Section 2; and its 1951 ruling in Timken Roller Bearing, finding a market allocation agreement between U.S. and foreign producers of roller bearings used in aircraft through a sham joint venture per se illegal under Section 1.

The Warren Court established an even stronger pro-enforcement antitrust record than its two predecessors. Under Warren, the Court ruled in favor of the government in 34 of 37 government antitrust cases and in favor of the plaintiff in 18 of 24 private antitrust actions, thus ruling for the plaintiff in 85 percent of the antitrust cases that came before it. Through its decisions, the Court vastly expanded the scope of the per se doctrine to include not only horizontal price fixing and market allocation conspiracies, but also most vertical restraints. It established a strong presumption of illegality under Section 7 of the Clayton Act for both horizontal and vertical mergers of companies with more than a de minimis share in any market in which there was a trend toward greater concentration. It extended the reach of Section 7 to conglomerate mergers, applying new theories of competitive harm to do so. The Warren Court also ruled consistently in favor of strict enforcement of the Robinson-Patman Act’s ban on most forms of price discrimination.

During the last several years of Earl Warren’s tenure, there began a backlash from antitrust scholars who felt that the Warren Court had overstepped the mark in its broad use of the per se doctrine, its record of ruling for the government in every merger case that came before it, and its rigid application of the Robinson-Patman Act. This backlash started with a series of articles published by Robert Bork and Ward Bowman in the mid-1960s. It then gained traction as other well-respected antitrust scholars echoed and amplified those criticisms in a series of law review articles published between 1968 and 1975. This wave of criticism reached its peak with the 1978 publication of Robert Bork’s The Antitrust Paradox, which, although largely a compilation of his earlier articles, pulled them together in a way that produced...
a highly influential critique of the Warren Court’s antitrust juris-
prudence.

Influenced by these and other articles criticizing its decisions,
many have dismissed the Warren Court years as “the dark ages”
of antitrust, an era before the light of modern economic science
illuminated antitrust doctrine.12 Today, most antitrust lawyers
and economists have come to accept as gospel Robert Bork’s
formulation that the antitrust laws are “a consumer welfare pre-
scription,”13 whose sole purpose is to protect “consumer wel-
fare,” by which Bork really meant economic efficiency, and not
the protection of smaller, less efficient competitors.14 Ironically,
one of the most often cited bromides capturing this idea is a sen-
tence from Warren’s opinion for the Court in Brown Shoe stating
that the purpose of the antitrust laws is the protection of “com-
petition, not competitors.”15 Those quoting this language gener-
ally overlook that Warren added in the very next sentence: “But
we cannot fail to recognize Congress’ desire to promote compe-
tition through the protection of viable, small, locally owned busi-
ness.”16

Today, during a period in which many believe there is rising
economic concentration and declining economic opportunity that
some call a New Gilded Age,17 a growing number of antitrust
activists have begun to question whether we have moved too far
in the direction of considering only the price effects of allegedly
anticompetitive conduct or transactions that are likely to increase
the level of concentration in any industry. Calling themselves
the New Brandeisians, these antitrust activists argue that the
antitrust laws should also be concerned with the socioeconomic
and political effects of increased economic concentration or
diminished opportunities for smaller competitors.18 They, there-
fore, look back on the Warren Court, not as the dark ages of
antitrust, but as its “golden era.”19

This ongoing debate makes 2019—50 years after
Earl Warren retired as Chief Justice—a good time to look back at the Warren Court to see what,
if anything, we can learn from its approach
to antitrust.

Earl Warren: A Californian, Born and Bred20
Earl Warren was the son of Swedish immigrants, born in Los
Angeles in 1891 (the year after the Sherman Act was enacted)
and raised in Bakersfield, California—a small, dusty frontier town
100 miles inland from L.A. The family moved to Bakersfield after
Warren’s father, a lineman for the Southern Pacific Railroad, was
blacklisted by the railroad for joining a strike.

Warren was “a handsome youngster, [with] blond hair tou-
spled, a straight nose and finely drawn bones.”21 As a teenager,
he was more interested in sports and social activities than in his
coursework and “squeaked by in high school with admittedly
mediocre study habits.”22 Warren spent his summers working for
the Southern Pacific, where he had “watched in horror as men
were crushed between cars and carried in agony to the workplace
lathe,” where their limbs would be “cut clean off with the work-
place blade.”23 He remembered later as Chief Justice that he
“always recoiled against these inequities” and “wanted to see
them wiped out.”24

Despite his mediocre academic record, Warren was admitted
to Berkeley, where again he focused more on sports and com-
panionship than on his studies. He was described as an “extro-
vert, hearty and boisterous in his politics and his friendships.”25
Warren slid by with little effort and was admitted to Berkeley’s law
school, where he once again graduated without distinguishing
himself.

After serving briefly in the Army near the end of World War I,
Warren thought of beginning a private practice in Oakland, but
accepted a job in the office of the Oakland city attorney before
he had landed a single client. Warren would spend the rest of his
life, up until his retirement as Chief Justice in 1969 at age 78,
as a government employee.

A Corruption-Fighting Prosecutor
Warren quickly moved from the city attorney’s office to the district
attorney’s office, where he could try cases on behalf of the state,
fulfilling his dream of becoming a trial lawyer. After working as a
line prosecutor for five years, Warren was elected district attor-
ney for Alameda County, where Oakland is located, in 1925. He
held that position for 13 years, building a reputation as a “stal-
wart, corruption-fighting prosecutor undeterred by political pow-
er in his quest for clean government.”26

Warren’s growing reputation for fighting corruption made him
a natural candidate for California Attorney General in 1938, a
state in which corruption was still common.27 But at one of his
early campaign appearances addressing a meeting of Masons,
Warren was joined by a telegram informing him that his father had
been savagely murdered in Bakersfield the night before and his
blood-soaked body had been found that morning. Warren imme-
diately returned home to meet with police and survey the progress
of the case, which many suspected might have been committed
by one of the many criminals Warren himself had sent to prison.
While the investigation continued, Warren soldiered on, finishing
his campaign and winning. Sadly, his father’s murder was never
solved.28

Warren served as California Attorney General for four years,
during which he kept building his reputation as a strong pro-
gressive, continuing to pursue corruption cases. His most con-
troversial action as Attorney General, however, was his role imme-
diately after Pearl Harbor as one of the leading advocates calling
for the federal government to remove all Japanese aliens and
Japanese-American citizens from the Pacific Coast and to place them in remote internment camps for the duration of the war.\(^{29}\)

It was only in his memoirs, published posthumously, that Warren finally acknowledged that his advocacy of their removal was a mistake: “I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens.”\(^{30}\)

**A Progressive Governor with a Growing National Reputation**

Running as a progressive candidate for governor in 1942, Warren won the Republican primary handily and went on to defeat the incumbent Democrat in the general election, winning over 57 percent of the vote in a solidly Democratic state.\(^{31}\) He became an enormously popular governor, in part because of his strong support for better education and health care for California’s working class, and was featured in 1944 on the cover of *Time* magazine. When Warren ran for re-election in 1946, he won *both* the Republican and Democratic primaries. As one biographer wrote, “No other gubernatorial candidate had ever won such a victory, and none ever replicated the feat.”\(^{32}\) As a result, he became “a virtually unassailable figure in his home state.”\(^{33}\)

Warren’s “extraordinary record and centrist appeal—the tax-cutter who also attacked segregation and built roads and water projects, hospitals, prisons, and mental health facilities—” appeared to make him a strong candidate for the Republican presidential nomination in 1948.\(^{34}\) Although the California delegation nominated Warren at the Republican convention, Thomas Dewey, who had run against FDR in 1944, received nearly enough votes for the nomination on the first two ballots.\(^{35}\) Warren, seeing no use in fighting, then pledged California’s delegates to Dewey, thereby securing Dewey’s nomination. In return, Dewey picked Warren as his running mate. Every poll and pundit predicted an easy Dewey victory, so neither Dewey nor Warren ran a particularly active campaign, perhaps overconfident in their ability to win.\(^{36}\) Truman, meanwhile, ran a vigorous campaign and surprised everyone by winning the election. It was the first election Warren lost.

**The 1952 Republican Convention**

In 1950, Warren was again easily reelected as governor. During that campaign, the antagonism between Warren and Richard Nixon that had developed when Warren refused to endorse Nixon when he first ran for Congress in 1946 was inflamed when Warren again declined to endorse Nixon, this time for the Senate. That ill will was further exacerbated when Warren ran again for the Republican presidential nomination in 1952. Warren finished the primaries in third place behind the two front runners, Dwight Eisenhower and Robert Taft, but close enough to still be viable going into the convention. Although he had earlier assured Warren of his support, Nixon began to distance himself from Warren just prior to the convention. Hearing rumors of Nixon shifting his support to Eisenhower, Warren sent an emissary to Eisenhower to complain that “[w]e have a traitor in our delegation. It’s Nixon.”\(^{37}\) In response, Eisenhower assured the emissary that “he had no designs on California and was not intending to undermine Warren.”\(^{38}\)

Reassured that Eisenhower was not behind Nixon’s treachery, Warren supported Eisenhower on a key procedural vote and released the California delegates to vote “in a way that satisfies your conscience.”\(^{39}\) With this assist from Warren, Eisenhower won the nomination, but then selected Nixon as his vice-presidential candidate, much to Warren’s displeasure. Warren reportedly congratulated Nixon “through gritted teeth.”\(^{40}\)

**Brown v. Board of Education**

When Warren joined the Court at the beginning of the term in October 1953, after a recess appointment, the other eight justices had all been appointed by Democratic presidents. Despite that, the Court was so bitterly divided that one law clerk characterized the justices as “nine scorpions in a bottle.”\(^{41}\) These divisions posed an immediate problem, as the Court had pending one of its most important cases, *Brown v. Board of Education*.\(^{42}\) Warren earned his stripes with his handling of this case at the outset of his tenure.

Protected by the Court’s 1896 ruling in *Plessy v. Ferguson*,\(^{43}\) racially segregated schools were common across a large portion of the country. The Court was deeply divided on whether to overturn *Plessy* and mandate desegregation. At the justices’ initial conference after *Brown* had first been argued, the previous term, only four justices favored overturning *Plessy*, with the other five justices, including Vinson, worried about overruling a decades-old precedent in a way that would force such a major change across much of the country.\(^{44}\) Justice Felix Frankfurter, who opposed segregation but was torn on whether to overrule *Plessy*, therefore proposed holding over the case for reargument the following term, to which the other justices agreed.\(^{45}\) Then, “fate intervened” when Vinson suffered a fatal heart attack.\(^{46}\) Frankfurter later privately called Vinson’s death “the first solid piece of evidence I’ve ever had that there really is a God.”\(^{47}\)

After the case was reargued, Warren quickly made his views known. To Warren, the decision was simple: “Segregation was not equally good for black and whites.” Therefore, “for the Court to endorse school segregation, it would have to embrace the notion of racial superiority,” which Warren said “he would not do.”\(^{48}\) With Warren replacing Vinson, there was finally a majority in favor of desegregation.

Warren knew, however, that a split vote on this case would be disastrous. Over the next few months, Warren therefore lobbied the other justices, shifting the focus away from whether to end segregation to how it should be done.\(^{49}\) Although his lobbying efforts had persuaded two more justices to join the majority, Warren remained concerned that Stanley Reed might still dissent and that Robert Jackson might issue a concurring opinion, rather than joining a unanimous opinion for the Court.\(^{50}\) Fate again intervened when Jackson suffered a heart attack just before Warren circulated his final draft opinion. His heart attack sapped Jackson of the will to write a concurring opinion and led him instead to join Warren’s opinion, describing it from his hospital bed as “a master work.”\(^{51}\) That left Reed, “the most stalwart
defender of segregation” on the Court. When Warren was blunt when he spoke to Reed: “Stan, you’re all by yourself now.”53 When Warren agreed to Reed’s request that “the South would be given time to implement the Court’s order,”54 the lone potential dissent fell into line.

As this short narrative illustrates, the key to Warren’s success as Chief Justice lay in his leadership, not in his skills as a legal craftsman. Warren wrote only a handful of important decisions, content to hand most to other justices. Even when he wrote an opinion, Warren relied on his clerks to craft the reasoning to support the result he felt justice required. But, as someone who held public office for decades, Warren had what Justice Stewart called “instinctive qualities of leadership,”55 as he would demonstrate time and again as Chief Justice.

Warren’s Antitrust Record
At the time Earl Warren became Chief Justice in 1953, there was broad support in the country for strong antitrust enforcement, driven initially by the success of FDR’s longest-serving head of the Antitrust Division, Thurman Arnold, in mounting a widely publicized campaign against bottlenecks to competition in many important industries, including construction, health care, and motion pictures.56 After a short fall-off during World War II, antitrust enforcement regained popularity after the war, both in Congress and among the public generally, in part due to the successful efforts of Tom Clark, Arnold’s successor as head of the Antitrust Division. Clark continued, as Attorney General, to use the antitrust laws to break up large multinational cartels.57 When Harry Truman appointed Clark to the Court, Clark joined another former Antitrust Division chief, Robert Jackson, and two of FDR’s earlier appointees, Hugo Black and William O. Douglas, to form a core of four justices who could be counted on to vote for the government in most antitrust cases.

When Warren joined the Court, he immediately became a fifth reliable vote for strong enforcement of the antitrust laws, voting in favor of the government or private plaintiffs in 90 percent of the antitrust cases decided while he was Chief Justice, a higher percentage than any other justice except Hugo Black.58 Three years later, in 1956, a sixth dependable vote in favor of strong enforcement was added when Eisenhower appointed William Brennan—whose father had been a labor union leader—to the Court. Eisenhower selected Brennan because Cardinal Francis Spellman of New York had persuaded the president that he needed to appoint a Catholic from the Northeast to the Court in order to assure his re-election.59 To satisfy this need, Ike appointed Brennan without inquiring into either his political affiliation or his views on legal issues generally. Because of that, Eisenhower later came to view Brennan’s appointment as another “mistake” after Brennan quickly joined the ranks of the Court’s liberal wing.60

During the last several years of Warren’s tenure as Chief Justice, Presidents John F. Kennedy and Lyndon Johnson—both liberal Democrats—added additional votes for strong antitrust enforcement through their appointments of four new Democratic justices: Byron “Whizzer” White (a former Heisman Trophy winner), Arthur Goldberg (a former labor lawyer), Thurgood Marshall (who argued Brown v. Board for the plaintiffs), and Abe Fortas (a law partner and protégé of Thuran Arnold).

As the Warren Court’s antitrust opinions reflect, most—if not all51—of the justices on the Court during that era shared a common view of the antitrust laws as serving multiple purposes and not just the protection of “consumer welfare.”62 These multiple goals were perhaps best summed up by Richard Hofstadter in his classic article, What Happened to the Antitrust Movement?, published in 1962, midway through Warren’s tenure as Chief Justice:

The goals of antitrust were of three kinds. The first were economic; the classical model of competition confirmed the belief that the maximum economic efficiency would be produced by competition . . . . The second class of goal was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character . . . .63

Hofstadter’s list omits another socioeconomic goal that Warren and his colleagues viewed as equally or more important: protecting freedom of opportunity and economic independence, as exemplified by Louis Brandeis’s “yeoman farmer and small shopkeeper.”64 This goal was articulated most clearly by Woodrow Wilson in his 1912 campaign for president when, advised by Brandeis, he spoke of

the ancient time when America lay in every hamlet . . . when America . . . ran her fine fires of enterprise up over the moun
tainsides and down into the bowels of the earth, and eager men were everywhere captains of industry, not employees; not looking to a distant city to find out what they might do, but looking about among their neighbors . . . .65

Given his background as a prosecutor who had spent much of his career fighting corruption and as a progressive governor whose later judicial philosophy was shaped by his strong belief in fairness, justice, and equal opportunity—not to mention by his experience as a youth observing the brutal working conditions in the rail yards in Bakersfield—it is not surprising that Warren viewed the social and political objectives of the antitrust laws as equally, if not more, important than their economic objectives. Nor is it surprising that most of Warren’s fellow justices shared his views as to the broader socioeconomic purposes of the antitrust laws, given their personal backgrounds, which I will describe in more detail in part two of this series. This view comes through most clearly in Warren’s best known and most often cited—as well as most criticized—antitrust opinion, Brown Shoe Co. v. United States.66

Brown Shoe was one of the first cases to reach the Supreme Court under the 1950 Celler-Kefauver Act amendments to Section 7,67 which Congress passed to broaden the statute and clarify its legal standard by prohibiting any acquisition of assets or voting securities where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monop-

oly” in “any line of commerce . . . in any section of the country.”68 Under this new standard, the government challenged the proposed merger of two large vertically integrated shoe companies:
Brown Shoe and Kinney, which at the time were the third and eighth largest sellers of shoes in the country. The district court had enjoined the merger, finding that the merger would deny competing shoe manufacturers nationwide access to Kinney retail stores and lessen competition at the retail level in cities where Kinney and Brown Shoe both owned stores.

At the Court’s initial conference, all nine justices agreed that the district court decision should be affirmed. Warren initially assigned the task of writing an opinion for the Court to Charles Evans Whittaker, but Whittaker resigned from the Court due to depression before he could finish his opinion, at which point Warren took over writing the opinion.

Warren’s opinion began by reviewing the legislative history of the Celler-Kefauver amendments. How Warren read that history tells us a great deal about what Congress and the Court, at that time, understood to be the purposes of the antitrust laws. Warren emphasized that “[t]he dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.” Congress, he wrote, intended to give the courts “authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipience.” Congress further intended that the courts would “not only . . . consider the probable effects of the merger upon the economics of the particular markets affected but also . . . consider its probable effects upon the economic way of life sought to be preserved by Congress,” by which Warren meant that “Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.”

Turning to the vertical aspects of the merger, Warren agreed with the district court that Brown’s acquisition of Kinney would lessen competition by denying competing shoe manufacturers access to Kinney retail stores nationwide and thereby foster a “trend toward vertical integration in the shoe industry.” As to the merger’s horizontal aspects, Warren also agreed that the merger would likely substantially lessen competition in more than 100 cities in which both companies had retail shoe stores and accounted for 5 percent or more of retail shoe sales. If a merger achieving 5 percent control were approved, he argued, the courts might have to approve future mergers by Brown’s competitors seeking similar market shares, thereby furthering “[t]he oligopoly Congress sought to avoid.” Warren was particularly concerned that, even if the combination controlled only a small share of shoe sales in some cities, having this share held by a large national chain could “adversely affect competition” because “a strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and . . . can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories.”

Warren feared this problem would be compounded in the case of the Brown-Kinney merger because it would create “a large national chain which is integrated with a manufacturing operation.” He explained: “The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers.”

Warren conceded that “some of the results of large integrated or chain operations are beneficial to consumers” and that “[t]heir expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected,” because “[i]t is competition, not competitors, which the Act protects.” In his very next sentence, however, Warren seemed to contradict what he had just written:

But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

As Robert Bork and others have pointed out, many of Warren’s arguments for blocking Brown Shoe’s merger with Kinney, especially this last one, seem self-contradictory. What they show, however, is that Warren was concerned not just with the short-term economic effect of the merger on the prices consumers pay for shoes, but also with its longer-term effects on the ability of smaller shoe manufacturers and retailers to compete with what would have become one of the largest vertically integrated shoe manufacturers and retailers in the country.

**Warren’s Retirement**

The Warren Court era is now seen by many as a period when the country came as close as it ever has to realizing the American dream. After the end of World War II, America’s GDP grew nearly fivefold, from $228 billion in 1945 to just over $1 trillion in 1969. By 1975, the U.S. economy represented over one-quarter of world GDP, more than three times larger than the runner-up, Japan. Just as importantly, this economic growth was distributed fairly evenly across economic classes, allowing the middle class to swell as the distribution of income became more equal than at any other time in American history.

Unfortunately, while the economy boomed, things started to unravel in the last five years of Warren’s tenure, beginning with the assassination of John F. Kennedy in 1963, and continuing through the assassinations of Martin Luther King, Jr. and Robert F. Kennedy in 1968. Warren—who had chaired the Commission that investigated President Kennedy’s assassination—was “devastated” by Bobby Kennedy’s subsequent assassination. Within days of his death, Warren decided to retire, fearing that without Bobby Kennedy, the Democrats would lose the White House to Nixon, whom he had long despised.

Warren urged Lyndon Johnson to appoint his former colleague on the Court, Arthur Goldberg, to replace him, but Johnson instead nominated his long-time consigliere, Abe Fortas. As 1968 was an election year, Fortas’s nomination immediately ran into problems in the Senate—and after it was revealed he had accepted payments from a corrupt financier, Fortas withdrew his candidacy and resigned from the Court.
Warren’s fear was realized when Richard Nixon defeated Hubert Humphrey for the presidency, thanks in large part to his “southern strategy”—which included attacks on Warren Court decisions expanding civil rights and civil liberties. With two vacancies on the Court, Nixon was able to move quickly to begin filling the Court with justices who would roll back many of those decisions, and in no area more than antitrust. But, that is a subject to return to in the final article of this series.

2 Id.
3 Id.
4 After the end of World War II, the Stone and Vinson Courts collectively ruled for the plaintiff in 30 of 44 government actions and 13 of 15 actions by private plaintiffs, for a total of 72% of all antitrust actions that came before them.
16 Id.
19 Id.
20 This brief sketch of Earl Warren’s early life and career prior to his appointment as Chief Justice is based primarily on an excellent biography of Warren by Jim Newton, Jim Newton, Justice for All: Earl Warren and the Nation He Made (2006).
21 Id. at 23.
22 Id. at 25.
23 Id. at 26.
24 Id.
25 Id. at 37.
26 Id. at 63.
27 Numerous movies have dramatized the extent of corruption in California in the 1930s, including such classics as The Maltese Falcon (Warner Bros. 1941) and Chinatown (Paramount Pictures, 1974).
28 Newton, supra note 20, at 89, 90, 97.
29 Id. at 133–34.
30 Id. at 140.
31 Id. at 164.
32 Id. at 197.
33 Id.
34 Id. at 209.
35 Id. at 210.
36 See id. at 211–14.
37 Id. at 248.
38 Id.
39 Id. at 249.
40 Id. at 249–50.
43 163 U.S. 537 (1896).
44 Newton, supra note 20, at 305–07.
45 Id. at 307.
46 Id. at 308.
47 Feldman, supra note 41, at 398.
48 Newton, supra note 20, at 310–11.
49 Id. at 313.
50 Id. at 316.
51 Id. at 321.
52 Id. at 322.
53 Id.
54 Id.
58 Hugo Black, like Warren, voted in favor of the government or private plaintiff in 90% of the antitrust cases that came before the Warren Court. Warren and Black were followed closely by Douglas, Clark, and Brennan (88% each), and then by White and Fortas (81% each).
60 See id. at 71–95 (describing what some have claimed was “Ike’s mistake” in appointing Brennan to the Court).
61 The three justices who dissented most frequently from the Warren Court’s pro-plaintiff antitrust decisions were Felix Frankfurter, John Marshall Harlan II, and Potter Stewart. In each case, however, their disagreement was with the majority’s analysis of the facts of the case, not the view of Warren and the other justices, such as Douglas and Black, who emphasized in their opinions that the antitrust laws served multiple socioeconomic purposes beyond simply promoting consumer welfare by assuring that markets operated efficiently.
See Reiter v. Sonotone, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription’"); see generally BORK, supra note 11, at 51–71; see also PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 103–113 at 7-33 (1978 ed.).

Richard Hofstadter, What Happened to the Antitrust Movement?, The BUSINESS ESTABLISHMENT (Earl F. Cheit, ed. 1964). Hofstadter’s description of the multiple goals of the antitrust laws is generally consistent with a description of their goals in what was one of the leading antitrust treatises published around the same time, CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 11–23 (1965).


370 U.S. 294 (1962). See BORK, supra note 11, at 210 (describing Warren’s opinion in Brown Shoe as a leading candidate for “the worst antitrust essay ever written”).


Brown Shoe, 370 U.S. at 297.

Id. at 299.

Freyer, supra note 10, at 370–71 (Justice Harlan dissented as to granting a direct appeal, but concurred on the merits.).

Id. at 371.

Brown Shoe, 370 U.S. at 315.

Id. at 317.

Id. at 333.

Id. at 332–34.

Id. at 339–43.

68 See Reiter v. Sonotone, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a ‘consumer welfare prescription’"); see generally BORK, supra note 11, at 51–71; see also PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 103–113 at 7-33 (1978 ed.).

69 Brown Shoe, 370 U.S. at 297.

70 Id. at 299.

71 Freyer, supra note 10, at 370–71 (Justice Harlan dissented as to granting a direct appeal, but concurred on the merits.).

72 Id. at 371.

73 Brown Shoe, 370 U.S. at 315.

74 Id. at 317.

75 Id. at 333.

76 Id. at 332–34.

77 Id. at 339–43.

78 Id. at 344.

79 Id.

80 Id.

81 Id.

82 Id.

83 Id.

84 See BORK, supra note 11, at 216.

85 See, e.g., BRILL, supra note 17.


90 SCHWARTZ, supra note 55, at 680–81.


92 SCHWARTZ, supra note 55, at 762–63.