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## The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust

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**THE NEW ROAD TO SERFDOM: THE CURSE OF BIGNESS  
AND THE FAILURE OF ANTITRUST**

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Carl T. Bogus\*

*This Article argues for a paradigm shift in modern antitrust policy. Rather than being concerned exclusively with consumer welfare, antitrust law should also be concerned with consolidated corporate power. Regulators and courts should consider the social and political, as well as the economic, consequences of corporate mergers. The vision that antitrust must be a key tool for limiting consolidated corporate power has a venerable legacy, extending back to the origins of antitrust law in early seventeenth century England, running throughout American history, and influencing the enactment of U.S. antitrust laws. However, the Chicago School’s view that antitrust law should be exclusively concerned with consumer welfare—that is, total industry output and consumer prices—has now become the consensus view. The result has impoverished communities, decreased innovation, increased corporate cronyism, and diminished the freedom of American citizens. This is too important a topic to be left up to antitrust specialists alone. As it was during the presidential election of 1912, antitrust must again be a subject of wide public debate.*

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INTRODUCTION

We are living in an era of behemoth corporations, consolidated industries, and enormous wealth flowing into the hands of a few people. This Article argues that our times demand a radical change in antitrust policy: Rather than focusing exclusively on consumer welfare, antitrust law should be concerned with the consequences of consolidated power. Moreover, antitrust needs to become a central topic of public debate. Just as Georges Clemenceau once declared that war is much too serious to be left to the generals,<sup>1</sup> I shall argue that antitrust is too important to be left exclusively to the economists. Antitrust issues are fundamental to American democracy and society, and they need to be a matter of general public concern.

There was a time when antitrust was, in fact, a subject of widespread public discussion. A century ago, Louis D. Brandeis warned the nation about the dangers of giant corporations and heavily concentrated industries. Brandeis was concerned not merely with the economic effects of behemoth entities—that is, not only with whether they had the ability to gouge consumers through monopoly prices—but also with the political and sociological effects of having fewer, larger companies rather than more, smaller ones. Among other things, Brandeis believed that big business weakened the spirit, verve, and élan of the nation.<sup>2</sup> As he saw it, every time an independent firm was swallowed by a conglomerate, someone who was previously a chief executive officer and captain of his or her ship became a mere member of the crew in a corporate bureaucracy. He was not persuaded by corporate chieftains who claimed

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1. See GEOFFREY O'BRIEN & JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 348 n.5 (18th ed. 2012) (attributing the statement to Georges Clemenceau, among others). There are various versions and attributions for the quotation; the version in the main body, attributed to Clemenceau, is the best known due to its use by the character General Jack Ripper in Stanley Kubrick's great film, *Dr. Strangelove* (1964).

2. See, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 235–36 (1996) (placing Brandeis in the tradition of those who believed that independent entrepreneurs were vital to the moral and civic life of the nation).

that mergers made their businesses more efficient; he was convinced that many businesses were, in fact, too big to manage. And he was concerned that big businesses were too politically powerful. Brandeis sounded his tocsin in a series of magazines articles, a book, and congressional testimony. His views received widespread attention, and made him a trusted adviser of Woodrow Wilson. Brandeis' theories about "the curse of bigness" inspired one of the main debates in the 1912 election, which historians consider "one of the greatest presidential campaigns in history."<sup>3</sup>

All four candidates in that contest—William Howard Taft, the incumbent president and Republican candidate;<sup>4</sup> Theodore Roosevelt, the former president and Progressive Party candidate;<sup>5</sup> Woodrow Wilson, then governor of New Jersey and the Democratic candidate;<sup>6</sup> and labor leader Eugene Debs, the candidate of the Socialist Party<sup>7</sup>—spoke about big business and what to do about it. As improbable as it may seem looking back from our vantage point, antitrust became a major campaign issue.

The clash was particularly pronounced between the two leading candidates and their programs, that is, between Wilson and what he called "The New Freedom," and Roosevelt and his "New Nationalism." Each made his approach to antitrust and the control of big business a fundamental part of his platform. Echoing Brandeis' thinking, Wilson complained that big business was turning rugged individualists into serfs.<sup>8</sup> "You know what happens when you are the servant of a corporation," Wilson declared; "Your individuality is

3. JOHN MILTON COOPER, JR., *WOODROW WILSON: A BIOGRAPHY* 159 (2009).

4. Taft argued that he was doing more to break up the trusts than Roosevelt had when had been president. He observed that his administration had brought more antitrust actions in one term than Roosevelt's administration filed in two terms. H.W. BRANDS, TR: *THE LAST ROMANTIC* 707 (1997). Taft boasted that his administration was suing to break up United States Steel Corporation, which was then the largest company in the country and controlled by the most powerful of all corporate magnates, J.P. Morgan. Taft's attorney attacked Roosevelt by arguing that U.S. Steel had become an illegal monopoly when it purchased Tennessee Coal and Iron Company, which had been done with the express approval of then-President Teddy Roosevelt. JAMES CHACE, *1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY* 95–98 (2004). Taft believed the antitrust laws outlawed corporate conduct, not size, and promised to continue to vigorously enforce those laws "no matter whether we be damned or not." *Id.* at 95.

5. See *infra* at notes 8, 15–18, 20–22, 303–32 and accompanying text.

6. See *infra* at notes 8–14, 18–19, 23–25, 334–41 and accompanying text.

7. Debs was a democratic socialist who wanted to overthrow capitalism lock-stock-and-barrel at the ballot box. CHACE, *supra* note 4, at 67–68, 81, 85. Debs denounced Roosevelt as a "servile functionary of the trusts." *Id.* at 223. In 1894, Debs had been convicted and jailed for organizing the American Railway Union as a combination in restraint of trade, in violation of the Sherman Act, and he wanted to exempt labor unions from the antitrust laws. COOPER, *supra* note 3, at 230.

8. James Chace writes that in a three-hour meeting at Wilson's home, Sea Girt, on August 28, 1912, Brandeis persuaded Wilson to make monopolies the principal issue of his

swallowed up in the individuality and purpose of a great corporation.”<sup>9</sup> Wilson drew a distinction between enterprises that had grown big through the “natural process” of outperforming rivals in honest competition and those that had grown “artificially” through mergers and combinations.<sup>10</sup> The latter were the real problem according to Wilson. “[T]hey are constantly buying up new competitors in order to narrow the field,” he said.<sup>11</sup>

Speaking in antitrust terms, Wilson might have noted that giant companies expanded vertically and horizontally through mergers in order to occupy every nook and cranny of an industry, thereby denying smaller firms profitable niches. When a pigmy found a foothold by developing a new product, the savviest response was not trying to outcompete the pigmy by creating an even more attractive product, or even trying to destroy the pigmy through predatory practices, but simply to buy the pigmy. During Wilson’s time for example, the United States Steel Corporation combined with or acquired no less than 228 separate companies.<sup>12</sup> Those companies had previously been located in 127 cities and towns.<sup>13</sup> They had been important not only to the local economies but also to the social and cultural fabric of their communities. Their top executives may have been trustees and benefactors of local hospitals, schools, colleges, religious organizations, museums, orchestras, and charities. They understood that the prosperity of their companies was tied to the well-being of their communities, and they often acted as city fathers urging elected officials to do the right thing. When local firms were ripped from their roots and headquartered somewhere

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campaign, and to argue to the American people that monopolies could not be effectively controlled by government but had to be destroyed. CHACE, *supra* note 4, at 192.

9. WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF A PEOPLE* 12 (Gray Rabbit Publications 2011) (1913). This book consists of twelve of Wilson’s major campaign speeches, which he collected and published after the election. Wilson’s views about big business and antitrust are peppered throughout many of the chapters, but two chapters— Chapter VIII “Monopoly or Opportunity?” and Chapter IX “Benevolence, or Justice?”—are devoted exclusively to these topics.

10. *Id.* at 71. Wilson thought that the nation need not be concerned about companies growing big naturally because their size would become a competitive disadvantage. “[Y]ou pass the limit of efficiency and get into the region of clumsiness and unwieldiness,” he explained. *Id.* at 72. Eventually, the “pigmy” will come out and “be so much more athletic, so much more astute, so much more active, than the giants, that it will be a case of Jack the giant-killer,” he said. *Id.* at 73.

11. *Id.*

12. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 153 (Martino Publishing 2009) (1914).

13. *Id.*

else, communities were impoverished—a process we today call “delocalization.”<sup>14</sup>

Like Wilson, Teddy Roosevelt was also influenced by a progressive intellectual. In Roosevelt’s case, it was Herbert Croly, a founder of the *New Republic* magazine and author of a book titled *The Promise of American Life*.<sup>15</sup> Roosevelt agreed with Wilson about the dangers that gigantic corporations and the enormous wealth they generated for the men who controlled them. In a series of magazine articles published the previous year, Roosevelt condemned “dishonest men of swollen riches” and the politicians who did their bidding through “class favoritism.”<sup>16</sup> “We are warring against bossism, against privilege social and industrial,” he declared on the campaign trail.<sup>17</sup>

Although Wilson and Roosevelt agreed on the disease, they prescribed different medicine.<sup>18</sup> Both men tried to draw a distinction between good trusts and bad trusts—between big businesses that should be broken up and those that should be left alone. But Wilson’s rhetoric always had the flavor of Brandeis’ belief in the “curse of bigness,” that is, that giant corporations were inherently undesirable.<sup>19</sup> Wilson was suggesting that they should be dissipated, whether through the natural forces of a competitive marketplace, where they would be done in by the disadvantages of their own bloated size, or through governmental action.

In contrast, Roosevelt argued that giant companies were inevitable in the industrial age. Moreover, in many instances big

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14. “Practically every trust created has destroyed the financial independence of some communities,” wrote Brandeis. *Id.* at 152. For an extensive modern analysis of how communities are diminished through delocalization, see Richard M. Brunell, *Social Costs of Mergers: Restoring Local Control as a Factor in Merger Policy*, 85 N.C. L. REV. 149 (2006–07).

15. Roosevelt was very taken with Croley’s book, perhaps more because Croley agreed with so many of Roosevelt’s ideas than the other way around. See BRANDS, *supra* note 4, at 684–85 (suggesting that Roosevelt’s raving about Croley’s “had much to do with the fact that Croley agreed with him on the need for energetic government activities to retain the overweening power of corporations.”); see also CHACE, *supra* note 4, at 58 (regarding Croley’s influence on Roosevelt).

16. BRANDS, *supra* note 4, at 684.

17. *Id.* at 715.

18. Not everyone agrees. For example, John Milton Cooper, Jr. writes: “On the two questions that did loom large, the trusts and the size and strength of government, it was hard to see where [Wilson and Roosevelt] differed. Wilson talked about ‘big business’ and ‘trusts’; Roosevelt talked about ‘good trusts’ and ‘bad trusts.’ Both would leave the former alone and break up the latter.” COOPER, *supra* note 3, at 174.

19. “A Curse of Bigness” was the title of an article Brandeis wrote for HARPER’S WEEKLY and later included as a chapter in his book OTHER PEOPLE’S MONEY, *supra* note 12. For a description of the evolution of Brandeis’s thinking on the topic, see especially chapter thirteen (“The Curse of Bigness”) and pages 161 and 342–51 in MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009).

companies were desirable because only big companies could do big things. The medicine Roosevelt prescribed was not breaking up big businesses but regulating them, and thereby ensuring that their power was not misused. Roosevelt wanted a national government that was strong enough to keep big businesses on a leash. He criticized Wilson for naively wanting to return to a preindustrial age, and for being afraid of power—corporate or governmental.<sup>20</sup> Roosevelt proposed establishing a “national industrial commission” and giving it “the complete power to regulate all the great industrial concerns engaged in interstate commerce—which practically means all of them in the country.”<sup>21</sup> Roosevelt argued that the precedent for this new commission was the Interstate Commerce Commission, which had the power to set railroad fares, but he wanted to give the new commission far more extensive authority. It would not only regulate big business’ relationships with its suppliers and customers but also its relationships with its employees. To ensure that corporations did not take unfair advantage of its employees, it would be empowered to regulate wages, hours of employment, and workplace conditions.<sup>22</sup>

Wilson and Brandeis believed that seeking to control giant corporations through regulation was doomed to failure. Big business was so large and powerful, and had such a strong interest in resisting regulation, that it would control the government. Wilson suggested that business control of government was, in fact, the real object of Roosevelt’s proposal; he said that Roosevelt’s industrial commission idea had originally been proposed by the United States Steel Corporation.<sup>23</sup> Roosevelt’s proposal of controlling big business through government regulation was a pipedream, argued Wilson, because big companies would collaborate to control the government instead. “We call upon all intelligent men to bear witness that if [Roosevelt’s] plan were consummated, the great employers and capitalists of the country would be under a more

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20. BRANDS, *supra* note 4, at 720.

21. See CHACE, *supra* note 4, at 167 (quoting Roosevelt). Roosevelt tried to begin to implement his vision in his first term by persuading Congress to establish the Department of Commerce and Labor and, within it, the Bureau of Corporations. However, Roosevelt had not persuaded Congress to create a Bureau of Corporations with regulatory teeth; it had been established merely as a research and reporting agency. See DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* 370, 404–05, 432–36, 523–25 (2013).

22. CHACE, *supra* note 4, at 99.

23. WILSON, *supra* note 9, at 87.

overpowering temptation than ever to take control of the government and keep it subservient to their purpose,” declared Wilson.<sup>24</sup> And the corporations would be successful. Wilson argued:

If the government is to tell big business men how to run their business, then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it?<sup>25</sup>

The parallels between the Gilded Age—when the nation was greatly concerned about the power amassed by Andrew Carnegie, J.P. Morgan, John D. Rockefeller, Sanford Dole, Cornelius Vanderbilt, and their “trusts”<sup>26</sup>—and our present era are striking. For example, John D. Rockefeller started the Standard Oil trust through a “buying spree” of oil refineries.<sup>27</sup> He followed that through an aggressive program of vertical integration, acquiring oil producers (“buy all we can get,” he instructed his agents), and even companies that built railroad tanker cars or pipelines that were used for transporting oil.<sup>28</sup> Other trusts of the era were formed in much the same way.<sup>29</sup>

Consider the parallels with today. During the past decade, the chemical company Monsanto purchased more than thirty companies, the computer giant Oracle acquired more than eighty companies, and Google purchased more than 120 companies.<sup>30</sup> Between 1994 and 2000, more than eighty aerospace-defense firms merged into four dominant firms.<sup>31</sup> Until relatively recently, there were a rich diversity of major book publishers in the United States.

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24. *Id.* at 89.

25. *Id.* at 85. In fact, Wilson argued that big business already controlled the government. *Id.*

26. *See infra* at notes 218–73 and accompanying text.

27. *See* H.W. BRANDS, *AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM 1865–1900*, at 88 (2010).

28. *Id.* at 91.

29. *See, e.g., id.* at 598–603 for a description of the formation of the United States Steel Corporation.

30. Barry C. Lynn, *Estates of Mind*, *WASH. MONTHLY*, July/Aug. 2013, at 28, 29.

31. Northrop Grumman boasts on its website that it has “integrat[ed]” nearly twenty firms. *Our Heritage*, NORTHROP GRUMMAN, <http://www.northropgrumman.com/AboutUs/OurHeritage/Pages/default.aspx> (last visited Sept. 1, 2015). General Dynamics says that since the mid-1990s it has “acquired and integrated more than 65 businesses.” *Corporate Overview*, GEN. DYNAMICS, <http://www.generaldynamics.com/about/corporate-overview/index.cfm> (last visited Sept. 1, 2015). Lockheed Martin formed in 1994 when the Lockheed and Martin Marietta companies merged. The modern Boeing Corporation results from the mergers with Rockwell aerospace and defense units in 1997, McDonnell Douglas in 1997, the space and communications divisions of Hughes Electronics Inc. and Jeppesen Sanderson



Now five conglomerates publish roughly two-thirds of all books in the country.<sup>32</sup> The largest, Penguin Random House, absorbed dozens of previously-independent publishers, including such eminent firms as Anchor, Doubleday, Dutton, Fawcett, Grosset & Dunlap, Knopf, Pantheon, G.P. Putnam's Sons, and Viking.<sup>33</sup> Authors and their agents say that these publishing houses used to separately review and bid for manuscripts; now there is less of that.<sup>34</sup> And when previously-independent publishers whose imprints once stood for literary quality are absorbed by cookie-cutter conglomerates, quality editing and individualized marketing may be sacrificed at the altar of efficiency.<sup>35</sup> By the time you read this, there may be only four, or fewer, publishers. Harper-Collins and Simon & Schuster are reportedly considering merging.<sup>36</sup> If they decide to do so, they will undoubtedly tell the antitrust regulators that they need to merge in order to compete with Penguin Random House—just as Penguin Random House told regulators it needed to merge to achieve some level of parity with Amazon, which sells more than forty percent of all books in the United States.<sup>37</sup> Gigantism breeds more gigantism.

One difference between the Gilded Age and our New Gilded Age is this: industry consolidation today often occurs on a global level. The British advertising company WPP, for example, has today become an international conglomerate by merging with or acquiring more than three hundred previously independent ad agencies, including such famous American firms as J. Walter Thompson, Young & Rubicam, Ogilvy & Mather, and Hill & Knowlton.<sup>38</sup> Today—as

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INC. in 2000. See DAVID ROTHKOPF, *SUPERCLASS: THE GLOBAL POWER ELITE AND THE WORLD THEY ARE MAKING* 205 (2008).

32. Boris Kachka, *Book Publishing's Big Gamble*, N.Y. TIMES (July 9, 2013), <http://www.nytimes.com/2013/07/10/opinion/book-publishings-big-gamble.html>.

33. *Id.*

34. Erick Pfanner & Amy Choznick, *Random House and Penguin Merger Creates Global Giant*, N.Y. TIMES (Oct. 29, 2012), [http://www.nytimes.com/2012/10/30/business/global/random-house-and-penguin-to-be-combined.html?\\_r=0](http://www.nytimes.com/2012/10/30/business/global/random-house-and-penguin-to-be-combined.html?_r=0). One author opined that “it’s usually true that an author benefits when there are as many big players as possible bidding against each other.” *Id.* Some publishers discourage or even forbid their subsidiary imprints—which previously had been independent rivals—from competing against each other for manuscripts. Kachka, *supra* note 32.

35. See Kachka, *supra* note 32 (asking “whether literary culture is best served by the ceaseless centralization of publishing”).

36. *Id.*

37. Franklin Foer, *Amazon Must be Stopped*, NEW REPUBLIC, Oct. 9, 2014, <http://www.newrepublic.com/article/119769/amazons-monopoly-must-be-broken-radical-plan-tech-giant>.

38. Barry C. Lynn, *Killing the Competition: How the New Monopolies are Destroying Open Markets*, HARPER'S MAG., Feb. 2012, at 27, 32; *Young & Rubicam Group*, WPP, <http://www.wpp.com/wpp/companies/young-rubicam-group/> (last visited Sept. 1, 2015). WPP describes itself as “the world’s largest communications services group, employing 179,000 people working in 3,000 offices in 111 countries.” *Who We Are*, WPP, <http://www.wpp.com/wpp/about/whoware/> (last visited Sept. 1, 2015).

had been the case in the original Gilded Age—big fish are swallowed by bigger fish, and then they in turn are swallowed by still bigger fish. Many of the agencies that WPP acquired, such as the Young & Rubicam Group,<sup>39</sup> had themselves become large by devouring other agencies. Meanwhile, delocalization has gone international. Penguin Random House, which describes itself as “the world’s first truly global trade book publishing company,” is owned by Europeans.<sup>40</sup>

Consumers are often unaware of increasing industry consolidation because it is camouflaged at the retail level. When a consumer goes to the local supermarket or liquor store to purchase beer, for example, he is greeted by what looks like a wide assortment of brands. And, in fact, there are presently two thousand beer companies in the United States. Yet only two companies—Anheiser-Busch InBev (AB InBev) and South African Breweries (SAB)—control eighty percent of the domestic market.<sup>41</sup> SAB acquired both of the previously-independent Miller and Coors companies in 2007, and the Belgium company InBev acquired Anheuser-Busch in 2008.<sup>42</sup> AB InBev sells two hundred brands of beer in the United States today, under such labels as Budweiser, Beck’s, Bass, Michelob, Busch, Rolling Rock, St. Pauli Girl, Corona, Stella Artois, Löwenbräu, Jinling, and many more.<sup>43</sup> The SAB line-up is equally wide, including not only a wide range of Miller and Coors beers but such brands as Foster’s, Molson, Red Dog, Steele Reserve, Icehouse, and Blue Moon, among others.<sup>44</sup> It may be true that the consumer can enjoy a wide variety of different types and tastes in beer, and maybe even do so at reasonable prices, but people are not merely consumers. What are the ramifications of consolidated corporate power for people in their roles as citizens in a democracy, residents of local communities, and workers?

Every time an independent firm is swallowed by a corporate behemoth, top executives—the chief executive, operating, and

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39. *Young & Rubicam Group*, WPP, *supra* note 38.

40. Kachka, *supra* note 32.

41. Tim Heffernan, *Last Call*, WASH. MONTHLY, Nov./Dec. 2012, [http://www.washingtonmonthly.com/magazine/november\\_december\\_2012/features/last\\_call041131.php?page=all](http://www.washingtonmonthly.com/magazine/november_december_2012/features/last_call041131.php?page=all).

42. BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 38 (2010).

43. *Brand Portfolio*, AB INBEV, <http://www.ab-inbev.com/brands/brand-portfolio.html> (last visited Sept. 1, 2015).

44. *Brand Portfolio*, MILLERCOORS, at <http://www.millercoors.com/Our-Beers/Great-Beers.aspx> (last visited Sept. 1, 2015). Moreover, the two giants continue to try to acquire other companies and expand their global market shares. See David Gelles & Stephanie Strom, *SABMiller’s Bid for Heineken Opens the Door to Possible Beer Industry Mergers*, N.Y. TIMES (Sept. 15, 2014), <http://dealbook.nytimes.com/2014/09/15/sabmiller-bid-for-heineken-opens-door-to-possible-beer-industry-mergers/>.

financial officers; the general counsel; division and department heads; and so on—suffer demotions in authority and self-image. Moreover, workers at all levels face a reduction in potential employers. In an industry with many employers, a worker looking for a job has a variety of prospects. If one employer is a bad fit, a worker might find a better spot somewhere else. Someone who feels unappreciated can look elsewhere. This kind of diversity is a meaningful component of freedom in modern society. When industries become consolidated, individual freedom is diminished. An executive at the advertising behemoth WPP remarked: “Every place I wanted to work was already owned by WPP. And I realized that to move, I’d need the approval of some grand poobah.”<sup>45</sup>

Today the nation has long been suffering from chronic problems in employment and wages notwithstanding high corporate profits and a surging stock market. It took a bafflingly long time for unemployment to fall from a high of ten percent in the wake of the Great Recession to 5.6% by the end of 2014.<sup>46</sup> Meanwhile, experts tell us standard unemployment figures have become misleading, perhaps because of shadow unemployment—people who were unemployed for so long that they have left the work force and are no longer counted as unemployed. There is wide agreement we are still far from the natural employment rate.<sup>47</sup> Meanwhile, wages are stagnant.<sup>48</sup> The typical American family earns less today than it did fifteen years ago.<sup>49</sup> There is much debate about whether these recalcitrant problems are due to now-permanent structural problems. We know that most jobs are created by small and medium-sized enterprises (SMEs), and that SMEs are also more innovative than big corporations.<sup>50</sup> For this and other reasons, some believe that

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45. LYNN, *supra* note 42, at 38 (quoting his interview of an anonymous WPP executive).

46. Robert J. Samuelson, *More Jobs, But Wages Still Stagnant*, SPOKESMAN-REV., Jan. 20, 2015, available at 2015 WLNR 1825637; see also Paul Krugman, *Robots and Robber Barons*, N.Y. TIMES (Dec. 9, 2012), [http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html?\\_r=0](http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html?_r=0) (describing an increase in corporate profits at the expense of labor’s wages).

47. Samuelson, *supra* note 46.

48. David Leonhardt, *The Great Wage Slowdown of the 21st Century*, N.Y. TIMES (Oct. 7, 2014) <http://www.nytimes.com/2014/10/07/upshot/the-great-wage-slowdown-of-the-21st-century.html>.

49. *Id.*

50. See Barry C. Lynn & Phillip Longman, *Who Broke America’s Jobs Machine? Why Creeping Consolidation is Crushing American Livelihoods*, WASH. MONTHLY (Mar. 4, 2010), <http://www.washingtonmonthly.com/features/2010/1003.lynn-longman.html> (“It is now widely accepted among scholars that small businesses are responsible for most of the net job creation in the United States. It is also widely agreed that small businesses tend to be more inventive, producing more patents per employee, for example, than do larger firms.”); see also JOSEPH E. STIGLITZ, *FREE FALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 6, 228 (2010) (stating that SMEs are the basis for job creation in any economy).

increasing consolidation is exacerbating national employment problems.<sup>51</sup>

As was also the case during the Gilded Age, we are living during a time when enormous wealth flows into very few hands. During the period from 1990 to 2004, for example, average real income increased two percent for the bottom ninety percent of American households but eighty-five percent for the top .01%.<sup>52</sup>

One of the most powerful contributors to this dynamic is the enormous increase in compensation for CEOs and other top executives at the nation's largest corporations. When I wrote about this topic twenty years ago, CEOs at large U.S. companies were making 130 times as much as the average worker.<sup>53</sup> CEOs at large firms now make almost three hundred times as much as their average worker.<sup>54</sup> This is unprecedented. Even during the Gilded Age, J.P. Morgan opined that top executives should not be paid more than twenty times the average company worker.<sup>55</sup>

Executive compensation is correlated with something else that Brandeis worried about: the interconnection of boards of directors. Typically in very large corporations, many members of a company's board are executives and directors of other large companies. Often outside executives are placed on the board's executive compensation committee, creating a scratch-my-back-and-I'll-scratch-yours dynamic that drives up executive compensation everywhere.<sup>56</sup> The widening gap between the extremely rich and everyone else suppresses social mobility<sup>57</sup> and exacerbates a pernicious pessimism in national life.

Americans used to believe their children would be financially better off than they were. This is no longer the case. Americans now

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51. Lynn and Longman argue that there is growing evidence that "the radical, wide-ranging consolidation of recent years has reduced creation at both big and small firms simultaneously." Lynn & Longman, *supra* note 50. They believe that large dominant firms have less incentive to create jobs themselves, but they also occupy such broad swaths of the market that SMEs have fewer niches to exploit.

52. ROTHKOPF, *supra* note 31, at 69 (citing a N.Y. TIMES report).

53. Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 BUFFALO L. REV. 1, 10 (1993).

54. See Glenn Kessler, *Clinton's Claim that CEOs make 300 Times More than American Workers*, WASH. POST (Apr. 16, 2015), available at 2015 WLNR 11036859 (stating that this is the result of a study by the Economic Policy Institute, and discussing how different studies and methodologies lead to different results); see also ROTHKOPF, *supra* note 31, at 72.

55. ROTHKOPF, *supra* note 31, at 75.

56. See *id.* at 73-74 (citing a 2006 study by Amir Barnea and Ilan Guedj of the University of Texas).

57. See *id.* at 71 (citing a study by Tom Hertz of American University that showed that an American born to parents in the bottom sixty percent of all income has less than a two percent chance of ending up in the top five percent).

generally believe their children will likely be worse off than their parents.<sup>58</sup> The growing gap between the very rich and everyone else may have many causes, but increasingly exorbitant executive compensation is one of them.<sup>59</sup>

Further, executive compensation is closely tied to company size.<sup>60</sup> Indeed, company size and top executive compensation are not merely correlated; compensation may be precisely the point of corporate growth. Some companies become larger—especially through mergers and acquisitions—because size provides a rationale for increased compensation of the top executives.<sup>61</sup>

Perhaps the greatest problem resulting from gigantic corporate size and high industry concentration is the political power of corporations. Bigger is more powerful, pure and simple. If we need a way to confirm that self-evidential proposition, one is readily available. How does business use whatever political power it can muster? First and foremost, it seeks to have government provide it with special benefits at the expense of the public-at-large. Economists call this “rent-seeking.”<sup>62</sup> In political discourse, liberals call the same thing “corporate welfare”<sup>63</sup> while conservatives prefer the term “crony

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58. Andrew Kohut, *What Will Become of America's Kids?* PEW RESEARCH CTR. (May 12, 2014), <http://www.pewresearch.org/fact-tank/2014/05/12/what-will-become-of-americas-kids>.

59. In 2014, the average annual compensation for CEOs at the nation's largest 350 publicly owned companies was \$16.3 million. *See Study: Average CEO Pay \$16.3M*, CHICAGO TRIB. (June 23, 2015), *available at* 2015 WLNR 18410490 (describing the large gap between CEO compensation compared to the average worker).

60. According to a series of studies by Graef Crystal of the University of California at Berkeley, there is a close association between company size and CEO compensation. A ten-percent increase in company size translates into a two-percent increase in CEO compensation. *CEO Salaries in 1991*, 41 ASS'N MGMT. 34 (1991), *available at* 1991 WLNR 4676994; *see also* James J. Cordeiro, *Beyond Pay for Performance: A Panel Study of the Determinants of CEO Compensation*, 21 AM. BUS. REV. 56 (2003), *available at* 2003 WLNR 6794171 (reporting that the link between company size and CEO compensation has been extensively studied); ROTHKOPF, *supra* note 31, at 72–75 (suggesting that the highest paid CEOs are at very large firms).

61. *See infra* note 115 and accompanying text.

62. “Rent seeking” has been defined as “the pursuit of governmentally-conferred benefits by private interest groups.” Michael E. DeBow, *The Ethics of Rent-Seeking? A New Perspective on Corporate Social Responsibility*, 12 J.L. & COM. 1, 2 (1992–93). Public policy experts sometimes use the narrower term “price supports.” *See* Isaac Chotiner, *What Part of Politico Do You Not Understand?*, NEW REPUBLIC (July 1, 2013), <http://www.newrepublic.com/article/113489/john-f-harris-jim-vandehei-interview-talking-politicos-editors> (calling price supports “a wonky Washington term” preferred by the Washington political class and defining it as a “subsidy or market intervention meant to keep the price of a good inflated”).

63. “Corporate welfare” has been defined as “any action by local, state or federal government that gives a corporation or an entire industry a benefit not offered to others.” Donald L. Bartlett & James B. Steel, *Corporate Welfare*, TIME (Nov. 9, 1998), <http://www.cnn.com/ALLPOLITICS/time/1998/11/02/corp.welfare.html>.

capitalism.”<sup>64</sup> I will use all three terms interchangeably.

One of the most extensive studies of corporate welfare was undertaken by an award-winning team of investigative journalists and published in a four-part series by *Time* magazine in 1998.<sup>65</sup> According to that report, the annual cost of corporate welfare in the United States is equal to the total salaries earned in a two-week period by every worker in the country.<sup>66</sup> Most of those benefits flowed to the five hundred largest companies.<sup>67</sup> A more recent academic study confirms that larger companies are significantly more likely to receive corporate welfare.<sup>68</sup> Even within the cohort of very large companies, the larger the company, the more corporate welfare it is likely to obtain.<sup>69</sup>

When Brandeis and Wilson debated big business and antitrust law with Croly and Roosevelt, their debate was considered to be so important that it became the principal issue in a presidential election.<sup>70</sup> The problem of consolidated corporate power was then new enough that the country had not yet accepted the status quo. Complacency had not settled in. Americans still believed these problems could be solved, or at least significantly controlled. One of the main tools for doing so was antitrust law, especially the Sherman Act, which had been enacted two decades earlier. Historian Richard Hofstadter says that the antitrust movement represented “the political judgment of a nation whose leaders had always shown a keen awareness of the economic foundations of politics. In this respect, the Sherman Act was simply another manifestation of an enduring American suspicion of concentrated power.”<sup>71</sup>

64. RALPH NADER, *UNSTOPPABLE: THE EMERGING LEFT-RIGHT ALLIANCE TO DISMANTLE THE CORPORATE STATE* 46–47 (2014); *see also* HUNTER LEWIS, *CRONY CAPITALISM IN AMERICA* 2008–12 (2013); Steven G. Calabresi & Larissa G. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 *HARV. J.L. & PUB. POL’Y* 983 (2013).

65. Bartlett & Steel, *supra* note 63, at 36; Donald L. Bartlett & James B. Steel, *Corporate Welfare: Fantasy Islands*, *TIME* (Nov. 16, 1998), <http://content.time.com/time/magazine/article/0,9171,989572,00.html>; Donald L. Bartlett & James B. Steel, *Paying a Price for Polluters*, *TIME* (Nov. 23, 1998), <http://www.cnn.com/ALLPOLITICS/time/1998/11/16/polluters.html>; Donald L. Bartlett & James B. Steel, *The Empire of the Pigs*, *TIME* (Nov. 30, 1998), <http://www.cnn.com/ALLPOLITICS/time/1998/11/23/pigs.html>.

66. Bartlett & Steel, *Corporate Welfare*, *supra* note 63.

67. *See id.* (stating that Fortune 500 companies “are the biggest beneficiaries of corporate welfare”).

68. Cedric E. Dawkins, *Corporate Welfare, Corporate Citizenship, and the Question of Accountability*, 41 *BUS. & SOC’Y* 269, 282–83 (2002).

69. *Id.* at 284.

70. Brandeis persuaded Wilson to make monopolies the main issue of his campaign. CHACE, *supra* note 4, at 192.

71. SANDEL, *supra* note 2, at 232 (quoting Richard Hofstadter, *What Happened to the Antitrust Movement*, in *THE BUSINESS ESTABLISHMENT* (Earl F. Cheit ed., 1964)).

The antitrust specialists—the lawyers and economists specializing in antitrust who work in the regulatory agencies, law firms and corporate counsel offices, think tanks, law schools, and congressional committees—are no longer concerned with questions about how big business affects the political and social fabric of the nation. As the specialists see it, those issues may be important; they are just not appropriate considerations for antitrust law. They are messy, ideologically-charged questions not susceptible to objective analysis. Trying to take them into account leads to unpredictability, making it impossible for corporations to know how to conduct their businesses. Courts used to take such things into account, but that led to judges mandating their own political and social preferences. Brandeisian lawyer-statesmen who thought that antitrust is properly concerned with matters fundamental to the health of the Republic have been displaced by economists with computer programs that purport to divine whether, if companies merge, the price of products will rise and production fall. (It is an iron law of economic theory that, all other things remaining constant, when prices rise, production falls, and vice versa.) Economists might disagree about the answers, but at least the debates appear to be scientific. To the extent the antitrust laws take other things into account, they involve other matters of consumer welfare such as innovation, product diversity, and product quality. That, in short, is what today's antitrust fraternity believes. Yet, as we shall see, antitrust policy traditionally was concerned not only with consumer prices but also with the political and social consequences of consolidated power.

Here is how I shall proceed. Part I will describe how antitrust changed. In a nutshell, it is because the Chicago School—and especially Robert H. Bork—persuaded the antitrust fraternity that its field should be exclusively concerned with consumer welfare. This Part of the Article will, therefore, describe and critique Judge Bork's argument. Part II will show that, contrary to Judge Bork's claims, antitrust traditionally had two strands. One strand was about direct economic issues—about whether, for example, a merger drove up prices or otherwise adversely affected consumers. But there was traditionally another strand as well. That strand was about the political and social effects of consolidated power.

Part III will bring concerns about consolidated power down to earth by examining them within the context of specific industries. I shall focus first on banking and the financial industry as a whole because that was the area that Brandeis focused on. Within this industry, Brandeis' original concerns have played out in the last ten years: if corporations become too large, they will become, not

merely too big to fail but too powerful to regulate. This Part will also use the poultry industry to illustrate what industry consolidation can mean for workers and for independent businesses that deal with behemoth enterprises. Lastly, I will discuss the political consequences of unrestrained corporate size. The Conclusion will restate the consequences of corporate giantism, and propose that we need a new antitrust paradigm that takes into account the consequences of consolidated corporate power.

## I. THE CHICAGO SCHOOL'S DEADWEIGHT VISION

### A. *Robert H. Bork and the Chicago School's Central Premise*

It would be an exaggeration to say that Robert H. Bork<sup>72</sup> single-handedly changed antitrust law. There were other influential advocates of the Chicago School's vision of antitrust, most notably Richard A. Posner and Frank H. Easterbrook, both Chicago Law School professors whom President Ronald Reagan nominated to federal courts of appeals.<sup>73</sup> Nevertheless, Bork's influence on antitrust law was so enormous that it is reasonable to focus on him exclusively.

A little background is in order. In 1978, Bork, then a fifty-one-year-old professor at Yale Law School, published *The Antitrust Paradox: A Policy at War with Itself*. Bork's book was sophisticated yet clearly written, fascinating, and brilliantly-argued. It is no surprise

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72. Bork may be best known to history as the man whom President Ronald Reagan nominated to the Supreme Court in 1987 and the Senate declined to confirm following a bloody political battle. See, e.g., Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES (Dec. 19, 2012), <http://nyti.ms/1C1WKU2>. Bork earned another footnote in history in October 1973, when he was solicitor general. In what has become known as the "Saturday Night Massacre," President Nixon fired both the attorney general and the deputy attorney general for refusing to fire special prosecutor Archibald Cox, who was investigating the president's role in the Watergate scandal. When Nixon fired his two superiors, Bork became acting head of the Department of Justice, and he complied with Nixon's order to fire Cox. *Id.*

Bork was originally a New Deal Democrat. His worldview was transformed when, as a student at Chicago Law School, he took classes with economist Aaron Director. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 93–96 (2008); Douglas Martin, *Aaron Director, Economist, Dies at 102*, N.Y. TIMES (Sept. 16, 2004), <http://nyti.ms/1PVMcPA>.

73. Their early articles include: Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?* 60 TEX. L. REV. 705 (1982). Posner says that developments in psychology have caused him to qualify his views about the rational maximizer model, and that since the 2008 economic crisis he has become "less trustful of purely economic analysis." Joel Cohen, *An Interview with Judge Richard A. Posner*, A.B.A. J. (July 1, 2014), [http://www.abajournal.com/magazine/article/an\\_interview\\_with\\_judge\\_richard\\_a.\\_posner/](http://www.abajournal.com/magazine/article/an_interview_with_judge_richard_a._posner/).



that the book was influential.<sup>74</sup> In a new introduction to the book fifteen years later, Bork was able to express his satisfaction that “antitrust law has moved a long way in the direction urged by this book.”<sup>75</sup> When he wrote those words, Bork was being uncharacteristically modest, since within the relatively short span of fifteen years, *The Antitrust Paradox* had made an enormous impact.

Before I describe the gist of his argument, it is worth noting something Robert Bork observed on the very first page of the original edition: “Antitrust is a subset of ideology.”<sup>76</sup> I entirely agree with him on that point. It may be argued that all fields of law are subsets of ideology; yet antitrust may be especially ideological. Ideology is about values, and the law should reflect the values the nation decides to adopt. Moreover, antitrust law does not merely involve technical issues about how to protect competition and consumer welfare. It is about what kind of society we want.

With this in mind, we might begin by asking what values Bork wanted antitrust law to promote. “The only legitimate goal of American antitrust law,” he wrote, “is the maximization of consumer welfare.”<sup>77</sup> That is, of course, a simple and highly-reductionist statement. Bork was not saying that antitrust has a number of goals but one is more important than others. He claimed that antitrust legitimately has a single goal. Any other goal—even if advocated by legislators or courts—is somehow illegitimate. What makes other goals illegitimate? I shall return to that question shortly.

First let’s ask: what constitutes consumer welfare? Bork said that consumers decide that question in the marketplace; that is, consumer welfare comprises the wants that consumers seek to satisfy through their purchases.<sup>78</sup> “Antitrust thus has a built-in preference for material prosperity,” he declared.<sup>79</sup> It is on this assumption that the entirety of Bork’s theory rests. And that is what it is—an assumption and nothing more—for Bork supported his claim that

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74. It is difficult to overstate the influence of Bork’s book. One of the most acute observers of the field writes: “Bork’s ANTITRUST PARADOX defined the agenda for antitrust discourse in its time.” William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1416 (1990).

75. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

76. *Id.* at 3. When she first encounters that statement, the reader may not have been entirely sure whether Bork was decrying that state of affairs. He was not, as he made clear later in his book by writing: “To claim, as I have, that antitrust is a subcategory of ideology is necessarily to assert that it connects with the central political and social concerns of our time.” *Id.* at 408.

77. *Id.* at 51.

78. “Consumer welfare, in this sense, is merely another term for the wealth of the nation,” he wrote. *Id.* at 90. This comes close to equating consumer welfare and the gross national product.

79. *Id.*

antitrust's only legitimate goal is consumer welfare merely through *ipse dixit*.<sup>80</sup>

Bork went on to argue that role of antitrust “lies at that stage of the economic process in which production and distribution of goods and services are organized in accordance with the scale of values that consumers choose by their relative willingness to purchase.”<sup>81</sup> Citing Frank Knight, one of the original Chicago School economists, Bork said that, properly conceived, antitrust law promotes allocative efficiency without unduly impairing productive efficiency.<sup>82</sup> Allocative efficiency involves the allocation of resources in the general economy while productive efficiency involves the effective use of resources by individual firms.<sup>83</sup> Allocative efficiency occurs when the economy produces a particular product at a price that reflects the marginal cost of producing that product. Under those conditions, consumers who are willing to pay the price of production, plus a reasonable profit, can obtain that product. Concomitantly, resources will flow toward the production of that product in accord with what consumers are willing to pay. Where there are greater demands, more resources will flow to meet that demand.

By contrast, productive efficiency concerns how much it costs to produce the product. Productive efficiency increases if a firm finds a way to produce the same product at a lower marginal cost.

Bork argued that antitrust law should focus on allocative efficiency. Because a monopolist has no competition, he is able to demand a price higher than the marginal cost of producing the product. This means that some consumers who would have purchased the product at a lower, competitive price will not do so. That, in turn, means fewer of those products will be produced. As Bork saw it, the problem with monopoly pricing is not that consumers must pay too much.<sup>84</sup> He argued that the price may rise to the same level that a monopolist might demand if, for example, the cost of raw materials used in production increased. He also observed that consumers pay monopoly prices in situations that the law condones, such as when a seller has a patent on the product.<sup>85</sup> Moreover, no wealth is destroyed when a monopolist obtains an inflated price. Wealth is merely transferred from one party to another. That is an income distribution effect, said Bork, and such

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80. *Id.*

81. *Id.* at 91.

82. *Id.*

83. *See id.* (especially the asterisked note).

84. *Id.* at 101.

85. *Id.* at 113.

effects “should be completely excluded from the determination of the antitrust legality of the activity.”<sup>86</sup>

But why should that consideration be excluded? Bork argued that any decision “that requires a choice between two groups of consumers” should be the exclusive province of the legislature and thus is not a proper concern for a court.<sup>87</sup> That is a strange proposition. Suppose A holds up B at gunpoint and robs him of \$100. No wealth was destroyed in that transaction either. A is \$100 richer, B is \$100 poorer, and total societal wealth remains the same. Is that transaction not a proper concern for a court? Perhaps Bork would have laughed at this analogy. I imagine him noting that, “I said that ‘income distribution effects of economic activity’ are not a proper concern for courts. I did not say courts should not enforce criminal statutes.”<sup>88</sup>

If legislatures may properly consider morality and income distribution effects when deciding to outlaw robbery, why should not courts take those same matters into account when deciding whether particular conduct should be deemed to violate the Sherman Act? After all, Congress intended the Sherman Act to be a common law statute to be interpreted flexibly by the courts.<sup>89</sup> Gouged customers surely would have no trouble with this analogy. The principal difference is that the robber’s instrument of coercion is the gun, while the monopolist’s instrument is market power.<sup>90</sup>

Bork’s central problem with monopoly prices was that “the monopolist has made his monopoly profit creating an imbalance between cost and desire.”<sup>91</sup> There are some consumers who would purchase the product at a competitive price but who will not purchase it at the higher monopoly price. They may not be able to afford the product at the inflated price, or even if they can afford it, they may choose to make do with a less expensive but also less desirable substitute. Either way, this is a loss of value to those consumers (as the consumers themselves perceive it)—a loss that is not counterbalanced by someone else’s gain. Economists call this a

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86. *Id.* at 110–11.

87. *Id.* at 111.

88. It is “the income distribution effects of economic activity” that Bork said “should be completely excluded from the determination of the antitrust legality of the activity.” *Id.*

89. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 61–65 (4th ed. 2011).

90. A similar example has been used before, with the added edge of making the robbery victim a Chicago School economist. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 200 (2008).

91. BORK, *supra* note 75, at 101.

“deadweight loss,” and Bork argued that this loss should be the primary concern of antitrust law.

The deadweight loss is a matter of allocative efficiency, and thus, according to Bork, the kind of consumer welfare with which the antitrust law should be concerned. He wrote:

We must appraise any questioned practice—say, a merger or a requirements contract—in order to determine whether it contains any likelihood of creating output restriction. If it does, and if it also contains the possibility of efficiency, we have a mixed case. . . . If a practice does not raise a question of output restriction, however, we must assume that its purpose and therefore its effect are either the creation of efficiency or some neutral goal. In that case the practice should be held lawful.<sup>92</sup>

Our main interest is how antitrust should evaluate mergers, and therefore we need to focus a little more on how Bork viewed corporate mergers. As the preceding discussion makes clear, Bork effectively recognized only three categories of mergers.<sup>93</sup> (1) Some mergers are calculated to produce the ability to obtain monopoly prices with the concomitant effect of reducing total industry output and creating deadweight losses, which was Bork’s real concern. The law, he believed, should look unfavorably on such mergers.<sup>94</sup> (2) Some mergers are calculated to create productive efficiency, which would produce greater wealth for the producer, consumers, or both. This is a reason to favor such mergers.<sup>95</sup> (3) Some mergers are calculated to achieve other goals.<sup>96</sup> Bork declared that the law should be disinterested in these other goals.<sup>97</sup>

Bork also suggested that when a company grows through merger, we should consider that it could have chosen internal growth instead. Antitrust law has traditionally been reluctant to condemn internal growth on the theory that the law should not restrict firms

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92. *Id.* at 122.

93. “A business firm may seek to increase profits by achieving new efficiency (beneficial), by gaining monopoly power and restricting output (detrimental), or by some device not related to either productive or allocative efficiency . . . (neutral).” *Id.* at 122.

94. *See supra* notes 91–92, *infra* note 101 and accompanying text.

95. BORK, *supra* note 75, at 125 (“There can be no rational antitrust policy that does not recognize and give weight to productive efficiency.”).

96. Bork maintained that “when a practice does not have the capacity to restrict output, we should assume that its purpose (and therefore its effect) is either the creation of efficiency or some neutral result.” *Id.* at 123.

97. “The law should interfere only where merger would create a market share that raises the likelihood of a significant restriction of output.” *Id.* at 207.

from growing—and even achieving a monopoly position—by simply outperforming rivals.<sup>98</sup>

There has always been a distinction between monopolies produced by superior skill and effort, and those achieved through mergers or predatory practices.<sup>99</sup> The distinction has two somewhat related justifications. The first is that it conflicts with American principles to punish a company for doing what we expect good companies to do, namely, grow by doing business well. The second is that internal growth demonstrates that a firm is producing social value by offering more attractive products or services. By contrast, some mergers occur for exactly the opposite reason, namely, a company recognized that it was unable to grow naturally. Internal growth serves the public interest in ways all mergers may not.

Bork seemed to accept this second rationale.<sup>100</sup> He said nothing about placing a ceiling on internal expansion. On the one hand, that is entirely understandable as the antitrust laws have always been interpreted as not placing a limit on internal expansion, as long as it has not been assisted by unfair practices.

On the other hand, though, under Bork's core theory—that the antitrust laws are designed to prevent firms from achieving such dominant market positions that they have the ability to restrict total industry output—it should not matter how that dominance was achieved.<sup>101</sup> That would not have been an unprecedented view. Over the years, some courts, scholars, and members of Congress have argued that a monopoly position should be prohibited regardless of how acquired.<sup>102</sup> Moreover, the language of the Sherman Act is, on its face, consistent with that position.<sup>103</sup> But that was not Bork's conclusion. He did not explain why; he simply ignored that

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98. *Id.* at 206–07.

99. HOVENKAMP, *supra* note 89, at 296.

100. BORK, *supra* note 75, at 199 (“[S]ize by internal growth demonstrates superior efficiency, but merger that creates real market control will certainly have the effect of restricting output and may or may not create new efficiencies.”).

101. *Id.* at 206 (“Growth is preferable to merger in only one type of case: where merger would create a market share so large that the result would be restriction to output. There is no other general reason to prefer internal expansion to merger.”). Bork intended this as a defense of growth by merger; he was arguing that growth through merger is generally just as fine as growth through internal expansion. Yet he failed to explain why—when a firm is on the threshold of achieving dominance sufficient to reduce output—he draws a distinction between growth through merger and internal growth. I draw a distinction between growth by merger and internal growth myself, but I do so on the basis of American tradition, not economic policy. See *infra* at notes 689–90 and accompanying text.

102. HOVENKAMP, *supra* note 89, at 290–97.

103. Section 2 states that “Every person who shall monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.” 15 U.S.C. § 2 (2012).

option. His bottom line was: “The law should interfere only where merger would create a market share that raises the likelihood of a significant restriction of output.”<sup>104</sup>

In addition, Bork argued that the law should entirely ignore vertical mergers and acquisitions by conglomerates because he believed that only horizontal mergers are designed to increase a firm’s market share.<sup>105</sup> Vertical mergers, he believed, are always designed to increase efficiency.<sup>106</sup> As Bork colorfully put it: “The law against vertical mergers is merely a law against the creation of efficiency.”<sup>107</sup> Conglomerate mergers are just as simple. Because only horizontal mergers increase market share, and conglomerate mergers are, by definition, not horizontal mergers between competitors, they should not be a concern of antitrust law.<sup>108</sup> “The legality of such mergers under the antitrust laws should in no way depend upon a showing that any particular merger will create new efficiencies or that conglomerates as a class create efficiencies. It is enough that they do not create the power to restrict output,” Bork wrote.<sup>109</sup>

### *B. Are All Mergers Rational Corporate Decisions?*

The fundamental Chicago School assumption—that people and businesses are rational maximizers—subtly leads to a vision of the world that is cartoonish in its simplicity. Bork believed that businesses merge either to increase market share or efficiency. Although he acknowledged in passing that there might be other motives driving mergers, he never explored what they might be, and he was, in fact, probably skeptical that other motives really exist. “When the likelihood of output restriction is not present,” he wrote, “we must assume that the firm makes the choice between

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104. BORK, *supra* note 75, at 207.

105. “Horizontal mergers increase market share, but vertical mergers do not.” *Id.* at 231. Horizontal mergers are those between firms at the same link on the production and distribution chain, such as a merger between two manufacturers or between two retailers. Vertical mergers are those between firms at different links on the chain, such as a merger between a supplier and its customer. ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CAUKINS, *ANTI-TRUST LAW AND ECONOMICS* 409 (5th ed. 2004).

106. “Antitrust’s concern with vertical mergers is mistaken,” he argued. BORK, *supra* note 75, at 226. “Vertical mergers are means of creating efficiency, not of injuring competition.” *Id.*

107. *Id.* at 237.

108. “A conglomerate merger is usually defined as any merger that is not horizontal or vertical.” *Id.* at 246.

109. *Id.* at 248.

internal expansion and merger on the basis of the relative costs of two routes to larger size.”<sup>110</sup>

But, in fact, people are motivated by far more than rationality. Human beings are driven by desires, hopes, and fears—some conscious, some unconscious—that often cause them to depart from the course of action that would be chosen by an entirely rational being. Corporations are, of course, nothing but collections of people, and they too are capable of engaging in irrational behavior. Sociologists have shown that large corporations, with presumably well-trained managers and multiple levels of review, are capable of breathtakingly irrational behavior.<sup>111</sup> Corporate managers may make decisions that are good for them personally but bad for their company. Thus, merger decisions may be driven by many reasons that are not rational from the firm’s point of view.

Bork was also wrong in arguing that when a company chooses to expand through a merger, we should assume that it could have chosen to expand internally. Companies may decide to acquire small innovative competitors because they were unable to themselves innovate. Even though Apple acquired many smaller companies under his leadership, Steve Jobs, for example, believed that mergers were signs of defeat because they represented failures to innovate internally.<sup>112</sup> Firms that are capable of innovating may find it

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110. *Id.*

111. For example, B.F. Goodrich Co. designed, manufactured, and delivered a brake assembly for a U.S. Air Force plane despite knowing that its new brake failed fourteen consecutive internal tests and was certain to fail when tested by the general contractor and Air Force, endangering plane and pilot. The company persisted in this course of conduct even though it was all but certain that its malfeasance would be discovered, the company would not profit, and its relationships with important customers would be damaged. Kent Vandivier, *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards*, in *CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY* ch. 6 (M. David Ermann & Richard J. Lundman eds.) (5th ed. 1996). Other stories of less-than-rational actions by large companies include the GM ignition switch and the Ford Pinto. See Bill Vlasic, *G.M. Inquiry Cites Years of Neglect Over Fatal Defect*, N.Y. TIMES (June 5, 2014), <http://www.nytimes.com/2014/06/06/business/gm-ignition-switch-internal-recall-investigation-report.html> (describing how GM employees sat through meetings about a dangerous safety issue without making decisions or taking action, disabled by a culture of avoiding “responsibility with a ‘G.M. salute’—arms crossed and pointing fingers at others—and the ‘G.M. nod,’” described by G.M.’s current CEO as “an empty gesture”); CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: BIG BUSINESS, DISCIPLINED DEMOCRACY, AND THE COMMON LAW* 190–92 (2001) (describing how Ford produced a car in which it knew occupants would burn to death while rejecting inexpensive safety modifications suggested by its own engineers).

112. Sarah Cohen, *Apple’s Acquisitions Aspirations: Think Again*, FORBES (Apr. 25, 2013), <http://www.forbes.com/sites/mergermarket/2013/04/25/apples-acquisition-aspirations-think-again>; see also Tom Peters, *Dumb Rules Businesses Often Follow*, SEATTLE POST-INTELLIGENCER, Oct. 24, 1994, at B3 (opining that most mergers are “lame excuses for the failure to create genuinely new products, services or markets”).

cheaper to purchase smaller firms that invent new products or processes than to invest more heavily in research and development themselves. When, for example, a large pharmaceutical company buys a small firm that invented a potentially profitable new drug, should the law care that there will be one less firm in the industry? Should the law care that so often the dream of innovative entrepreneurs appears to be not to build companies that will flourish and grow over time, but to get rich quicker by building companies that will be bought out by a corporate behemoth?<sup>113</sup> Judge Bork would answer no to the first question, and presumably to the second as well.<sup>114</sup> Bork was also insensitive to the possibility of a corporate agenda being driven by the personal interests of its top executives.

Suppose the real motivation behind a company purchasing three other firms was because the company's top executives believed that increasing their company's size would produce increases in their compensation.<sup>115</sup> In a slightly different twist, suppose the company's top executives are motivated more by ego than money. Suppose, for example, that they want the prestige that goes with running a larger company. Of course, the executives would not reveal their real motives. They would argue that the mergers would produce synergies or otherwise enhance efficiency. Moreover, cognitive dissonance being what it is, they may even persuade themselves that their proffered rationalizations are true. Should the law care about the real motives behind a merger? Bork would surely say that it is not the job of antitrust regulators and courts to psychoanalyze or second guess a company's executives; that's the job of the board of directors. Besides, he would argue, the actual motives—good or bad, laudable or not—should not matter to the law as long they do not involve restricting output.<sup>116</sup>

Bork and the Chicago School became blind to the complexity of the world by relying too heavily on theory. The central premise of Chicago School theory is that people and firms are rational

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113. See *infra* at notes 692–93 and accompanying text.

114. BORK, *supra* note 75, at 206.

115. Companies often justify executive compensation on the basis of their size. For example, when four New York hospitals were asked why they were paying their chief executive officer more than four million dollars per year, "All of the hospitals said the pay was justified by the size of their systems." Anemona Hartocollis, *At New York-Presbyterian Hospital, Its Ex-CEO Finds Lucrative Work*, N.Y. TIMES (July 15, 2014), <http://www.nytimes.com/2014/07/16/nyregion/at-newyork-presbyterian-hospital-its-ex-ceo-finds-lucrative-work.html>.

116. BORK, *supra* note 75, at 123 ("Antitrust must content itself with the identification of attempts to restrict output and let all other decisions, right or wrong, be made by the millions of private decision centers in the American economy.").



maximizers.<sup>117</sup> But, in fact, people are often driven by emotions. They don't always act rationally to maximize their self-interest; and because corporations are managed by human beings, they too often fail to follow the rational-maximizer model. Bork accepts at face value that corporate mergers are driven by honest analyses of profitability.

There is evidence, however, that most mergers between large companies destroy rather than increase shareholder wealth. According to one study, when large companies acquire other firms of some significant relative size, shareholder wealth is destroyed far more often than it is created.<sup>118</sup> Surely executives of large companies know this. Perhaps some of them believe that they are smarter and savvier than their counterparts at other companies, and will succeed where others have failed.

Another example of Bork relying too heavily on theory involves cartels. He argues that few cartels exist because it is difficult to maintain cartels over any period of time.<sup>119</sup> The theory—long promoted by many economists—is that each member of the cartel has a strong incentive to cheat and sell more than the established quota, and it is difficult for other members of the cartel to detect and punish cheating. Thus, cartels quickly disintegrate. That is the theory. But we have learned that, in fact, many cartels are successful over extended periods of time.<sup>120</sup>

Similarly, Bork also argued that predatory pricing—that is, attempting to drive a rival out of business by selling products below cost—seldom occurs, and even in those rare instances when it does

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117. Throughout this paper, I use the term “rational maximizers” to mean rational profit maximizers. Chicago School and other rational choice theorists will argue that they use the term more broadly to mean that people rationally seek to maximize all that is personally useful to them, including not only material wealth but also status, sexual satisfaction, love, pleasure, knowledge, vengeance, enlightenment, and so on. There are two problems with that claim. First, after having made it, rational choice theorists generally focus on material wealth and ignore everything else. Second, when one broadens what is being maximized to include everything, it is no longer analytically useful to say that people are rational maximizers. You might as well say that people are motivated by human desires.

118. The study focused on acquisitions worth \$500 million or more and only on deals when the buyer offered a price more than fifteen percent of its own market capitalization. David Henry, *Mergers: Why Most Big Deals Don't Pay Off*, BUSINESSWEEK, Oct. 14, 2002, at 60, 63. It found that sixty-one percent of deals destroyed rather than created shareholder wealth of the buyer company, measured one year after acquisition. *Id.* The results remained about the same two years post-merger. *Id.* An earlier study produced similar results. *Id.*

119. Bork, in fact, carries this idea even further. Not only does he believe that cartels seldom exist, he is “highly skeptical of the entire theory of oligopolistic interdependence.” BORK, *supra* note 75, at 191.

120. WYATT WELLS, ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD 13 (2002). We have learned that cartels can be profitable and difficult to detect. Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573, 644–45 (2014).

occur, it does not have a deleterious effect on allocative efficiency.<sup>121</sup> According to Chicago School theory, predatory pricing was irrational because to make its scheme effective the predator would have to increase output. Meanwhile, the firm it was trying to hurt had the option of reducing output. This would result in the predator bleeding losses at a greater rate than the victim.<sup>122</sup> Even if a predator succeeded in driving a competitor out of the market, it would be unlikely to recoup its losses because should it start reaping the rewards of monopoly pricing, new competitors will enter the market, forcing prices down to competitive levels.<sup>123</sup>

Besides, predatory pricing benefits consumers. “The theoretical argument presented here suggests that predatory pricing is most unlikely to exist and that attempts to outlaw it are likely to harm consumers more than would abandoning the effort,” concluded Bork.<sup>124</sup> The theory was elegant and seemed to make intuitive sense. But theories can be dangerous. Albert Einstein warned: “Pure logical thinking cannot yield us any knowledge of the empirical world; all knowledge of reality starts from experience and ends in it.”<sup>125</sup> We know from real-world experience that predatory pricing does occur and is often successful.<sup>126</sup> Amazon, for example, has repeatedly and successfully engaged in predatory pricing, often to force a recalcitrant rival to sell its business to Amazon.<sup>127</sup>

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121. BORK, *supra* note 75, at 148–60.

122. *Id.* at 149.

123. Bork put a finer point on it. Theory suggested that “ease of entry will be symmetrical with ease of exit.” *Id.* at 153. That is, the easier it would be to drive a rival out of the market through predatory pricing, the easier it would be for new rivals to enter to the market. Conversely, the higher the barriers to entry, the more difficult it would be to drive a rival from the market. “This symmetry of entry and exit means that predation by price cutting is a poor investment even if the predator has the reserves to bear the disproportional losses required,” concluded Bork. *Id.* And if this were not enough, said Bork, losses were immediate while any monopoly profits were in the future. Thus, even assuming they were not pie in the sky, future monopoly profits had to be discounted by the interest rate, thus making the recouping of losses still more difficult. *Id.* at 154.

124. *Id.* at 155.

125. ALBERT EINSTEIN, *IDEAS AND OPINIONS* 271 (1954). Einstein was not saying that logic and reason have no place; he was emphasizing the danger of relying on *pure* reason and not grounding theory in experience. *Id.*

126. Behavioral research also suggests that firms may engage in predatory pricing and other predatory conduct even when that conduct is theoretically irrational. Tor, *supra* note 120, at 660–61; Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 767–68 (2004).

127. For example, Amazon wanted to purchase the internet shoe retailer Zappos, but Zappos wasn’t interested. BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 269–70 (2013). Amazon spent a great deal of money launching a competing business, offering services and pricing that “ensured Amazon would lose money on each sale.” *Id.* Contrary to Chicago School theory, when Zappos tried to match Amazon, the victim’s losses exceeded those of the predator because Zappos’ volume was greater. (While Amazon was the bigger and financially-stronger company, Zappos had a much larger share of the shoe market.) Amazon tightened the noose more by giving customers a five-dollar bonus to free

Bork and the Chicago School presented an ideological worldview and a set of values camouflaged as immutable economic laws. I do not dispute that when prices rise above competitive levels consumers who can no longer afford the product suffer deadweight losses. Nor do I dispute that monopoly prices and deadweight losses are proper concerns of antitrust law. But it is an ideological choice to make consumer welfare and deadweight losses the only concern. It is too easy to confuse what we value with what we measure.<sup>128</sup> Ironically, Bork himself observes: “Economists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured.”<sup>129</sup> Yet that is precisely what Bork and the Chicago School have done by throwing out all considerations other than one that economists claim to be able to measure, namely, whether a merger produces sufficient concentration to result in monopoly pricing and deadweight losses.

### C. *The Influence of Chicago School Theory on the Law*

Ten years after publication of *The Antitrust Paradox*, Richard Posner declared, “Almost everyone professionally involved in antitrust

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overnight shipping. “In other words,” explains Stone, “a customer was given five dollars just to buy something on the site.” *Id.* Eventually, Zappos surrendered and sold itself to Amazon. *See id.* at 250–56.

A second example is Amazon’s acquisition of Quidsi, an online retailer of diapers and other baby supplies. After Quidsi’s fiercely-independent cofounders rebuffed Amazon’s invitation to buy their company, Amazon entered their market, pricing diapers so low that Quidsi estimated that Amazon would incur losses of \$100 million over just a three-month period. *Id.* at 277. Quidsi was not strong enough to wage a sustained war however. It capitulated and was acquired by Amazon. The FTC approved the deal because other firms sold diapers online and in physical stores, and therefore the acquisition did not result in a monopoly. This is, incidentally, an example of antitrust law’s single-minded focus on consumer welfare. *See id.* at 274–79.

Amazon also engaged in somewhat different predatory practices to force another unwilling firm, Lovefilm, to sell itself to Amazon. *See id.* at 286–90.

Amazon’s use of predatory pricing of e-books and other predatory practices is an ongoing story. *See id.* at 237–42, 260–66, 311; *see also* David Streitfeld, *Feed the Beast (or Else)*, N.Y. TIMES, July 13, 2014, at BU1; David Streitfeld, *Amazon Angles to Attract Hachett’s Authors to Its Side*, N.Y. TIMES, July 9, 2014, at B3; Jonathan Mahler, *Toe-to-Toe With a Giant*, N.Y. TIMES, June 2, 2014, at B1.

128. Two centuries ago, Edmund Burke had the same complaint about certain members of parliament. “They think there is nothing worth pursuit, but that which they can handle; which they can measure with a two-foot rule; which they can tell upon ten figures,” he lamented. JESSE NORMAN, *EDMUND BURKE: THE FIRST CONSERVATIVE* 161 (2013) (quoting Burke).

129. BORK, *supra* note 75, at 127.

today—whether as a litigator, prosecutor, judge, academic, or informed observer . . . agrees that the only goal of the antitrust laws should be to promote economic welfare.”<sup>130</sup> This was not just wishful thinking by a prominent Chicago School member. Although everyone may not have been fully persuaded of the wisdom of its vision, just about everyone was persuaded that the Chicago School was now the consensus view. Thirty-five years after its publication, *The Antitrust Paradox* has been cited in over 200 court opinions and nearly 2,500 law review articles.<sup>131</sup> Contributors to a 2014 symposium on Bork and antitrust published by the *Antitrust Law Journal* said Bork’s influence on antitrust law is “unequaled,”<sup>132</sup> declared his book to be “undeniably the most influential work in modern antitrust,”<sup>133</sup> and observed that it is “difficult to overstate Robert Bork’s impact on law and politics in the second half of the 20th century.”<sup>134</sup> Bork is hardly just of historical importance. The contributors agreed that his influence has been “deep and durable”<sup>135</sup> and “enduring.”<sup>136</sup> Bork remains the single most influential voice in antitrust law.

The Chicago School worldview has so saturated the collective mind of the antitrust fraternity that most of those who try resisting wind up debating details while conceding first principles.<sup>137</sup> Perhaps the greatest challenge to the Chicago School is coming from a

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130. Maurice E. Stucke, *Reconsidering Antitrust Goals*, 53 B.C. L. REV. 551, 563 (2012) (citing Posner’s treatise on antitrust law).

131. According to Westlaw searches conducted in the “all cases” data base on October 9, 2015.

132. William E. Kovacic, *Out of Control? Robert Bork’s Portrayal of the U.S. Antitrust System in the 1970s*, 79 ANTITRUST L.J. 855, 855 (2014).

133. Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 ANTITRUST L.J. 881, 881–82 (2014).

134. Adam J. Di Vincenzo, *Editor’s Note: Robert Bork, Originalism, and Bounded Antitrust*, 79 ANTITRUST L.J. 821, 821 (2014).

135. Kovacic, *Out of Control?*, *supra* note 132, at 855.

136. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and The Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 847 (2014).

137. One commentator observed that in the early years of the debate, Chicago School theorists would argue that an entire field of law was one hundred percent wrong, “[a]nd then the replies would be, ‘No, we were only 80 percent wrong.’” TELES, *supra* note 72, at 99 (quoting Douglas Baird). Critics generally still argue that the Chicago School’s error is a matter of degree. *E.g.*, JONATHAN B. BAKER ET AL., HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008). Another prominent example is Herbert Hovenkamp, who believes Chicago School doctrine is oversimplified and who welcomes a post-Chicago School antitrust that recognizes greater complexity. *See generally*, Hebert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 (2001). Nevertheless, Hovenkamp accepts first principles when he states: “Antitrust is a defensible enterprise only if it can make markets more competitive—that is, if antitrust intervention tends to produce higher prices, larger outputs, or improved product quality. *Id.* at 269.

burgeoning behavioral antitrust movement, which seeks to apply the findings of behavioral economics to antitrust policy.<sup>138</sup> Behavioral economics holds that individual rationality is often compromised by psychological biases and failures of willpower, and it argues that the Chicago School exaggerates the degree to which individual choices are driven by rational judgments.<sup>139</sup> Behavioral economics challenges many of Chicago School theory-based dogmas with empirical research, and it is extremely useful. Nevertheless, in the main behavioral economists are not challenging the central values and objectives of the Chicago School. “There is nothing left of the old pre-Chicago, social/political, big business is bad, small business is good, rationale for antitrust,” write two commentators.<sup>140</sup>

To get a feel for how Chicago School theory has influenced antitrust jurisprudence, let’s consider a couple of cases that—although having little to do with our central concern of mergers—are nonetheless useful in showing how Chicago School theory has affected fundamental values.

In 1984, the Supreme Court heard a dispute between the NCAA and two of its member colleges.<sup>141</sup> The NCAA had entered into four-year television contracts with the ABC and CBS television networks, giving each network the right to broadcast a certain number of football games played by its member schools per year. In the 1980–1981 football season, for example, one network telecast twelve national games and forty-six regional games.<sup>142</sup>

In theory the colleges were free to negotiate fees with the networks for the right to broadcast their games; but in practice everyone adhered to a NCAA recommended fee schedule that set rates depending upon whether a game was televised nationally or regionally, and whether a team was in Division I, II, or III.<sup>143</sup> Within those classifications, all colleges received the same fees. Over every two-year period no school could have its games broadcast more than six times, and each network had to telecast games of least

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138. See Tor, *supra* note 120, at 576 n.7 (citing much of the literature that attempts to apply behavioral economics to antitrust issues).

139. See generally Amanda R. Reeves & Maurice Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527 (2011).

140. Kirkwood & Lande, *supra* note 90, at 191.

141. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

142. *Id.* at 93 n.10. The NCAA entered into a separate contract with Turner Broadcasting System, Inc. (TBS), giving TBS the exclusive right to cablecast NCAA football games. *Id.* at 92 n.9. TBS was permitted to cablecast nineteen games per season that were not broadcast by either ABC or CBS. *Id.* at 124. At the time, the cable audience was relatively small. *Id.* at 95.

143. Nearly ninety percent of total revenue went to Division I teams. *Id.* at 93 n.10.

eighty-two different schools.<sup>144</sup> NCAA rules also prohibited Division I colleges from having any other football games televised.<sup>145</sup>

Unhappy with limits being placed on their ability to sell television rights for their games, two football powers—the University of Oklahoma and the University of Georgia—sued the NCAA, alleging that the TV contracts and its rules unreasonably restrained trade.<sup>146</sup> They argued that the NCAA was acting like a cartel, restricting output, that is, the total number of televised college football games. The NCAA argued that it was attempting to protect attendance at its members' football stadiums, competitive balance among its members, and amateur athletics.<sup>147</sup>

The Court decided that the NCAA plan was unlawful. “Congress designed the Sherman Act as a ‘consumer welfare prescription,’ ” declared the Court.<sup>148</sup> Its authority for that proposition was *The Antitrust Paradox*.<sup>149</sup> As the Court saw it, in this case the consumers were television viewers.<sup>150</sup> Thus, the welfare of those viewers was going to be paramount. The Court defined consumer welfare in terms

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144. *Id.* at 94. There were 187 NCAA member colleges that played Division I football. *Id.* at 89. Thus, the TV contracts required that the networks telecast games by about forty-four percent of those schools. Not all telecasts were equal, however. Syndicated stations might elect not to carry a particular telecast. The Court noted that on a particular weekend in 1981, ABC telecast a football game between the University of Oklahoma and USC that was carried by more than two hundred stations, and a football game between Appalachia State and The Citadel that was carried by only four stations. *Id.* at 107 n.33.

145. *Id.* at 94.

146. More precisely, five major conferences formed a separate association, the College Football Association (CFA), to represent their interests as their member colleges, which were all major football schools and NCAA members. The CFA negotiated a contract with NBC to broadcast additional games. The NCAA announced that it would impose sanctions on any member that allowed its football games to be broadcast by NBC. Under the threat of sanctions, colleges balked, and the CFA-NBC contract was cancelled. *Id.* at 89, 95.

147. The case is generally considered significant because the Court decided that the NCAA plan had to be analyzed under a rule of reason analysis rather than decided on a *per se* basis. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984). That is, rather than condemning the TV arrangement merely because it constituted a horizontal restriction that reduced output, the Court held that it was necessary to consider whether the plan's anticompetitive effects outweighed any procompetitive benefits. *See generally id.* However, the Court stressed that it was not mandating the more extensive rule of reason inquiry because the NCAA was a non-profit organization or because the NCAA sought to protect intercollegiate amateur athletics. *Id.* at 100–01. Rather, the Court said that rule of reason analysis was necessary because no sports league can exist without horizontal agreements, and it cited *THE ANTITRUST PARADOX* for that noncontroversial proposition. *Id.*

148. *Id.* at 107.

149. While the Court did not cite *THE ANTITRUST PARADOX* directly in support of this proposition, it quoted from one of its earlier decisions, which cited Judge Bork's book. *Id.* at 107 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

150. The Court clearly drew a distinction between broadcasters and consumers. *Id.* at 99. It also cited with approval the trial court's statement that consumers were as “the viewers of college football television.” *Id.* at 107 n.34.

of prices and output.<sup>151</sup> Television viewers were harmed because the number of college football games being telecast was artificially limited.<sup>152</sup> In fact, the Court used the word output no less than forty-seven times in its decision.

However, the laws of economics that govern the manufacture and sale of widgets are not as readily transferable to this arena as the Court seemed to assume. The Court never paused to consider that, in this situation, price and output were not the two sides of the same coin. As a general principle, when output decreases, price increases, and vice versa. But although the NCAA television plan may have artificially reduced the number of college football games available for television viewers, it did not inflate prices for those consumers. Regardless of whether viewers were receiving network broadcasts free over the airwaves or via cable, there is no evidence that they were paying higher prices in any form, whether in money or time spent suffering through commercials. Maybe this should make a difference; maybe it should not. Viewers may have been disadvantaged because of decreased output—that is, fewer TV college football games—but reduced output was not driving up consumer prices.<sup>153</sup>

The television networks were, of course, affected. They paid more to broadcast particular games than they would have paid for the same games if there were no limits on the number of games that could be televised. Scarcity increases prices in this situation too. But the networks were not complaining because what they paid colleges and what it charged advertisers were both dependent upon the size of the television audience. Scarcity increased the fees they had to pay colleges for individual games, but it also increased their advertising rates. For the same reason, advertisers were not being

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151. The Court spoke of prices and output as intertwined vis-à-vis consumers. It wrote, for example:

A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.

*Id.* at 107–08.

152. *Id.* at 99.

153. The court of appeals seemed to have a better understanding of this. It noted that many of the alleged injuries did not involve “the allocative efficiency/deadweight loss classically attributed to cartelization.” *Bd. of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1151 (10th Cir. 1983). When it mentioned reduced output, it did not automatically associate it with increased consumer prices. *Id.* at 1156 (stating that the TV plan “suppresses product diversity and restricts output.”).

harmed. They pay higher rates to reach larger audiences with desirable demographics for all programming.<sup>154</sup>

In simple terms, the case comes down to a cost-benefit analysis, comparing the plan's anticompetitive effects against whatever legitimate benefits it produces. The plan was anticompetitive in that it restricted the number of games for which Oklahoma and Georgia could sell television rights. The NCAA argued that its plan had an important procompetitive effect because it protected ticket sales at its members' football stadiums. In response to that argument, the Court wrote: "At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output."<sup>155</sup>

Is it appropriate to consider noneconomic benefits when evaluating an alleged antitrust violation? Or should anticompetitive economic harms be weighted only against procompetitive, economic benefits? The Court's opinion elided this controversial issue.<sup>156</sup> "Today we hold only that . . . by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life," it declared.<sup>157</sup> It was a 7-2 decision, and the justices did not divide ideologically. The two dissenters, Justices Byron White and William Rehnquist, thought it proper to consider noneconomic factors. "When these values are factored into the balance," they wrote, "the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters amateurism by spreading revenues among various

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154. Advertisers pay premium rates for NCAA football games because those broadcasts draw viewers with college degrees and higher incomes. *Id.* at 1158.

155. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984), at 116–17. The dominance of television is having its effect; student attendance at college stadiums is declining. Darren Rovell, *Will Next Generation of Fans Show Up?*, ESPN (Feb. 17, 2004), [http://espn.go.com/college-football/story/\\_/id/10458047/next-generation-ticket-holder-concern-students-show-college-football-games](http://espn.go.com/college-football/story/_/id/10458047/next-generation-ticket-holder-concern-students-show-college-football-games).

156. Based on its reading of previous Supreme Court precedent, the court of appeals had held, "Noneconomic considerations, however worthy, cannot be used to justify restraints that adversely affect competition." 707 F.2d 1147, at 1154. Its conclusion was based on language in an earlier Supreme Court case that stated: "[W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687–96 (1978). In his dissenting opinion in *Bd. of Regents of the Univ. of Okla.*, Justice White said that language should not be interpreted to mean that courts should not consider noneconomic effects. 468 U.S. 85, at 133–34.

157. 468 U.S. 85, at 120.



schools and reducing the financial incentives toward professionalism.”<sup>158</sup>

The most articulate expression of that view was offered by Judge James E. Barrett in his dissenting opinion at the U.S. Court of Appeals for the Tenth Circuit. Judge Barrett argued that the primary purpose of the NCAA’s television plan was not anticompetitive but in furtherance of the association’s mission of maintaining “intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institution.”<sup>159</sup> He stressed that many NCAA rules were designed to insure that college athletes were “genuine students,” and he thought the TV plan supported that fundamental objective.<sup>160</sup> It was a mistake, he said, to view “intercollegiate football competition not only as a business, but as a ‘pot of gold’ business” for football power schools such as Oklahoma and Georgia.<sup>161</sup> But of the thirteen jurists who ruled in the case—the trial judge, the three judges on the panel of the Court of Appeals, and the nine justices of the Supreme Court—ten of them brushed aside the NCAA’s arguments that important noncommercial interests were at stake.<sup>162</sup>

Focusing nearly exclusively on output has the virtue of providing an objective method for deciding the case. One of the principal virtues of the doctrine is that it is administrable. Attempting to weigh intangibles such as amateurism and academic integrity is a messier and more subjective endeavor.<sup>163</sup> In addition, it may have struck judges as naïve to swallow claims about protecting amateurism, academic values, and culture when big money was at stake.<sup>164</sup> Courts had become skeptical of professional associations arguing

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158. *Id.* at 135.

159. 707 F.2d 1147, at 1163.

160. *Id.* at 1164.

161. *Id.* at 1165.

162. The district-court judge also ruled in plaintiff’s favor. He wrote:

NCAA submits that if it is not allowed to control football, the “power elite” will systematically rout their opposition on the field, thereby alienating viewers, and ultimately destroying the marketability of college football. This argument borders on frivolous. What NCAA argues, in essence, is that competition will destroy the market. . . . If NCAA is correct about the “power elite,” and if viewers lose interest in one-sided games, the free market should and will resolve the problem. The networks will respond to poor ratings by showing more competitive games. That is how the market should operate, and that is what the Sherman Act demands.

Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1310–11 (W. D. Okla. 1982).

163. The NCAA argued that it was attempting to protect amateurism. 468 U.S. 85. The language about protecting a culture consistent with academic integrity and values is mine.

164. The trial judge did not find the NCAA witnesses who testified that the controls were essential to the NCAA’s overall regulatory mission to be credible. 546 F. Supp. 1276, at 1309.

that rules that restricted competition were designed to protect professionalism or the public rather than their members' incomes.<sup>165</sup> Yet culture is important. Just as courts should guard against being too naïve, they should also guard against becoming too cynical.<sup>166</sup>

In retrospect, it has become clear that *NCAA v. University of Oklahoma* was a watershed event in college football. Sports historian Andrew Zimbalist writes:

By applying normal standards of free enterprise, the majority of the Court was giving freer reign to further commercialism of college sports. The resulting potential for heightened revenue, in turn, has led universities to devote even greater resources to seeking athletic success and to the increasing prominence of sports in U.S. culture."<sup>167</sup>

We are now witnessing how the extreme commercialization of college football is degrading academic values and threatening amateurism. Not only have the number of televised games increased, but the number of college football and basketball games that teams play per season has steadily increased. So too have the number of hours that college athletes devote to those sports. At Division I colleges, football and basketball players spend as much as sixty hours per week training, practicing, traveling, and playing their sports.<sup>168</sup> Do they have time to attend classes, study, and absorb material? It is no wonder that scandals about athletes attending fake courses erupt at even well-regarded universities. Indeed, we have recently learned that between 1990 and 2013 3,100 students at the University of North Carolina—most of them athletes, including those in the football and men's basketball programs—took sham courses

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165. The landmark case in this area is *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). Courts also confronted other schemes in which professional associations used market power for their own benefit. *See, e.g., Bogus v. Am. Speech & Hearing Ass'n*, 582 F.2d 277 (3d. Cir. 1978) (involving the tying of association membership to professional certification).

166. The Supreme Court understands the need to protect intangibles that affect its own work and image. For example, although it now makes audio recordings of oral arguments available at the end of the week in which they occur, it continues to resist arguments from many quarters that it should allow its proceedings to be televised. Editorial, *Time for TV in the Supreme Court*, N.Y. TIMES (July 2, 2015), <http://nyti.ms/1R6IneU>. The Court understands that live television would change the character of its proceedings. Lawyers and justices alike would be principally performing for a live audience rather than attending to the substance of the arguments.

167. ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG TIME COLLEGE SPORTS 100 (1999).

168. *Id.* at 37.

designed to keep the athletes eligible to play.<sup>169</sup> It was difficult not to conclude that an Ohio State football player was merely telling an unacknowledged truth when he tweeted: “Why should we have to go to class if we came here to play FOOTBALL, we ain’t come to play SCHOOL, classes are POINTLESS.”<sup>170</sup>

Successful coaches at major programs receive salaries in the millions of dollars, far more than university presidents or Nobel Laureates on the faculty.<sup>171</sup> It is television that has driven coaches’ salaries to their present levels. UCLA basketball coach John Wooden—who retired in 1975, and was arguably the greatest college coach of all time—was never paid more than \$32,500.<sup>172</sup> Moreover, before 1984, college athletic conferences were largely regional. Now Rutgers and Nebraska are in the same conference. So are Syracuse and Florida State, Connecticut and SMU, East Carolina and Tulsa. These otherwise wacky realignments are driven by conference desires to extend their media markets and increase the value of television contracts.<sup>173</sup> We have reached a point where serious people contend that amateurism in college sports is a sham—a mere pretense for exploiting athletes on whose backs universities make a great deal of money.<sup>174</sup>

It is not fair to lay all of these developments at the feet of the Supreme Court.<sup>175</sup> Nevertheless, how the Court decides cases can

169. See generally JAY M. SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FAILURE OF BIG-TIME COLLEGE SPORTS (2015); Paul M. Barrett, *University of North Carolina Apologizes for Fake Classes, Promises Real Change*, BLOOMBERG BUSINESSWEEK (Jan. 27, 2014), <http://www.businessweek.com/articles/2014-01-27/university-of-north-carolina-apologizes-for-fake-classes-promises-real-change>.

170. Marc Tracy and Tim Rohan, *What Made College Ball More Like Pros? \$7.3 Billion, for a Start*, N.Y. TIMES (Dec. 30, 2014), <http://nyti.ms/1tz9vZ3>.

171. See ZIMBALIST, *supra* note 167, at 80–83. In 2013, the head football coach at the University of Texas at Austin made \$5.4 million, about eight times as much as the University president. Allie Grasgreen, *Coaches Make More than You*, INSIDE HIGHER ED (Nov. 7, 2013), <http://www.insidehighered.com/news/2013/11/07/football-coach-salaries-10-percent-over-last-year-and-top-5-million#sthash.cDBIjvz7.dpbs>. In forty states, the highest paid state employee was either a college football or basketball coach. In nine states, the highest paid state employee was a university president or dean. Nevada was the outlier; its highest paid state employee was a medical school plastic surgeon. Reuben Fischer-Baum, *Infographic: Is Your State’s Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228>.

172. ZIMBALIST, *supra* note 167, at 80.

173. *Id.* at 93–97 (describing the value of television contracts).

174. E.g., John Feinstein, *In O’Bannon Trial NCAA Officials Give Amateur-Hour Performance*, WASH. POST (June 23, 2014), [https://www.washingtonpost.com/sports/colleges/in-obannon-trial-ncaa-officials-give-amateur-hour-performance/2014/06/23/8e579048-fb06-11e3-b1f4-8e77c632c07b\\_story.html](https://www.washingtonpost.com/sports/colleges/in-obannon-trial-ncaa-officials-give-amateur-hour-performance/2014/06/23/8e579048-fb06-11e3-b1f4-8e77c632c07b_story.html); Joe Nocera, *Amateurism and the N.C.A.A.*, N.Y. TIMES (June 20, 2014), <http://nyti.ms/TfUCJV>.

175. Zimbalist notes that if the Supreme Court held in favor of the NCAA in 1984, it’s possible that the University of Oklahoma and other football powers would have seceded from the NCAA to pursue more lucrative television contracts. He adds, however: “While this would

have an impact on public attitudes. Let us return briefly to the environment in which the courts handed down their decisions in 1984. The NCAA was a large and diverse organization. Some of its members wanted to rid themselves of restrictions so that they could maximize television revenue. Others wanted rules that might provide them with at least a smidgeon of television exposure and revenue. Still others were primarily interested in ensuring that college athletes were genuine students and preserving academic values. In this struggle for the soul of college athletics, the Court might have found a way of supporting those who believed academic values should be of paramount importance. Instead, it effectively prohibited all efforts to restrict or spread television exposure in college sports, sounding a starting gun for an unbridled race for money and air time that would ultimately overwhelm other efforts to protect amateurism and academic values. Perhaps even more importantly, it implicitly adopted the worldview that sees everyone as self-interested rational maximizers, and that values consumer welfare—defined as high output and low prices—above all else.<sup>176</sup>

This thinking reached the point of *reductio absurdum* in a 1999 Supreme Court decision involving the Code of Ethics of the California Dental Association.<sup>177</sup> The association's code prohibited false or misleading advertising. The FTC challenged the association's practice of interpreting that rule as precluding advertisements that promised special offers or across-the-board discounts, such as discounts to senior citizens or new patients; precluding advertisements that characterized fees as "low, reasonable, or affordable"; and precluding advertising that made quality claims, such as "gentle dentistry in a caring environment."<sup>178</sup>

This case, too, is generally considered significant for the Court's decision regarding the level of review.<sup>179</sup> The Court held that the

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have created a hyper-commercialized sector within college sports, it might have reduced the commercialization tendencies within the rest of the NCAA." ZIMBALIST, *supra* note 167, at 116.

176. Of course, the Court did not say such things in so many words. It paid lip service to amateurism by stating:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

177. Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

178. *Id.* at 783–84.

179. The Court wrote: "The truth is our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them

court of appeals review had been too quick, and it sent the case back for scrutiny of its assumption that the association's interpretations had anticompetitive tendencies.<sup>180</sup> Although the Court did not decide the case, it defined the key question in the case as "whether the limitation on advertisements obviously tends to limit the total delivery of dental services."<sup>181</sup>

Should that really be the key question? Dental services are not like widgets. In the main, customers will not purchase more widgets than they need, and even if they do the public-at-large will not be harmed. That is not the case with dental or medical services however. Because doctors and hospitals are generally paid on a fee-for-service basis, the system incentivizes providers to recommend services regardless of whether patients truly need them.<sup>182</sup> And patients may too easily be persuaded to undergo unnecessary procedures. That is bad not only for the patients but, to the extent those services are paid for by insurance, for society-at-large. I am not arguing that all of rule interpretations at issue were targeting unnecessary dental services; nor am I arguing that, after careful analysis, the association's practices should have been found unlawful.<sup>183</sup> However, antitrust has become an unsophisticated, kneejerk discipline if it cannot recognize that more output is not always a good thing. This was a case in which the word *output* should not have appeared at all. In fact, it appeared in the Supreme Court's majority and dissenting opinions twenty-two times. Moreover, the *NCAA* and *California Dental Association* cases are merely two of many examples in which Supreme Court antitrust jurisprudence reflects Chicago School dogma.<sup>184</sup>

The law both reflects and reinforces societal values. The Chicago School and modern antitrust doctrine do not stand alone; they are

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appear. . . . What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 779, 781.

180. *Id.* at 781.

181. *Id.* at 776. The Court added: "[I]t is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed limitation has the anticompetitive effect of artificially raising prices." *Id.* at 777.

182. STEVEN BRILL, *AMERICA'S BITTER PILL: MONEY, POLITICS, BACKROOM DEALS, AND THE FIGHT TO FIX OUR BROKEN HEALTHCARE SYSTEM* 58, 237–38 (2015).

183. The Court noted that it was "plausible . . . that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market." 526 U.S. 756, at 778. That was closer to a sensible way of analyzing the case; nevertheless, the Court was suggesting that anticompetitive effects may only be counterbalanced by procompetitive effects. The Court should acknowledge that anticompetitive effects can be justified by legitimate goals, regardless of whether those goals can be classified as procompetitive.

184. See Tor, *supra* note 120, at 583–88; Dibadj, *supra* note 126, at 762 (listing Supreme Court antitrust cases influenced by Chicago School doctrine).

part and parcel of the larger problem of valuing only what economists can measure. This problem affects not merely the law or the United States but western society as a whole. Speaking broadly about the effect of neoclassical economics on modern thinking, British Member of Parliament Jesse Norman writes:

[M]odern economists have themselves now become highly influential institutions in their own right, embedded in universities, business schools and corporations around the world. Since their basic tenet is often that humans are purely economic agents, seeking gain and shunning loss, the danger is that this creates further feedback loops, inculcating successive generations into an orthodoxy of self-interest and thereby making them more selfish. What starts with an economist's assumption ends up as a deep cultural pathology.<sup>185</sup>

French economist Thomas Piketty agrees. "For far too long, economists have sought to define themselves in terms of their supposedly scientific methods," he writes.<sup>186</sup> "In fact, those methods rely on an immoderate use of mathematical models, which are frequently no more than an excuse for occupying the terrain and masking the vacuity of the content."<sup>187</sup> No area of American law has succumbed to this problem more than antitrust. It is time for antitrust to throw off the narrow blinders of Chicago School thinking and acknowledge that there are other values at stake beyond production, consumption, and efficiencies. But is antitrust an appropriate place to take these other values into consideration, or is antitrust properly limited to economic considerations? That is the question to which I shall now turn.

## II. THE SOCIO-POLITICAL TRADITION OF ANTITRUST

David Millon said: "Only one scholar, then Professor Robert Bork, has argued that Congress had the Chicago School's approach in mind when it passed the Sherman Act."<sup>188</sup> It is a wonderfully wry comment. Of course, Bork hadn't really argued that members of the fifty-first Congress were devotees of twentieth-century Chicago School economics. Nevertheless, Bork presented Chicago School

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185. NORMAN, EDMUND BURKE, *supra* note 128, at 247.

186. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 574 (2014).

187. *Id.*

188. David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1222 (1988).

principles as eternal truths, and he went so far as to argue that Senator John Sherman and his colleagues had much the same fundamental vision as did the Chicago School a century later. For example, Bork wrote: “The legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare.”<sup>189</sup> The problem with that claim is the word *exclusive*. In this Part of the Article, I shall show that except for the very recent post-Chicago School past, antitrust law has never been exclusively concerned with consumer welfare. Traditionally antitrust law was also concerned with other social and political values.

The antitrust tradition historically has been comprised of two broad and overlapping strands: (1) to promote consumer welfare, and (2) to check the adverse sociological and political consequences that can flow from concentrations of economic power. Because the consumer welfare strand is not in dispute, I shall focus only on the second strand. This will be a very short and incomplete thumbnail history—just enough to demonstrate that the socio-political strand has a venerable pedigree, and thereby show that I am advocating the revival and modernization of a deeply-rooted tradition.<sup>190</sup>

The Sherman Act was not meant to create new law, but to provide a federal statutory basis for courts, especially federal courts, to enforce the common law of antitrust.<sup>191</sup> Senator John Sherman and the Fifteenth Congress were not writing on a blank slate. They already had a well-formed understanding about the purposes of antitrust law. It is important, therefore, to start at the beginning.

### A. Antitrust Origins

Antitrust law extends at least as far back as the famous *Case of Monopolies*, decided by the King’s Bench in 1603.<sup>192</sup> In that case,

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189. BORK, *supra* note 75, at 61.

190. What I call the “socio-political” vision has sometimes been called the “civic” tradition of antitrust. I prefer the term “socio-political” for two reasons. First, I want to stress that we need to modernize rather than to merely adopt the older civic views of Brandeis and the progressives. Second, the term “socio-political” suggests that insights provided by the socio-economic school of thought can be useful in reforming antitrust law. *See, e.g.*, Robert Ashford, *The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 TUL. L. REV. 1187 (2002) (describing the socio-economic approach).

191. HOVENKAMP, *supra* note 89, at 61–65.

192. *The Case of Monopolies*, 77 Eng. Rep. 1260, 11Co. Rep. 84b (1603). This published decision is not an opinion by the court. The judges never publicly stated their reasons for finding for the defendant. It is instead a report by Edward Coke published in 1615. Coke was not a disinterested observer; he himself had argued the case for Darcy in his capacity as

Edward Darcy, a groom of Queen Elizabeth's Privy Chamber, brought an action against Thomas Allein, a haberdasher in London, for infringing upon his exclusive right, granted to him by Queen Elizabeth, to manufacture and import playing cards for sale in England.<sup>193</sup> The Crown granted monopolies of these kinds to raise revenue, especially when Parliament declined to financially support the royal household to the extent requested. The possessor of the monopoly paid the Crown an annual rent or "farm" on the grant.<sup>194</sup> In this case of Darcy versus Allein, the court held that the monopoly was invalid because it contravened both statutes and common law. The court believed that the monopoly violated common law for four reasons.<sup>195</sup> One reason involved consumer welfare, specifically that goods produced by a monopolist are not "so good or merchantable" as they had previously been.<sup>196</sup> But another reason had to do with the welfare of workers who "had maintained themselves and their families" by practicing card making and were thrown out of work.<sup>197</sup> A third reason rested on the constitutional argument that only Parliament had the authority to grant monopolies involving recreational items such as playing cards, dice, and hawks' hoods, and thus the Crown granting exclusive license to manufacture or import playing cards was "utterly against law."<sup>198</sup> The fourth reason was that the Queen was "deceived in her grant" because she intended it to be for the benefit of the public when, in fact, it only benefitted the monopolist.<sup>199</sup> This may have been merely a way of ruling against the sovereign while making the pro forma suggestion that the malefactor was not the Queen but the party who deceived her. The rationale involving worker welfare appears no less important than the one involving consumer welfare. The case report says that the monopoly violated a subject's liberty. "The 'liberty' at issue," writes Thomas B.

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attorney general. Historians debate the accuracy of Coke's report. Nevertheless, it has been cited by both English and American courts. See Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261 (1996). For our purposes, the legacy of the decision matters more than what the judges themselves thought when they decided the case.

193. Some authorities spell the defendant's name "Allen." Morris D. Forkasch, *The Doctrine of Criminal Conspiracy and its Modern Application to Labor*, 40 TEX. L. REV. 303, 315 n.55 (1962).

194. Corré, *supra* note 192, at 1322.

195. See 77 Eng. Rep. 1260.

196. *Id.* at 1261.

197. *Id.* at 1263.

198. *Id.* at 1265.

199. *Id.* at 1264.



Nachbar, “was not the freedom to consume; it was the freedom to practice a trade.”<sup>200</sup>

Despite the decision, the Crown continued to aggressively raise revenue by granting monopolies.<sup>201</sup> In 1624, Parliament enacted the Statute of Monopolies, which voided all monopolies granted by the Crown, either previously or in the future, although it preserved monopolies granted by Parliament.<sup>202</sup> The statute also provided a right of action—and treble damages—for anyone aggrieved by monopolies. This did not settle the matter either. The Crown continued to grant monopolies, and the Star Chamber and other conciliar courts that did the Crown’s bidding enforced them. Parliament railed against the practice, and insisted that monopoly cases be heard instead by common law courts, which were not controlled by the Crown. The issue, along with others involving the division of powers between Crown and Parliament, was finally settled in the Glorious Revolution of 1689.<sup>203</sup> Henceforth, monopolies had to be granted by Parliament.

One of the monopolies granted by Queen Elizabeth I was to the East India Company, which was established by royal charter in 1600.<sup>204</sup> The monopoly was to all trade beyond the Atlantic Ocean, most importantly to the East Indies and especially India. By the mid-eighteenth century, the East India Company controlled 281,412 square miles of the Indian subcontinent, employing an army of 60,000 for that purpose.<sup>205</sup> Following the Glorious Revolution the company was reorganized. Parliament granted the company a new charter and refashioned it into a modern-styled stock corporation.<sup>206</sup>

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200. Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1336 (2005).

201. Calabresi & Leibowitz, *supra* note 64, at 994–98.

202. English Statute of Monopolies of 1623, 21 Jac. 1, c. 3. Thomas Nachbar writes: “While the Statute of Monopolies does represent a strong and important tradition, it is not one of free trade; it is one of political action.” Nachbar, *supra* note 200, at 1354.

203. *Id.* Section 2 of the English Bill of Rights of 1689 reads: “That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.” English Bill of Rights. This provision, among others, effectively ended the practice of granting monopolies because the Crown had previously claimed it was dispensing with laws prohibiting monopolies when it granted them. For a brief history of the Glorious Revolution and the drafting of the English Declaration of Rights (which became the Bill of Rights when enacted), see Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 379–86 (1998).

204. For a brief history of the East India Company, see Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 435–51 (2007).

205. *Id.* at 435–36.

206. *Id.* at 437.

The history of the East India Company is revealing because it demonstrates the old adage that the more things change, the more they remain the same. Where great riches are to be made, corporations will find creative means of taming regulators. Techniques may change; human nature does not. The small clique of East India stockholders remained people with close ties to the Crown, and the Company worked assiduously at fending off parliamentary regulation by granting favors to members of Parliament and allying them with the company and its interests. Although the company formally existed for the benefit of the stockholders, managers were more concerned with their own interests and concentrated on enriching themselves. They did this by extorting money from the natives through many different rackets for themselves personally as well as their benefactors and protectors.<sup>207</sup> While the East India Company itself seldom turned a profit, many of its employees and allies amassed personal fortunes.<sup>208</sup> Both of these things—compromising regulators, and personal enrichment, even at corporate and social expense—are facilitated by a lack of competition.<sup>209</sup>

Powerful companies do not merely work to immunize themselves from government regulation; they seek corporate welfare in as wide a variety of forms as imagination allows. And if a company is too big to fail without devastating the national economy, government is all but forced to save it. This too was the case with Britain and the East India Company, and that history had a marked effect on American attitudes toward monopolies.

In 1773, when the East India Company was on the verge of bankruptcy, Parliament came to its aid. It loaned the company one-million pounds.<sup>210</sup> It also granted the company a monopoly on selling tea in America, which had a large appetite for the beverage.<sup>211</sup> However, even with a monopoly, the East India Company faced stiff competition from American smugglers. Parliament helped there as

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207. For example, the East India Company forced Indian Nabobs to borrow money from private parties at usurious rates, and cut members of Parliament in on the scheme by including them among the private lenders. *Id.* at 446.

208. *Id.* at 437.

209. A champion of the abused and exploited Indians finally arose within the English government, Edmund Burke, who argued that Parliament needed to regulate the East India Company. In rebutting arguments that the company was immune from governmental regulation because it was a private company or because Parliament had granted it a charter, Burke contrasted the company's charter with the Great Charter—that is, the Magna Carta or Magna Charta—by stating: "Magna Charta is a charter to restrain power and to destroy monopoly." *Id.* at 444.

210. JOHN FERLING, *INDEPENDENCE: THE STRUGGLE TO SET AMERICA FREE* 34–41 (2011).

211. *Id.*

well by lowering the duty imposed on tea so that the East India Company could undersell smugglers.

Though it may have seemed like a good idea at the time, it did not work out so well. During the cold night of December 16th, American colonists disguised as Indians boarded three East India ships and dumped 90,000 pounds of tea into the waters of Boston Harbor.<sup>212</sup> The colonists protested Parliament's taxing them indirectly by imposing duties on imports and the East India Company's monopoly, both of which were inextricably intertwined.<sup>213</sup>

This was not the first distaste Americans had for monopolies. Massachusetts and Connecticut had prohibitions on monopolies dating back one hundred years earlier.<sup>214</sup> England had long rankled Americans by granting English firms monopolies on importing many goods besides tea to the Americas.<sup>215</sup>

It is not surprising, therefore, that in the minds of many Americans the concept of liberty included the right to be free from monopolies. Six states formally proposed including a prohibition against monopolies in the United States Constitution.<sup>216</sup>

### B. Sherman Act

The Magna Carta of American antitrust law is the Sherman Act, enacted in 1890. The legislation resulted from the public's alarm about the growth of the enormous "trusts,"<sup>217</sup> that is, the behemoth

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212. *Id.* at 41.

213. Calabresi & Leibowitz, *supra* note 64, at 1008.

214. *Id.* at 1004.

215. *Id.* at 1007.

216. *Id.* at 1013.

217. Trusts are, of course, instruments for separating legal and beneficial ownership. For example, testators bequest money to trustees for the benefit of children who cannot responsibly handle their own affairs. In 1882, Rockefeller employed this device to establish the Standard Oil trust. Under his arrangement, nine trustees—who basically composed a board of directors—held stock in a collection of oil companies. He employed this device as a means of getting around state laws that forbade one corporation from owning stock or assets of another corporation, or forbade a company from conducting business in other states. Rockefeller knew that public sentiment would not look favorably upon evading the spirit, if not the letter, of these state laws, or upon the consolidation of so much corporate power, so he used the trust as a device to avoid the state prohibitions and to conceal the existence of what was, in effect, a large holding company. He publicly denied that the companies had been combined until a congressional committee exposed the truth. In 1882, following an adverse antitrust ruling from an Ohio state court, Rockefeller reorganized Standard Oil. Thereafter, the stock of subsidiary companies were held by a holding company named Standard Oil Company of New Jersey. By this time, however, the term "trust" had come to mean any giant corporation. BRANDS, *supra* note 27, at 98–99; 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, 10 (Earl W. Kintner ed. 1978) [hereinafter Kintner, Vol. 1].

companies that controlled railroads,<sup>218</sup> oil,<sup>219</sup> steel,<sup>220</sup> whiskey,<sup>221</sup> sugar,<sup>222</sup> copper,<sup>223</sup> and many other industries. There were concerns that the titans who controlled these industries—J.P. Morgan, John D. Rockefeller, Cornelius Vanderbilt, and others—could gouge consumers; but there was even greater concern about their exploiting workers.

Where monopolists controlled industries, not only did consumers lack a choice of sellers but workers lacked a choice of employers. This meant that companies faced little competition for employees and could get away with offering low pay, long hours, and undesirable—and often dangerous—working conditions. H.W. Brands writes: “From a worker’s perspective, the salient characteristic of the modern age was consolidation.”<sup>224</sup>

There were a variety of ways to try to address this. One was with countervailing power through labor unions. That effort was underway—this was the dawn of the labor movement—but success was, at best, limited, and the price of attempting to organize was high. For the most part, government sided with the powerful, that is, with the moguls and big business. Not only were workers seeking to organize or strike often forced to combat private police and vigilantes employed by big companies, but they often faced state militias and federal troops as well.<sup>225</sup>

The courts also sided with big business and its titans—not just in the field of labor law, but across the entire legal spectrum.<sup>226</sup> Railroads were the first giant industry. For them, labor was cheaper than equipment.<sup>227</sup> Rather than invest in automatic air brakes, for example, railroads used manual braking systems that required brakemen to turn wheels on the roofs of speeding railroad cars. They had to dash from roof to roof across as many as six cars, sometimes in driving rain or snow. Many fell to their deaths. In the course of one twelve-month period—from June 1888 to June 1889—1,972 railway men were killed and 20,028 were injured on

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218. BRANDS, *supra* note 27, at 25–29.

219. *Id.* at 84–92.

220. *Id.* at 92–94.

221. See 21 Cong. Rec. 2459 (statement of Sen. Sherman).

222. *Id.*

223. *Id.*

224. BRANDS, *supra* note 27, at 118.

225. *Id.* at 95–120.

226. Most of this paragraph is adapted from BOGUS, *supra* note 111. For a fuller discussion of how courts shielded business from lawsuits seeking compensation for injured and killed workers, see *id.* at 127–37. See also BRANDS, *supra* note 27, at 5.

227. BOGUS, *supra* note 111, at 128.

the job.<sup>228</sup> The total dead and injured in that single year represented more than three percent of the railroad industry's workforce. This is but one example of how the railroads sacrificed safety to economic efficiency.

State legislatures were unequal to the task of regulating the railroads with respect to worker safety. The railroads were generally successful at lobbying against legislation. When, on occasion, legislatures enacted laws they did not like, they often simply ignored them. The courts shielded railroads—as well as factories, mines, and other big businesses—from lawsuits by injured workers and families of workers who had been killed on the job.<sup>229</sup>

Big business found many ways to purchase political influence. One way was to provide inside information to politicians or political parties that allowed them to profit by purchasing stock or property that would soon increase in value. A Tammany Hall official defended such arrangements by calling them “honest graft.”<sup>230</sup> It was a time, says H.W. Brands, when “capitalism threatened to eclipse democracy.”<sup>231</sup> And, of course, it was a time of rapidly growing inequality of wealth.<sup>232</sup> Books about business moguls amassing fortunes at the public's expense became best sellers.<sup>233</sup> It seemed that economic shocks and traumas had to result from so many eggs being in so few baskets. When the nation was gripped by an economic depression in 1873, the public blamed big business.<sup>234</sup> Ironically, the moguls used the depression to their advantage, snapping up distressed businesses at bargain prices and adding them to their commercial empires.<sup>235</sup>

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228. *Id.*

229. *Id.* at 129–33.

230. BRANDS, *supra* note 27, at 351. It is worth noting that until 2012, when the Stop Trading on Congressional Knowledge Act was passed, members of Congress were arguably exempt from federal law banning insider trading. See Robert Pear, *Insider Trading Ban for Lawmakers Clears Congress*, N.Y. TIMES (Mar. 22, 2012), <http://nyti.ms/1JF7hL0>. That legislation was quietly weakened by an amendment a year later. See Craig Holman, *Congressional Insider Trading Revisited (But Don't Tell Anyone): Commentary*, ROLL CALL, May 9, 2013, [http://www.rollcall.com/news/congressional\\_insider\\_trading\\_revisited\\_but\\_dont\\_tell\\_anyone\\_commentary-224674-1.html](http://www.rollcall.com/news/congressional_insider_trading_revisited_but_dont_tell_anyone_commentary-224674-1.html).

231. BRANDS, *supra* note 27, at 7.

232. See PIKETTY, *CAPITALISM*, *supra* note 186, at 348 (showing that inequality of wealth became increasingly more extreme from at least 1810 until 1910, with the steepest rise in the portion of national wealth held by the top one percent beginning in 1870).

233. *E.g.*, EDWARD BELLAMY, *LOOKING BACKWARDS 2000–1887* (1888); HENRY GEORGE, *PROGRESS AND POVERTY* (1877). See BRANDS, *supra* note 27, at 377–83 (describing Bellamy's books at length). In *THE GILDED AGE: A TALE OF TODAY*, published in 1873, Mark Twain and Charles Dudley Warner addressed the problems through satire and coined the famous term for the era. *Id.* at 411–13.

234. Kintner, Vol. 1, *supra* note 217, at 11–12.

235. See BRANDS, *supra* note 27, at 84–94.

The American people demanded a check on corporate power. One approach was to regulate business. In 1877, Congress created the Interstate Commerce Commission to regulate railroad rates and practices. That legislation was principally about protecting small business from big business—specifically to stop railroads from forming cartels and conspiring to fix prices, and to stop giant shippers from extracting low rates from railroads companies through rebates and other practices, thereby giving them lower rates than those charged to their smaller competitors.<sup>236</sup> Benjamin Harrison, then a United States Senator, said he favored establishing the I.C.C. because the large railroads were exercising “a most dangerous and unwarranted control over the commerce of this country.”<sup>237</sup>

The other way to check corporate power was to do something to control corporate size and consolidation. In 1888, both the Democratic and Republican Parties included antitrust planks in their platforms. The Democratic plank said that “the interests of the people are betrayed” by trusts and combinations, which were “unduly enriching the few” at the expense of the body of the citizenry.<sup>238</sup> The Republican plank declared the party’s “opposition to all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens.”<sup>239</sup> Of course, the two ways of checking corporate power—regulating business, and limiting corporate power by limiting corporate size and consolidation—are not mutually exclusive.

In the presidential election that year, the Republican nominee, Benjamin Harrison, defeated the incumbent Democrat, Grover Cleveland. A month after the election, President Cleveland devoted his last state of the union message to Congress to the need for anti-trust legislation. He said in part:

Our cities are abiding places of wealth and luxury; our manufactories yield fortunes never dreamed of by the fathers of the Republic; our business men are madly striving in the race for riches, and immense aggregations of capital outrun the imagination in the magnitude of their undertakings. . . .

Upon more careful inspection we find the wealth and luxury of our cities mingled with poverty and wretchedness and unremunerative toil . . . .

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236. Kintner, Vol. 1, *supra* note 217, at 13; GOODWIN, *supra* note 21, at 445.

237. CHARLES W. CALHOUN, BENJAMIN HARRISON 42 (2005).

238. See Kintner, Vol. 1, *supra* note 217, at 54 (reproducing Antitrust Plank of the Democratic Party Platform, June 5, 1888).

239. See *id.* (reproducing Antitrust Plank of the Republican Party Platform, June 19, 1888).

We discover that the fortunes realized by our manufacturers are no longer solely the reward of sturdy industry and enlightened foresight, but that they result from the discriminating favor of Government and are largely built upon undue exactions from the masses of the people. The gulf between employers and the employed is constantly widening, and classes are rapidly forming, one comprising the very rich and powerful, while in another are found the toiling people.

As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel. Corporations, which should be carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters.<sup>240</sup>

Congress was, in fact, already busy at work drafting legislation to control the trusts. The principal leader of the effort was Senator John Sherman, a Republican from Ohio, and one of the most widely respected figures in Congress.<sup>241</sup> The Sherman Antitrust Act was enacted the following year. During floor debates on the legislation, Sherman and other members of Congress made many arguments in favor of the legislation. Many of those arguments had to do with the evils of monopoly pricing. During one point in debate, Sherman even alluded to what we today would call allocative efficiency and deadweight losses.<sup>242</sup> But Sherman also argued that the legislation was necessary for social and political reasons. He said:

The popular mind is agitated with problems that may disturb social order, and among them none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.<sup>243</sup>

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240. See *id.* at 57–58 (reproducing, in abbreviated form, the Fourth Annual Message of President Grover Cleveland, Dec. 3, 1888).

241. See, e.g., CALHOUN, *supra* note 237, at 37 (referring to Sherman as being in “the front rank of senators”). Sherman had been a leading candidate for the Republican presidential nomination and received the highest number of votes on the first ballot at the party's convention. *Id.* at 50.

242. He said: “It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at the pleasure of the combination.” 21 Cong. Rec. 2460 (1890).

243. *Id.*

He also declared:

If the concentrated powers of [a] combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king of political power we should not endure a king over the production, transportation, and sale of the necessities of life.<sup>244</sup>

Sherman was also concerned about how trusts affected the freedom of workers. He reported there were “complaints from the workingmen all over the land” about the problems caused by corporate combinations.<sup>245</sup>

Other members of Congress also made it clear that their concerns extended beyond consumer welfare. Senator Henry M. Teller (R., Colo.) said during the debate: “I have not learned the doctrine that cheapness is the only thing in the world that we are to go for. I do not believe the great object in life is to make everything cheap.”<sup>246</sup> Senator George F. Edmunds (R., Vt.) opposed the trusts even though he believed that the oil trust had considerably reduced the price of oil and the sugar trust may have reduced the price of sugar.<sup>247</sup> Senator James K. Jones (D., Ark.) thought that liberty was at stake. “If the proceeds of the labor of our men and women are not to be their own we have no liberty and our Government is a farce and a fraud.”<sup>248</sup> He also thought that the trusts created a culture of rapacious and immoral greed. He said that the trusts had been “allowed to grow and fatten upon the public,” and that,

their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing the victims, their general public, in defiance of every principle of law or morals.<sup>249</sup>

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244. *Id.* at 2457.

245. *Id.* at 2569.

246. *Id.* at 2561 (said during a discussion with Senator George about whether the bill would apply to labor unions and, if so, to what effect. Teller was replying to George’s observation that labor unions were dedicated to raising wages, and that higher wages meant higher prices.)

247. *Id.* at 2726.

248. 20 Cong. Rec. 1457 (1889).

249. *Id.*



Senator George F. Hoar (R., Mass.) observed that the great monopolies “are a menace to republican institutions themselves.”<sup>250</sup> Senator James Z. George (D., Miss.) was concerned about what others much later would refer to as the problem of central planning, that is, economic decisions of sweeping national effect being made by a single person or organization. He said that “the great evil” of combinations and monopolies is that,

they have gathered together the money and the means of large numbers of persons, and under these combinations, or conspiracies, or trusts, this aggregated capital is wielded by a single hand and guided by a single brain, or at least by hands and brains acting in complete harmony and co-operation, and that in this way, by this association, by this direction of this immense amount of capital, by one organized will, to a very large extent, these wrongs have been perpetrated on the American people.<sup>251</sup>

The legislation passed the Senate on a nearly unanimous vote. Only a single senator voted nay.<sup>252</sup>

There was more skepticism about the legislation in the House. Representative Richard Parks Bland, a prominent Democratic from Missouri, was worried that the trusts were so powerful and resilient that they would inevitably get their way notwithstanding Congress’ efforts.<sup>253</sup> Bland was not sanguine about how the Supreme Court would interpret the legislation, and he wanted the House to take more time to strengthen the bill by making it more specific. He succeeded in having the bill amended so that it explicitly covered the railroads and sellers of cattle and hogs, which were then controlled by four large companies.<sup>254</sup> The conference committee rejected these amendments because it considered them unnecessary and feared they might provide ammunition for members who

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250. 21 Cong. Rec. 3146 (1889).

251. *Id.* at 3147.

252. The vote was 52 to 1, with 29 senators absent. *Id.* at 3153.

253. Bland argued that history demonstrated that big corporations had powerful advantages in litigation, whether before agencies or courts. He said that the railroads overwhelmed smaller parties in the I.C.C. and the courts by “procuring the testimony of experts who claim to know all about transportation and the ‘reasonableness’ of freight charges.” *Id.* at 5953. Representative Elijah Morse, a Republican from Massachusetts, agreed. “[T]he interstate-commerce commission was supposed to be in the interest of the consumer and people,” said Morse. Yet “it has proved to be the opposite. In its practical workings it has strengthened the chains that it was intended to loosen.” *Id.*

254. *Id.* at 5952–53. See also Kintner, Vol. 1, *supra* note 217, at 26–27.

wanted to delay and defeat the legislation.<sup>255</sup> The conference committee reported out the bill in the Senate form, which the House then passed without a single dissenting vote.<sup>256</sup>

Congress enacted Magna-Carta-type legislation. That is, the Sherman Act announced broad principles and left it to the courts to interpret and develop those principles through common law adjudication.<sup>257</sup> The Act prohibited contacts, combinations, or conspiracies “in restraint of trade or commerce.”<sup>258</sup> It also prohibited monopolizing or attempting to monopolize “any part of trade or commerce.”<sup>259</sup> Violating the act was a crime. Moreover, anyone who was injured by violations could sue the perpetrators in federal court and recover three times his damages plus his attorney’s fees and other costs of suit.<sup>260</sup>

Because this was landmark legislation, and remains—nearly a century and a quarter later—the nation’s most important antitrust law, scholars have long debated exactly what Congress intended when it enacted the Sherman Act. Robert Bork, of course, believed that the Sherman Act was all about consumer welfare. Some have argued that members of Congress—and especially the generally pro-business Republicans—passed the legislation for cynical political reasons.

Economist Thomas Hazlett, for example, argues that Congress’ true objective was pro-business.<sup>261</sup> He believes that Congress slyly placated a demanding public by passing a law that trumpeted grand-sounding principles but that was designed to be ineffectual. This ploy not only allowed Congress to avoid having to take meaningful action against the trusts; it also provided cover for giving big business what it really wanted: the protectionist McKinley Tariff Act. Hazlett’s evidence for that proposition is a high correlation between how members of Congress voted on both pieces of legislation. Even putting aside a serious error in his underlying data,<sup>262</sup> Hazlett’s conclusion is difficult to swallow. If Congress truly

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255. There was a heated exchange between Bland and Representative William E. Mason, a Republican from Chicago. After Mason argued that the amendment was unnecessary and would only help opponents, Bland accused Mason of protecting the “Big Four” meat companies. 21 Cong. Rec. 5960–61 (1890). *See also* Kintner, Vol. 1, *supra* note 217, at 28–30.

256. The vote was 242 to 85, with 85 representatives not voting. 21 Cong. Rec. 6313 (1889).

257. HOVENKAMP, *supra* note 89, at 61–65.

258. Sherman Act §1, 26 Stat. 209 (1890) (current version at 15 U.S.C. §1).

259. Sherman Act §2 (current version at 15 U.S.C. §2.)

260. Sherman Act §7 (current version at 15 U.S.C. §15).

261. Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 263 (1992).

262. Hazlett counts 62 House Democrats as voting “no” on the Sherman Act, and he says he excluded members who abstained. *Id.* at 271. He does not explain where he got that

intended the Sherman Act to be a weak instrument, would it have given private parties the right to sue for injuries in any judicial district where the defendant could be found—and to recover treble damages and attorney’s fees?<sup>263</sup>

The more likely explanation is that members of Congress sincerely strived for what may seem irreconcilable goals. They wanted to break up or at least restrain the trusts. At the same time, they—especially Republicans, who represented the industrial states—wanted to protect American business from foreign competition.<sup>264</sup> They enacted legislation to do both. Economists may believe high tariffs supported the trusts by protecting them from foreign competition (and in fact members of Congress expressed exactly that view).<sup>265</sup> But while economists may see the two legislative acts as irreconcilable, the messy business of governing can produce seemingly irrational compromises.

Horace H. Robbins expressed the far more widely shared view when, more than half a century ago, he wrote: “At the time the Sherman Act was passed, there was certainly some intention to legislate against size and concentration. There was widespread agitation and deep feeling prevailing against the great business units and the great concentration of capital.”<sup>266</sup>

Writing more recently, Herbert Hovenkamp agrees. He says that the Sherman Act was enacted either “at the behest of small businessmen who had been injured by the formation of larger, more

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number, but other sources suggest he is mistaken. The House voted twice on the Sherman Act. On the first occasion, April 25, 1890, the bill passed without a recorded vote count. The official record merely states: “The bill as amended was ordered to a third reading; and being read the third time, was passed.” 21 Cong. Rec. 4105 (1890). *See also* Kintner, Vol. 1, *supra* note 217, at 27 n.177 (“*Congressional Record* does not reflect that a record vote was taken.”). The second occasion was June 20, 1890, when the bill was reported out of the conference committee. On that time, there were 242 yeas, 0 nays, and 85 not voting. 21 Cong. Rec. 6314 (1890).

263. This was in the original Section 7 of the Act. In 1955, that section was repealed because it had been reenacted with modifications in section 4 of the Clayton Act, 15 U.S.C. §15. *See* Kintner, Vol. 1, *supra* note 217, at 52.

264. Doris Kearns Goodwin tells us: “Protectionism had become a central tenet of Republican ideology.” GOODWIN, *supra* note 21, at 583. It was a party commitment with staying power. Theodore Roosevelt studiously avoided the issue throughout his presidency, notwithstanding his sympathy for progressive claims that high tariffs strengthened monopolies and inflated prices. Howard Taft made a major push for tariff reform during his presidency but achieved only limited success. *See id.* at 726–45.

265. For example, Congressman William L. Wilson (D., W.Va.) spoke about tariffs at length, and argued that at then-existing levels, which were lower than those later imposed by the McKinley Tariff Act, the American tariff system “presents the most favorable and tempting field in the world for the successful formation and growth of trusts.” 21 Cong. Rec. 4093 (1890).

266. Horace H. Robbins, “Bigness,” *The Sherman Act, and Antitrust Policy*, 39 VA. L. REV. 907, 907 (1953).

efficient firms,”<sup>267</sup> or “out of a persuasive fear of private ‘bigness’ and the political power that it engendered.”<sup>268</sup>

Robert H. Lande also concurs. He believes that Congress’ main concern was allocative efficiency, that is, with firms having the market power to raise prices and restrict output.<sup>269</sup> But, writes Lande, “[t]he Act also involved efforts to decentralize economic, social, and political decisionmaking to ensure that narrow private interests would be unable to override the public good flowing from free competition.”<sup>270</sup>

Noted historian Richard Hofstadter was more emphatic. He said Congress had three goals in mind when it enacted the Sherman Act.<sup>271</sup> The first was economic: the belief that competition would produce the greatest efficiencies. The second goal was political: the desire to block accumulations of power that threatened democratic government. The third was social and moral: the belief that robust competition improved national character, making Americans more vital and disciplined. “Among the three,” writes Hofstadter, “the economic goal was the most cluttered with uncertainties, so much so that it seems to be no exaggeration to regard antitrust as being essentially a political rather than an economic enterprise.”<sup>272</sup>

### *C. The Antitrust Movement and the Clayton Act*

The Sherman Act had a troubled early life. The first major Sherman Act case that the Court considered involved American Sugar Refining Co., then popularly known as the sugar trust. Previously the company had acquired all of the sugar refineries in the United States except five. In March 1892, it entered into agreements to acquire four of its remaining five competitors.<sup>273</sup> The fifth and putatively only remaining independent firm had a market share of two percent. The federal government brought an action under the Sherman Act to enjoin the acquisitions. The Sherman Act had been enacted pursuant to Congress’ constitutional power to regulate interstate and foreign trade.<sup>274</sup> The Court held that Congress had no

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267. HOVENKAMP, *supra* note 89, at 60.

268. *Id.* at 61.

269. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 910 (1999).

270. *Id.* at 911.

271. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS 199–200* (1965).

272. *Id.* at 200.

273. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

274. U.S. CONST. art. I, § 8, cl. 2.

power to prevent American Sugar from monopolizing sugar refining in the United States because refining sugar was a purely *intrastate* activity, even though the refined sugar was to be shipped throughout the country.<sup>275</sup> Some believed the Court was simply attempting to protect the traditional role of the states in regulating corporations. Some believed the decision was evidence that the Court was a pawn of the plutocrats.<sup>276</sup> Business read the sugar trust case and other early decisions of the Court<sup>277</sup> as a green light for mergers and acquisitions.<sup>278</sup>

The Court seemed more willing to apply the Sherman Act against restraints of trade than to mergers, however. In a famous case, *U.S. v. Trans-Missouri Freight Association*, the government brought an action against eighteen competing railroads and an association they formed for fixing rates.<sup>279</sup> The Court rejected the railroads' argument that they should be deemed exempt from the Sherman Act because they were regulated by the Interstate Commerce Commission.<sup>280</sup> It also rejected their argument that they had not violated the Sherman Act because the rates they adopted were reasonable.<sup>281</sup>

In its opinion, the Court addressed what it saw as one of the great purposes of the Sherman Act—protecting small firms that needed to ship goods via railroad from being put out of business by big corporations that demanded preferential rates from the railroads. The Court observed that sometimes small companies were destroyed by dislocations due to changes in technology and methods of doing business. That was unfortunate but inevitable. The Court continued:

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at

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275. 156 U.S. 37–38.

276. See, e.g., BRANDS, *supra* note 4, at 435 (stating that William Jennings Bryan's supporters believed the decision confirmed "that the captains of industry had captured the courts and suborned them to the plutocrats' profit-mongering purposes").

277. E.g., *Hopkins v. United States*, 171 U.S. 578 (1898) (holding that an association of livestock traders was not engaged in interstate commerce even though its activities were part of the process of shipping livestock throughout the country).

278. See, e.g., NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904*, at 109 (1985) (stating "there is undoubtedly some validity to [the] argument" that the Court's decisions signaled that mergers would be tolerated).

279. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897). The number of railroads is set forth in the district court's opinion at 53 F. 440, 441 (1892).

280. 166 U.S. 290.

281. *Id.*

which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity. . . . Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital.<sup>282</sup>

Meanwhile, big businesses had powerful incentives to swallow competitors. Three years after the enactment of the Sherman Act, the country experienced a severe economic depression, and the depression stimulated price wars in many industries—wars too aggressive to end through collusion.<sup>283</sup> The best way to end the price wars was to buy one's rivals.

In just a nine-year period beginning in 1895, more than 1,800 companies were eliminated through mergers and acquisitions.<sup>284</sup> That merger wave created scores of firms with more than forty percent of their respective markets, and forty-two firms with more than seventy percent of their markets. Many of the giants created then remain with us today, including DuPont, Kodak, International Harvester, International Paper, International Salt, Nabisco, Otis Elevator, Pittsburgh Plate Glass, and United States Steel.<sup>285</sup> By 1903, there were three hundred U.S. companies with \$10 million in assets and seventeen companies with more than \$100 million—even though, four years earlier, only a dozen non-railroad firms had assets valued at \$10 million.<sup>286</sup>

This disturbing growth in company size and industry consolidation helped fuel the Progressive Era. Progressives were concerned

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282. *Id.* at 323–24 (1897). Half a century later, the Supreme Court continued to favorably cite the language from *Trans-Missouri Freight Association* set forth in the main body. *See, e.g., Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

283. LAMOREAUX, *supra* note 278, at 12, 100, 107, 166. The depression lasted from 1893 to 1897. STEVEN J. DINER, *A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA 19–22* (1998).

284. LAMOREAUX, *supra* note 278, at 2.

285. *Id.* at 3–4.

286. DINER, *supra* note 283, at 28.

about consumers being gouged by monopoly prices, but they were more concerned about how congealed economic power was destroying freedom.

Big corporations treated workers like cogs in a machine. They engaged efficiency experts to tell employees exactly how to do their work—how much to lift at one time, what sequence of tasks to follow, even when to rest.<sup>287</sup> Moreover, when efficiency increased, employers appropriated all the benefits. Factories, for example, started paying workers on a piece-rate basis to encourage them to work faster; but when employees worked hard to increase their productivity, employers cut the rates to control wages.<sup>288</sup> Work hours were brutally long, and workplace conditions were difficult and often dangerous. When workers sought to improve their lot through collective bargaining, corporations used political muscle to bust unions. Police and National Guard troops were used to break strikes, and union leaders were jailed.<sup>289</sup> Ironically, big business used the Sherman Act against unions. Between 1890 and 1914, federal courts issued more than one hundred injunctions against unions under the Sherman Act,<sup>290</sup> and twelve of the first thirteen criminal convictions that the federal government obtained under the Act were against unions.<sup>291</sup>

Farmers faced similar problems. “[F]armers found their autonomy and economic security challenged by remote institutions: the railroads on which they shipped their products to market, the currency and credit system, the corporations which manufactured and sold agricultural machinery, and most important, the invisible hand that determined the price of farm commodities,” writes historian Steven J. Diner.<sup>292</sup> Much effort was put into educating farmers about scientific methods and teaching them how to increase their productivity. Manufacturers sold them modern equipment, states sponsored institutes for farmers, land grant universities tried to persuade farmers to send their sons to their agricultural colleges or to extension courses, and the federal government funded research devoted to increasing agricultural productivity.<sup>293</sup> And productivity did increase. But the problem from the farmers’ point of view was

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287. *Id.* at 36–39.

288. *Id.* at 55–59, 64.

289. *Id.* at 25–26.

290. 2 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 993 (Earl W. Kintner ed. 1978) [hereinafter Kintner, Vol. 2].

291. HOVENKAMP, *supra* note 89, at 65.

292. DINER, *supra* note 283, at 102.

293. *Id.* at 121.

that increased production resulted in lower prices.<sup>294</sup> With lower prices and increased costs for machinery (and bank loans financing the machinery), farmers reaped few rewards from their increased productivity. Even the most successful farmers found that their cash earnings were generally lower than those of city workers.<sup>295</sup> The principal beneficiaries were city dwellers, which was precisely the point. “What the city man wanted was cheap food,” an official in Theodore Roosevelt’s administration remarked in 1918.<sup>296</sup> “Therefore, what was done for the farmer was directed almost without exception toward helping or inducing him to grow cheap food.”<sup>297</sup> But, of course, factory workers had not been demanding that their government subsidize agriculture programs.

Who, really, had government officials been trying to please by working to increase farmers’ productivity? Steven Diner suggests that it was the corporate capitalists. “Low food prices lessened pressure to increase the wages of industrial workers,” he explains.<sup>298</sup> The progressives understood all of this. Their principal concern was freedom, not low prices. “The great common people are slaves and monopoly is the master,” declared Mary Elizabeth Lease, a famous progressive orator.<sup>299</sup> There were increased public outcries over the growth of the trusts, the consolidation of industries, and the passivity of presidents and, especially, the courts.

On September 14, 1901, President William McKinley was killed by an assassin in Buffalo, New York. McKinley, who had been owned lock-stock-and-barrel by big business,<sup>300</sup> was succeeded by his vice president, Theodore Roosevelt, a Republican progressive who wanted to do something about the trusts.<sup>301</sup>

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294. *Id.* at 122.

295. *Id.* at 103.

296. *Id.* at 123 (quoting Gifford Pinchot).

297. *Id.*

298. *Id.* at 122.

299. *Id.* at 14.

300. Terrified of populist William Jennings Bryan, James J. Hill, John D. Rockefeller, and others corporate moguls contributed as much as \$12 million to McKinley’s campaign (the equivalent of more than \$330 million today). Rockefeller’s Standard Oil Company contributed a quarter of a million dollars. BRANDS, *supra* note 27, at 550. Neither Grover Cleveland nor McKinley had been much interested in antitrust enforcement. The justice department instituted only eleven antitrust actions during the combined eight and half years of their administrations, compared to seven antitrust actions instituted in the roughly thirty-two months remaining in Benjamin Harrison’s administration after passage of the Sherman Act. CALHOUN, *supra* note 237, at 94.

301. Republican boss Mark Hanna, who was closely tied to the moguls, had warned McKinley not to make Roosevelt his vice president. “I asked him if he realized what would happen if he should die,” Hanna said. GOODWIN, *supra* note 21, at 292.



Although Roosevelt was genuinely repulsed by what he considered rapacious, unpatriotic greed by the moguls, part of his motivation was to dampen populist sentiment for an all-out war on business.<sup>302</sup> Two months after he became president, a group of the great business barons—James Hill, J.P. Morgan, Cornelius Vanderbilt, E.H. Harriman, John D. Rockefeller, and Jay Gould—created the Northern Securities Company by uniting large railroads throughout the northwest and southwest sections of the country. It instantly became the nation’s second-largest company. Because this new trust was formed on his watch, Roosevelt felt he had to do something about it.<sup>303</sup> In great secrecy, Roosevelt asked his attorney general, Philander C. Knox, to examine whether the new trust violated the Sherman Act; and on November 13, 1901, the Roosevelt administration surprised the nation by announcing it was filing an action to break up Northern Securities.<sup>304</sup> Three days later, Morgan was at the White House to explain to the president how things should work.<sup>305</sup>

It was not clear when these two men met which one was the most powerful person in the country. Morgan did not attempt to persuade the president that Northern Securities did not violate the Sherman Act. He scolded the president for suing his firm without talking to him first and resolving matters the way they ought to be resolved. “If we have done something wrong, send your man to my man and they can fix it up,” said Morgan.<sup>306</sup>

“That can’t be done,” Roosevelt responded. Attorney General Knox added: “We don’t want to fix it up; we want to stop it.”<sup>307</sup>

“Are you going to attack my other interests?” asked Morgan. “The steel trust and others?”<sup>308</sup> The “steel trust” was the United States Steel Corporation, the largest corporation in the nation—the first, in fact, with more than one billion dollars of capital—which Morgan formed the previous year with John D. Rockefeller, Andrew Carnegie, and others.<sup>309</sup> The whole country had been wondering whether the government would take action against that colossus.

“Certainly not, unless we find out that in any case they have done something that we regard as wrong,” replied Roosevelt.<sup>310</sup> It was, in

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302. BRANDS, *supra* note 4, at 435.

303. *Id.* at 436.

304. *Id.*

305. GOODWIN, *supra* note 21, at 299.

306. BRANDS, *supra* note 4, at 435.

307. *Id.* at 435–36.

308. *Id.*

309. *Id.* at 434.

310. *Id.* at 437.

fact, an extremely revealing statement because it summed up his philosophy about the great trusts: they would be permitted unless their actions offended Roosevelt's sense of right and wrong. It was, to say the least, not a very legalistic approach.<sup>311</sup>

A great deal hinged on the Northern Securities case. Doris Kearns Goodwin writes: "For Roosevelt, the outcome loomed with enormous implications for his party, as well as the nation. If the Court sustained the administration's argument that the colossal merger represented a monopoly that restricted trade, the victory would demonstrate a fundamental shift in the Republican Party's relationship to the trusts."<sup>312</sup>

It was, therefore, a time of high drama, when on March 14, 1904, Justice John Marshall Harlan read the Court's opinion from the bench. By a vote of 5-4, the Court held that the railroad trust violated the Sherman Act. "The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect," said the Court.<sup>313</sup> Roosevelt was delighted—though he was irked that one of the two justices he had appointed to the Court, Oliver Wendell Holmes, joined the dissent. Roosevelt had nominated Holmes for the Court because he was considered a friend of common people. "I could carve out of a banana a judge with more backbone than he," Roosevelt privately remarked.<sup>314</sup>

Roosevelt's administration also took on other trusts, including the beef and tobacco trusts.<sup>315</sup> Following a massive exposé of John D. Rockefeller's Standard Oil Company by the investigative reporter Ida M. Tarbell—published as a twenty-four-part series in *McClure's Magazine* and then as two-volume book<sup>316</sup>—newspaper editorials began calling for the government to take action. The problem was "as much a moral issue as a financial one," one editorial declared.<sup>317</sup> Soon after, the government filed suit against the

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311. Steven Diner says that Roosevelt "preferred to prosecute trusts selectively, not for bigness itself but for bad behavior, judging goodness and badness [for] himself." DINER, *supra* note 283, at 221.

312. GOODWIN, BULLY PULPIT, *supra* note 21, at 398.

313. Northern Securities Co. v. United States, 193 U.S. 197, 327 (1904).

314. GOODWIN, BULLY PULPIT, *supra* note 21, at 399.

315. *Id.* at 378.

316. IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904).

317. GOODWIN, *supra* note 21, at 549 (quoting William White's editorial in the *Emporia Gazette*). Press attention stimulated an investigation by James Garfield, director of Roosevelt's Bureau of Corporations. Garfield found that Standard Oil had achieved a monopoly position in the oil industry by using predatory practices such as rebates and fully abhorrent practices such as bribes and kickbacks. *Id.* at 546, 550–51. This met Roosevelt's criterion of being not only a trust, but a bad trust.

Standard Oil Company of New Jersey, also naming as defendants Rockefeller himself, six other individuals, and thirty-three affiliated companies.<sup>318</sup>

Although Teddy Roosevelt took great pride in being called “the trust buster,” Roosevelt’s successor, Howard Taft, was a more vigorous enforcer of the Sherman Act.<sup>319</sup> Taft’s administration instituted more antitrust actions in its first three years than Roosevelt’s filed in more than seven years.<sup>320</sup> Most dramatically, Taft filed an action to break up the biggest trust of all, United States Steel Company, and indicted the company’s top officials, including J.P. Morgan, John D. Rockefeller, and Andrew Carnegie, personally.<sup>321</sup> When it filed its complaint in that action, Taft’s Department of Justice insinuated that years earlier J.P. Morgan bamboozled Roosevelt into permitting U.S. Steel to engage in a controversial acquisition of the Tennessee Coal and Iron Company.<sup>322</sup> During his presidency, Roosevelt personally blessed that merger, but he did so as part of deal in which Morgan saved a leading brokerage house from bankruptcy during the financial panic of 1907.<sup>323</sup> Roosevelt was enraged by the suggestion that Morgan had pulled the wool over his eyes. Indeed, this perceived insult triggered Roosevelt’s decision to oust his successor by running again for presidency in 1912.<sup>324</sup>

Meanwhile, on May 15, 1911, the Supreme Court decided the Standard Oil case.<sup>325</sup> The Court unanimously held that the defendants violated both the restraint of trade and monopolization provisions of the Sherman Act, and had to be broken up. The decision is famous for adopting the rule of reason,<sup>326</sup> but for our

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318. See *Standard Oil Co. of New Jersey*, 221 U.S. at 45.

319. See, e.g., DINER, *supra* note 283, at 221 (stating that “Roosevelt’s reputation as a ‘trust buster’ had never been deserved.”).

320. GOODWIN, *supra* note 21, at 668.

321. *Id.* at 667.

322. At the time, a respected financial analyst claimed Roosevelt had allowed J.P. Morgan to pay \$45 million for stock worth at least \$1 billion, acquire an energetic competitor, and look public spirited in the process. Other Taft loyalists happily picked up the theme. *Id.* at 529-30, 667-68. See also BRANDS, *supra* note 4, at 602-05.

323. The brokerage house Moore & Schley had been teetering on bankruptcy. The administration feared that if Moore & Schley failed, it would bring down other financial institutions. J.P. Morgan proposed saving Moore & Schley by buying its large position in TC&I, but he insisted that Roosevelt promise not to challenge the acquisition. BRANDS, *supra* note 4, at 602-05.

324. GOODWIN, *supra* note 21, at 667.

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

326. The Court held that in determining whether the Sherman Act was violated courts must apply “the rule of reason” guided by the established law and “judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes.” *Id.* at 63. The adoption of the rule of reason is considered a watershed event in the development of antitrust law. One commentator writes:

purposes what is most significant is what the Court said about the history and purpose of the Sherman Act. The Court wrote:

[T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations, and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.<sup>327</sup>

It is worth noting that this was quite a different Court than the one that decided *Trans-Missouri Freight Association* fifteen years earlier. Only one justice who had been in the majority in *Trans-Missouri* was still on the Court.<sup>328</sup> That was John Marshall Harlan, who agreed with the majority that defendants had violated the Sherman Act and should be broken up, but disagreed with using a rule of reason analysis. Nonetheless, Harlan agreed with his colleagues about the history and purpose of the Sherman Act, adding the following in a separate opinion:

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals, and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be

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The *Standard Oil* decision summed up, as much as anything, the implicit compromise on big business that emerged from the Progressive Era. The country would accept large companies as long as they were efficient and stopped short of monopoly. Accordingly, many industries developed into oligopolies, dominated by a handful of very big enterprises that competed, albeit cautiously.

WELLS, *supra* note 120, at 31.

327. *Standard Oil Co. of N.J.*, 221 U.S. at 50.

328. THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* 96 (4th ed. 2009).

then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong.<sup>329</sup>

I described the antitrust trust debate in the presidential campaign of 1912 in the Introduction to this Article, and will not repeat that here, other than to briefly note that both the Democratic and Republican party platforms of 1912 called for new antitrust legislation to supplement and strengthen the Sherman Act.<sup>330</sup> Wilson's election was considered something of a referendum on the issue. In 1914, Congress—following committee testimony and floor debate that fill thousands of pages in the Congressional Record<sup>331</sup>—enacted both the Clayton Act and the Federal Trade Commission Act. Among other things, the Clayton Act strengthened the anti-monopoly provision of the Sherman Act,<sup>332</sup> made it unlawful to discriminate in price between different purchasers of commodities<sup>333</sup> or to sell goods to a buyer on the condition the buyer not do business with a competitor,<sup>334</sup> exempted labor organizations from the antitrust laws,<sup>335</sup> and provided that any person injured by antitrust violations could bring a private action and recover three times the amount of their damages plus their attorney's fees.<sup>336</sup> The Federal Trade Commission Act provided that “unfair methods of competition in or affecting commerce” are unlawful,<sup>337</sup> and it established a new antitrust enforcement agency to determine when methods are unfair, thus empowering the FTC to find conduct unlawful even if it does not technically violate provisions of the Sherman or Clayton Acts.<sup>338</sup>

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329. *Standard Oil Co. of N.J.*, 221 U.S. at 83–84 (Harlan, J., concurring and dissenting).

330. See *Republican Party Platform of 1912*, THE AMERICAN PRESIDENCY PROJECT (June 18, 1912), <http://www.presidency.ucsb.edu/ws/index.php?pid=29633>; *Democratic Party Platform of 1912*, THE AMERICAN PRESIDENCY PROJECT (June 25, 1912), <http://www.presidency.ucsb.edu/ws/index.php?pid=29590>.

331. See THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, *supra* note 290, at 1000 (reporting that more than 100 witnesses testified before the committees, and the record of testimony and debates takes up nearly 2,800 pages).

332. See 15 U.S.C. § 18 (1914).

333. *Id.* § 13.

334. *Id.* §14. This section was designed to expressly make exclusive dealing and tying arrangements unlawful, even though they could also be considered a violation of Sherman Act §1. See generally HOVENKAMP, *supra* note 89, at 66.

335. *Id.* §17. This exemption turned out to be largely ineffective. HOVENKAMP, *supra* note 89, at 66.

336. 15 U.S.C. § 15.

337. *Id.* § 18.

338. HOVENKAMP, *supra* note 89, at 66.

Antitrust concerns were quickly whisked off the stage by the First World War.<sup>339</sup> The prevailing view was that producing the arsenals of war required big companies unhampered by concerns about consolidations, collaboration, or cartelization.<sup>340</sup> In many ways, of course, free enterprise is often suspended during the emergency of war and the government is allowed to allocate materials, ration goods, and fix prices.<sup>341</sup>

Nor would real interest in antitrust return soon after the war ended. The next three presidents—Warren Harding, Calvin Coolidge, and Herbert Hoover—were pro-business Republicans who disfavored government regulation of business. Their collective attitude toward antitrust was typified by the man whom Coolidge nominated to be a commissioner of the FTC calling that agency “an instrument of oppression and disturbance and injury,”<sup>342</sup> and by Herbert Hoover denouncing as a “perversion of justice” antitrust enforcement actions brought against trade associations by his own Department of Justice.<sup>343</sup>

#### *D. The New Deal*

In his first term, Franklin Delano Roosevelt sought to fight the Depression by essentially suspending the antitrust laws and encouraging business to collaborate—including agreeing on prices and industry production quotas—through the auspices of the National Industrial Recovery Act (NIRA).<sup>344</sup> The idea was to save businesses from ruinous competition and thereby restore their profitability. The fruits of prosperity would be shared by working people through wage codes and collective bargaining, which the Act

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339. See, e.g., WELLS, *supra* note 120, at 54 (stating that “Washington suspended the anti-trust laws” during World War I).

340. See ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 35 (1995) (describing the view that the war effort required harmony among business, government and labor).

341. See, e.g., JAMES MACGREGOR BURNS, *ROOSEVELT: THE SOLDIER OF FREEDOM 1940–1945* at 90–97, 116–120, 255–62, 332–43 (1970) (regarding resource allocation and wage and price controls during World War II).

342. The FTC commissioner who made the remark was William Humphrey. DAVID GREENBERG, *CALVIN COOLIDGE* 73 (2006). Greenberg notes that while the Coolidge administration filed a record seventy antitrust actions, it settled almost a third of them on terms favorable to industry. National Cash Register, for example, was convicted of price fixing and ultimately paid a fifty-dollar fine. *Id.*

343. WILLIAM E. LEUCHTENBURG, *HERBERT HOOVER* 65 (2009).

344. BRINKLEY, *supra* note 340, at 38–39; WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932–1972* at 104–05 (1973).

authorized.<sup>345</sup> But industry was more enthusiastic about establishing codes to raise prices rather than wages. Prices rose; wages did not keep pace; small businesses complained that large corporations controlled the process and were using it to magnify their own market positions; unions complained that employers were not bargaining in good faith.<sup>346</sup> The experiment collapsed even before 1935 when the Supreme Court declared the NIRA unconstitutional.

This ignited an explosion of thinking by liberal intellectuals both inside and outside the administration. One source of their inspiration was work done by lawyer Adolf A. Berle and economist Gardiner C. Means. In one of his early public statements about their work, in the spring of 1929, Berle said:

The economist working with me has produced statistics indicating that presently something over one-third of the national wealth of the country will be administered by some two hundred corporations who in turn are dominated by less than eighteen hundred men. This small group in connection with their bankers thus has a power over a very large proportion of the savings of the country; likewise over the lives of men who work in the industries; and in a less direct sense, over the public served by them. *This is a problem of government rather than finance.*<sup>347</sup>

In a subsequent article, Berle argued that the concentration of power in giant corporations constituted a “major shift in civilization.”<sup>348</sup> “A Machiavelli writing today would have very little interest in princes, and every interest in the Standard Oil Company of Indiana,” he observed.<sup>349</sup> In 1932, Berle and Means expanded their thinking in their book, *The Modern Corporation and Private Property*. Before the year was out, Louis D. Brandeis, who was now on the Supreme Court, cited the book in one of his opinions.<sup>350</sup> The next spring, *Time* magazine reported the book had become “the economic Bible of the Roosevelt administration.”<sup>351</sup>

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345. MANCHESTER, *supra* note 344, at 105.

346. BRINKLEY, *supra* note 340, at 39.

347. See JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 56 (1987) (quoting Berle).

348. *Id.*

349. *Id.*

350. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 558 n.37 (1933) (Brandeis, J., dissenting in part).

351. SCHWARZ, *supra* note 347, at 61.

Another influential thinker of the time, at least within liberal intellectual circles, was the economist Saul Nelson.<sup>352</sup> Nelson argued that a crusade against economic concentration was necessary to provide individuals with the freedom of economic opportunity and to preserve the integrity of communities. The ability of people to start their own businesses or have some control over the conditions in which they worked was at stake. Nelson was quite clear: the problem was not that large companies were abusing power, but that they had that power. “The monster is a menace not because of the way he acts,” he wrote, “but simply because he is too large.”<sup>353</sup>

In 1936, while still in the midst of the Depression, Congress enacted the Robinson-Patman Act, which attempted to strengthen the Clayton Act’s section dealing with quantity discounts.<sup>354</sup> The purpose of the Act was to protect small businesses by restricting manufacturer discounts to large retailers.<sup>355</sup> The legislation was proposed, drafted, and lobbied for by the United States Wholesale Grocers’ Association, whose members were not able to purchase goods at the same low prices granted to chain supermarkets.<sup>356</sup>

The Act is extremely weak. It permits discounts based on the seller’s cost savings, and a patchwork of legislative compromises produced a final product described by three leading commentators as “a deplorable model of statutory obfuscation.”<sup>357</sup> Nevertheless, the Act was passed because, in this context at least, Congress wanted to protect small businesses even though consumers would wind up paying higher prices.<sup>358</sup>

By 1937, when the country starting slipping back into recession, FDR and his brain trust had become convinced that giant corporations, consolidated industries, and gross inequalities in income were draining energy from the economy, and that the medicine the nation needed was a vigorous new approach to antitrust.<sup>359</sup> In December 1937, Harold Ickes, who was Secretary of the Interior, and

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352. BRINKLEY, *supra* note 340, at 60–61.

353. *Id.*

354. See 15 U.S.C §§13(a)–(f).

355. Congressman Wright Patman argued that when independent merchants were forced out of business, “the reservoir of credit” for local communities was drained. He believed that draining credit from communities was one of the causes of the Great Depression. See MORGAN, *supra* note 328, at 388 (quoting Patman).

356. See KINTNER, VOL. 2, *supra* note 290, at 2895 n.6.21 (quoting Frederick M. Rowe as stating that, “Throughout the hearings [the association’s counsel] functioned as Mr. Patman’s factorum—drafting, analyzing, and explaining for the legislators.”).

357. GELLHORN, KOVACIC & CAUKINS, *supra* note 105, at 36.

358. HOVENKAMP, *supra* note 89, at 629.

359. Indeed, some within the administration thought they were facing a “capital strike,” that is, large corporations and titans of industry were conspiring to deliberately sabotage the



Robert Jackson, who headed the antitrust division in the Department of Justice, gave a series of coordinated speeches in which they argued that the national economy was hostage to the nation's richest families.<sup>360</sup> Young men and women finishing their educations had no realistic choice "except to start of the bottom of an impossibly long ladder of a few great corporations dominated by America's sixty families," Jackson declared in two speeches that month, one carried over radio and the other before the American Political Science Association.<sup>361</sup>

The following month, the president told Congress that economic concentration threatened the body politic.<sup>362</sup> He said the antitrust laws needed "reconstruction," and promised to send recommendations along those lines to Congress.<sup>363</sup> Three months later, Roosevelt asked Congress for increased funding for antitrust enforcement and half a million dollars to study the concentration of economic power in America, explaining this was necessary because "the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself."<sup>364</sup>

Roosevelt made the theme an important part of his 1939 reelection campaign. In his speech accepting the Democratic Party's nomination for president, Roosevelt echoed the title and thinking of Brandeis' classic old book, *Other People's Money*.<sup>365</sup> He declared:

A small group has concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness. . . . Here in America we are waging a great and successful war. It is not alone a war against want and destitution and economic

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recovery—and with it, the Roosevelt administration—by not spending for business expansion. There is evidence that the president, himself, thought there might be something to this view. BRINKLEY, *supra* note 340, at 56; WELLS, *supra* note 120, at 37; HOFSTADTER, *supra* note 271, at 229–30.

360. The theme was taken from Ferdinand Lundberg's popular book *America's 60 Families*, published in 1937.

361. BRINKLEY, *supra* note 340, at 57.

362. Roosevelt also deployed his Brandeisian phrase "other people's money, other people's labor, and other people's lives" in this message. *Id.* at 58.

363. *Id.*

364. SANDEL, *supra* note 2, at 239.

365. BRANDEIS, *supra* note 12.

demoralization. It is more than that; it is a war for the survival of democracy.<sup>366</sup>

But the socio-political viewpoint was challenged within Roosevelt's inner circle. Others believed the desire to break up big business was antediluvian and naïve. "We need big business," one New Dealer said.<sup>367</sup> "To talk about returning to arts and crafts is not only romantic, it is impossible."<sup>368</sup>

Many liberals argued that the modern economy depended on a consumer culture.<sup>369</sup> People had to want things and earn enough to satisfy some of their desires. Consumption was the engine that would drive the economy. If consumers wanted things, business would produce them. Business revenues, in turn, would be sufficient to pay workers enough so that, in their roles as consumers, they could afford to purchase things. The spark plug of consumption was desire. The great danger for the modern economy was "underconsumption."<sup>370</sup> Modern industrial society had the capacity to produce sufficient food, shelter, goods, and entertainment, to eliminate poverty, and to give everyone the good life. But industry would deliver the cornucopia of goods only if people hungered for them.<sup>371</sup>

Some labor leaders agreed. For example, Sidney Hillman, the president of the Amalgamated Clothing Workers of America who was influential within New Deal circles, maintained that it "is essential to our system of mass production to create a consumer's demand for almost unlimited output."<sup>372</sup> An economist at the University of Pennsylvania argued that consumer desire was the true meaning of modern life.<sup>373</sup> It is a view that gives advertising an important social purpose; but this economist went even further, arguing that the primary purpose of education should be to arouse within people desires and make them aware of pleasures awaiting them in department stores and amusement parks. New Dealers

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366. WELLS, *supra* note 120, at 34.

367. See BRINKLEY, *supra* note 340, at 62 (quoting Maury Maverick).

368. *Id.*

369. See generally *id.* at 65–85 (Chapter 4, "Spending and Consumption.").

370. See *id.* at 70 (describing the thinking of journalist Stuart Chase).

371. In this line of thinking, people's desire for consumer products had to be ardent enough to cause them to buy rather than save. Two liberal thinkers, William Trufant Foster and Waddill Catchings, argued that consumers were saving too much—something they characterized as "wasteful thrift." *Id.* at 76.

372. See *id.* at 217–18 (identifying Hillman) and 218 (setting forth the quotation).

373. See *id.* at 67–68 (describing the writings of economist Simon Patten).

holding to this view wanted a new cabinet-level Department of the Consumer.<sup>374</sup>

This debate occurred not merely within the confines of FDR's inner circle. It was carried on in newspapers and magazines.<sup>375</sup> Dorothy Thompson, a widely-read syndicated columnist, explained the root of the debate to her readers:

Two souls dwell . . . in the bosom of the American people. The one loves the abundant life, as expressed in the cheap and plentiful products of large-scale mass production and distribution. . . . The other yearns for the former simplicities, for decentralization, for the interests of the 'little man . . . denounces 'monopoly' and 'economic empires,' and seeks means of breaking them up.<sup>376</sup>

This debate, of course, has profound implications for antitrust policy. If the consumer is king, the economy exists to provide as many goods as inexpensively as possible. What makes that possible is efficiency—both allocative and productive efficiency—and the best industrial structure is whatever makes that possible. Such a system would help fashion an economy system that is good for the efficient wheels of industry but often is not good for social organizations—professional, cultural, educational, civic.

Although neither side prevailed absolutely, the consumer welfare model started to gain the upper hand. This occurred for two reasons. One reason was the Second World War. War, as previously noted, requires the industrial production of arsenals, and government regulation of all kinds, including antitrust, are suspended to the extent it is considered an interference. The other reason that the consumer welfare model gained strength was that in 1938, Robert Jackson became solicitor general, and Thurman Arnold replaced him as chief of the antitrust division.<sup>377</sup>

There is little in his background that suggested that Thurman Arnold would become one of the most influential figures in antitrust history. Arnold had been mayor of Laramie, Wyoming; dean of the West Virginia University College of Law; a professor at Yale Law School, where he published a best-selling book titled *The Folklore of Capitalism*, which caught the attention of the inner circle of

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374. *Id.* at 71.

375. *Id.* 299 n.35 and 313 n.48.

376. See WELLS, *supra* note 120, at 29 (quoting Dorothy Thompson).

377. *Id.* at 38.

the New Deal; and a tax lawyer in Department of Justice.<sup>378</sup> Although he made some comments about antitrust in *The Folklore of Capitalism*, that field had never been his particular focus.

Some feared Arnold was a radical who might be overzealous; others worried that he had a jaundiced view of antitrust and was not opposed to monopolies.<sup>379</sup> Arnold turned out to be a dynamo. In just his first two years, the budget of the antitrust division quintupled, the number of lawyers in the division grew from fifty-eight to more than three hundred, and the number of antitrust complaints filed annually more than tripled to 3,412.<sup>380</sup> Even more remarkably, Arnold won a stunning ninety-four percent of cases brought to trial, and he settled the rest on terms so favorable to the government that he successfully argued for appropriations by showing that antitrust enforcement was producing three times its cost for the U.S. Treasury.<sup>381</sup> For the first time, Arnold brought antitrust enforcement to a prominent place within the Department of Justice.

However, while Arnold believed in energetic enforcement of the antitrust law, he also believed the law should support efficiency and competition and not seek to deter bigness. “What ought to be emphasized is not the evils of size but the evils of industries which are not efficient or do not pass efficiency on to consumers,” Arnold later explained.<sup>382</sup> He dismissed concerns about bigness as outmoded “religion” and “an anachronism in a machine age.”<sup>383</sup> “The test,” he said, “is efficiency and service—not size.”<sup>384</sup>

And yet Arnold’s tenure as antitrust chief was something of a mixed bag. Historian Wyatt Wells writes that, notwithstanding the main thrust of his views, Arnold harbored suspicions of big enterprises, and most of the lawyers in the antitrust division shared

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378. BRINKLEY, *supra* note 340, at 106–11.

379. Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 79 ST. JOHN’S L. REV. 569, 574–76 (2004).

380. The passages about antitrust in Arnold’s book were sufficiently oblique that readers wondered whether Arnold did not like antitrust law itself or merely how the law was being applied. At Arnold’s confirmation hearing, Senator William Borah of Idaho asked Arnold whether he believed in breaking up monopolies. “Certainly,” Arnold replied. Alan Brinkley observes: “Borah seemed satisfied, but his original concerns were well grounded.” BRINKLEY, *supra* note 340, at 111.

381. *Id.*

382. See WELLS, *supra* note 120, at 41, 241 n.43 (quoting Arnold’s 1940 book *The Bottle-necks of Business*).

383. *Id.*

384. *Id.*

Brandeis' concern that an economy dominated by large companies was inimical to democracy.<sup>385</sup>

The tug of war between the consumer welfare and socio-political models continued.<sup>386</sup> The struggle is reflected by a famous case. In 1937, when Robert Jackson still headed the antitrust division, the government sued the Aluminum Company of America—the company popularly known as Alcoa—seeking to dissolve its monopoly in the production of aluminum ingot.<sup>387</sup>

There was no doubt that decades earlier Alcoa had, in part, maintained its monopoly through unlawful practices. It had formed a cartel with foreign producers, who agreed either not to import aluminum ingot to the United States at all or to do so under quota and price restrictions.<sup>388</sup> It had also purchased electricity from power companies on the condition that they not supply electricity to Alcoa's rivals.<sup>389</sup> These practices allegedly ended decades earlier; but still, Alcoa possessed more than ninety percent of the relevant market.<sup>390</sup>

The case was controversial when instituted, and it became even more controversial as America started to mobilize for war. Thurman Arnold, now head of the antitrust division, blamed Alcoa for production shortages endangering the nation's defense efforts. Indeed, he came close to accusing Alcoa of war profiteering.<sup>391</sup> Before the war, the international cartel had previously divvied up the world market. The German producers' share had been twenty percent; but in 1934—when Adolf Hitler assumed dictatorial powers and was furiously building up the Luftwaffe<sup>392</sup>—they demanded the right to produce unlimited amounts of aluminum for domestic needs. The other members of the cartel reluctantly agreed, but only on the condition that exports from Germany be severely restricted.<sup>393</sup> Alcoa, however, neither increased production nor its production

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385. See *id.* at 216 (describing Arnold as “deeply suspicious of big business”), 211 (describing the sentiments of lawyers in the antitrust division).

386. Historian Ellis Hawley tells us that not only did New Dealers fail to reach a consensus by 1939, but if anything they were even more divided than they had been in 1933. See SANDEL, *supra* note 2, at 263 (quoting Hawley).

387. For the background of the case, see WELLS, *supra* note 120, at 59–64.

388. *United States v. Aluminum Co. of America*, 148 F.2d 416, 422 (2d Cir. 1945).

389. *Id.*

390. *Id.* at 425. The definition of the relevant market was hotly contested. The Second Circuit found that the relevant market was virgin aluminum ingot, including all of that product that Alcoa fabricated whether sold to others or used itself to produce other aluminum products. *Id.* at 424–25.

391. WELLS, *supra* note 120, at 61–62.

392. See generally WINSTON S. CHURCHILL, *THE SECOND WORLD WAR, THE GATHERING STORM* 110–29 (1948).

393. WELLS, *supra* note 120, at 61–62.

capacity. As Arnold put it: “Hitler tripled aluminum product for aircraft and war materials while the democracies stood still.”<sup>394</sup> Arnold was implying that Alcoa had put the nation in peril to enjoy monopoly profits.

The trial in district court lasted more than two years, and the district judge took almost another two years to write his decision.<sup>395</sup> As a result, the case reached the Supreme Court as the war was ending. The Court could not then muster a quorum to hear it, and referred the case to the Second Circuit, which ultimately produced a decision written by the great jurist Judge Learned Hand.<sup>396</sup>

It was clear that Alcoa had a monopoly, though less clear whether it had maintained its monopoly through illegal practices, at least within the past couple of decades. Moreover, the district trial had found that Alcoa never took extortionate profits. Its profit had been about ten percent; its consumers had never been gouged. The Second Circuit found that irrelevant. “[I]t is no excuse for ‘monopolizing’ a market that the monopoly has not been used to extract from the consumer more than a ‘fair’ profit. The Act has wider purposes,” Learned Hand wrote.<sup>397</sup> Even if only economic consequences mattered, many believed that “unchallenged economic power deadens initiative, discourages thrift, and depresses energy,” he continued.<sup>398</sup> It did not matter whether Alcoa had been a good trust. Congress “did not condone ‘good trusts’ and condemn ‘bad’ ones; it forbade all.”<sup>399</sup>

Moreover, Congress had not necessarily been motivated “by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.”<sup>400</sup> The court wrote:

We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based on the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a

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394. *Id.* at 62.

395. *Aluminum Co. of America*, 148 F.2d at 421.

396. MORGAN, *supra* note 328, at 256 n.1.

397. *Aluminum Co. of America*, 148 F.2d at 427.

398. *Id.*

399. *Id.*

400. *Id.*

desire to put an end to great aggregations of capital because of the helplessness of the individual before them. . . . Throughout the history [of the Sherman Act and other laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.<sup>401</sup>

The court then wrestled with the question of whether there is such a thing as a lawful monopoly, that is, whether the law required dissolving a monopoly even if its position was achieved without engaging in unlawful acts. Judge Hand noted that on at least five occasions, the Supreme Court had ordered the dissolution of such monopolies. Nonetheless, he observed, courts “had at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality.”<sup>402</sup>

In the end, it was not a problem the court had to definitively resolve because it found that that Alcoa was not merely a “passive beneficiary of a monopoly” but had intentionally taken action to shut out competition.<sup>403</sup> That was a bit of hedge however. The court accepted Alcoa’s argument that there had been “no moral derelictions after 1912.”<sup>404</sup> Thus, there had been no showing that Alcoa had engaged in unfair practices for the last quarter-century. But the court famously concluded that it was nonsense to read the Sherman Act as requiring a showing of specific intent “for no monopolist monopolizes unconscious of what he is doing.”<sup>405</sup> The Supreme Court later indirectly endorsed this decision by citing it favorably in another antitrust case.<sup>406</sup>

Although antitrust enforcement often took a backseat during the war, FDR still considered antitrust important to individual freedom. On January 11, 1944, he proposed a Second Bill of Rights in his annual message to Congress and in a radio address to the nation.

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401. *Id.* at 428–29.

402. *Id.* at 429.

403. *Id.* at 430.

404. *Id.* at 431.

405. *Id.* at 432. The court cited with approval Justice Benjamin N. Cardozo’s famous language that, “Mere size . . . is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.” *Id.* at 420 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932)).

406. The Supreme Court also remarked that “the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or exclude competition when it is desired to do so.” *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

One of the eight rights he included was the following: “The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad.”<sup>407</sup>

Following the war, importing antitrust law to Germany and Japan was considered necessary to the reorganization of both nations. Cartels dominated industries in both countries. Based on both recent and earlier experience in which cartels had been a driving force for European colonial empires, some thinkers associated cartels with imperialism.<sup>408</sup> In a long memorandum, a U.S. interagency Committee on Private Monopolies and Cartels concluded that the “growth of monopoly unparalleled in western industrial nations” was one of the factors that led to the development of the authoritarianism in Germany, and drove the Third Reich to seek foreign expansion.<sup>409</sup> Arms manufacturers especially nurtured German aggression. “Almost from the end of the World War I Germany’s arms manufacturers, for the most part the great combines which constituted the very heart of heavy industry, set about preparing Germany for another effort at conquest,” read the memo.<sup>410</sup> A U.S. Senate report also concluded that German imperialism would be permanently extinguished only if the structure of the nation’s industry were dramatically changed. Democracy, it was feared, could not flourish where economic power was highly concentrated.<sup>411</sup>

Therefore, giant firms had to be broken up, and cartels had to be eliminated. In April 1945, the joint chiefs of staffs sent General Dwight D. Eisenhower orders concerning the occupation of Germany, which instructed: “It is the policy of your government to effect a dispersion of the ownership and control of German industry.”<sup>412</sup> The Soviet Union, Great Britain, and the United States discussed how to accomplish these goals. In 1947, the United States and Great Britain issued identical laws for the occupation zones they controlled, outlawing cartels and stating that there was a prima

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407. Harvey J. Kaye, *FDR’s Second Bill of Rights: “Necessitous Men are Not Free Men,”* NEXT NEW DEAL (Jan. 11, 2011), <http://www.nextnewdeal.net/fdrs-second-bill-rights-necessitous-men-are-not-free-men>.

408. WELLS, *supra* note 120, at 119.

409. *See id.* at 110 (describing the committee), 138 (describing the memo).

410. *Id.* at 138.

411. Edward Welch, who headed the antitrust and cartels division of U.S. occupation forces in Japan said, “People can talk and write about democracy, but they cannot really live democracy without deconcentration of economic power.” *Id.* at 176. *See also id.* at 142.

412. *Id.* at 140.



facie case for dissolving any firm that had more than 10,000 employees.<sup>413</sup>

American policy was very much the same regarding Japan. At war's end, ten giant Zaibatsu (family-dominated firms) controlled about half of Japan's industrial and financial resources.<sup>414</sup> President Harry S. Truman instructed General Douglas MacArthur "to favor a program for the dissolution of the large industrial and banking combinations which have exercised control of a large part of Japan's trade and industry."<sup>415</sup>

In April 1947, at the strong urging of the U.S. occupation authority, the Japanese Diet adopted antitrust legislation.<sup>416</sup> These policies were not unchallenged. Some American officials believed that efficiency should trump concerns about size.<sup>417</sup> Some industries were successfully deconcentrated while others were not.<sup>418</sup> Nevertheless, for political and social rather than economic reasons, the official policy of the United States favored eliminating cartels and breaking up giant firms in Germany and Japan.<sup>419</sup>

But, at home, some of the practical difficulties in reconciling attempts to promote robust competition and at the same time to support small businesses were evident in a 1949 Supreme Court case.<sup>420</sup> The Court decided that it was unlawful for an oil company to enter into exclusive supply contracts with independent service stations, thereby precluding these small businesses from purchasing gasoline from other suppliers. The oil company's distribution system included both company-owned and independent stations. Justice William O. Douglas dissented because he believed the Court's decision would discourage the oil companies from dealing with independent dealers. If they could not ensure that that dealers would not buy from others, the big oil companies would distribute their product exclusively through company-owned stations. Thus, believed Douglas, even though the Court sought to promote competition and the freedom of small businesses, the unintended consequence of its decision would be to snuff out small businesses and make giant oil companies even larger. He wrote:

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413. *See id.* at 154.

414. *Id.* at 150 (regarding discussions with the Soviet Union) and 154 (regarding the U.S. and British laws).

415. *See id.* at 142 (quoting Truman's instructions).

416. *Id.* at 179.

417. *Id.* at 154.

418. In Germany, the banking sector escaped deconcentration, for example. *Id.* at 166–67.

419. *See generally id.*, at 13786 (Chapter 5, "Among Unbelievers: Antitrust in Germany and Japan").

420. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

The economic theories which the Court has read into the Anti-Trust Laws have favored rather than discouraged monopoly. As a result of the big business philosophy underlying [the Court's decisions], big business has become bigger and bigger. Cartels have increased their hold on the nation. The trusts wax strong. There is less and less place for the independent.

The full force of the Anti-Trust Laws have not been felt in our economy. It has been deflected. . . . [W]hen it comes to monopolies built in gentlemanly ways—by mergers, purchases of assets or control and the like—the teeth have largely been drawn from the Act. . . . The increased concentration of industrial power in the hands of a few have changed habits of thought. A new age has been announced. It is more and more an age of ‘monopoly competition.’ Monopoly competition is a regime of friendly alliances, of quick and easy accommodation on prices even without the benefit of trade associations, of what Brandeis said was euphemistically called ‘cooperation.’ . . .

The lessons Brandeis taught on the curse of bigness have largely been forgotten in high places. Size is allowed to become a menace to existing and putative competitors. . . . [T]here is an effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. There is a serious loss of citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices the nation pays for the almost ceaseless growth in bigness on the part of industry.<sup>421</sup>

The consumer welfare model may have gained the upper hand, but Douglas' own dissent demonstrates that Brandeis' warnings had not been entirely forgotten. The debate between the consumer welfare model and what may be called the citizen welfare model<sup>422</sup>—one that insisted upon taking account not only people's roles as consumers, but also their roles as workers and members of communities—was not over.

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421. *Id.* at 315–19 (1949) (Douglas, J., dissenting).

422. Other possible terms for this view are “civic model” or “civic welfare model.” I prefer the term “citizen welfare model” because of its more direct contraposition with the term “consumer welfare model.” The heart of the debate is whether antitrust should consider what is best of people solely as consumers and as citizens with many other roles.

*E. Mid-Twentieth Century*

If war is a friend to corporate bigness, then the period immediately following a war may be an even better friend. That, at least, was the case for American companies following both the First and Second World Wars. In 1947, the FTC reported to Congress that large American companies were then making large profits, and using some of those profits to go on acquisition sprees, repeating what had occurred in the aftermath of World War I.<sup>423</sup> From “1940–47, more than 2,450 formerly independent manufacturing and mining companies have disappeared as a result of mergers and acquisitions,” reported the FTC.<sup>424</sup> The asset value of the swallowed firms represented about 5.5% of the total value of all manufacturing companies in the nation.<sup>425</sup> The FTC was particularly concerned about seventy-eight giant manufacturers. The combined asset value of those giants equaled the combined asset value of the 50,000 manufacturing companies in the country with individual asset values of less than \$1 million. Moreover, the giants were holding enormous amounts of cash and government securities. Although it was not predicting things would go that far, the FTC noted that seventy-eight giants had the financial capacity to purchase ninety percent of all of the manufacturing companies in the nation.<sup>426</sup>

Congress reacted by passing the Celler-Kefauver Act of 1950. That legislation amended and strengthened the anti-merger provision of the Clayton Act by making it clear that it applied not only to acquiring other companies by purchasing their stock but also to effectively acquiring them by purchasing their assets—thereby closing a large loophole that many businesses exploited. The act revised the anti-merger provision so that it would apply to vertical as well as to horizontal mergers.<sup>427</sup> It provided that the FTC could seek to dissolve mergers that had been consummated before it filed an injunction action.

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423. See KINTNER, VOL. 2, *supra* note 290, at 3418, 3448–49 (FTC Report to Congress, *The Present Trend of Corporate Mergers and Acquisitions*, March 10, 1945). (FTC Report to Congress, *The Present Trend of Corporate Mergers and Acquisitions*, March 10, 1945).

424. *Id.* at 3448.

425. *Id.*

426. *Id.* at 3450–51. Congress' view about the nature of the then-ongoing merger wave was challenged by a study that reported that, in contrast to the merger waves of 1895–1904 and 1926–30, most mergers in this third wave, beginning in 1940, were between relatively small companies and produced harmless economic effects, at least in terms of industry concentration. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 231–33 (1960).

427. *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

In 1976, Congress strengthened the anti-merger provision still further by requiring companies to notify the Department of Justice and the FTC before completing mergers or acquisitions of a certain sizes, thereby affording regulators time to investigate and object before the transactions occurred.<sup>428</sup>

Perhaps most importantly, the revision expanded the anti-merger provision by prohibiting any acquisition if its effect “may be substantially to lessen competition, or tend to create a monopoly.”<sup>429</sup> As the Supreme Court later put it, Congress intended the amended anti-merger provision to “arrest incipient threats to competition which the Sherman Act did not ordinarily reach.”<sup>430</sup> Thus, the Celler-Kefauver Act was not merely about closing loopholes; it was designed to create a new and more robust anti-merger policy.<sup>431</sup>

The sponsors of the Act were not concerned with efficiency and consumer prices but with corporate bigness and the civic fabric of the nation. Representative Emanuel Celler worried that the independent and decentralized businesses that “made our country great,” were disappearing, and that American business was tending toward “monster concentration.”<sup>432</sup> Senator Estes Kefauver of Tennessee said the central issue was this: “Shall we permit the economy of the country to gravitate into the hands of a few corporations?”<sup>433</sup> Congress intended to give regulators and the courts an instrument to preserve small and medium-sized businesses, even when consolidation would produce lower consumer prices.<sup>434</sup> There was a clear congressional consensus that the socio-political benefits of deconcentration were not to be sacrificed for efficiency and lower consumer prices.<sup>435</sup>

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428. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Clayton Act §7A, 15 U.S.C. §18A (1976).

429. Clayton Act §7, as amended by the Celler-Kefauver Act of 1950, 15 U.S.C. §18 (emphasis added). The House committee report explained that the revision was intended to allow the government to stop mergers that would significantly reduce “the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.” See Bok, *supra* note 426, at 237 (quoting House report).

430. See, e.g., *United States v. Penn-Olin Chemical Corp.*, 378 U.S. 158, 171 (1964).

431. Bok, *supra* note 426, at 306.

432. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 275 n.10 (1966).

433. *Id.*

434. Herbert Hovenkamp writes that when Congress enacted the Celler-Kefauver amendments to the Clayton Act, its chief concern was protecting small businesses “even though the result of such protection would be lower total output and higher consumer prices.” HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 89, at 59.

435. See Bok, *supra* note 426, at 306 (regarding congressional consensus), 247–48, 318 (regarding noneconomic factors having the higher priority).

The Warren Court sought to honor Congress' intent. Two notable cases are worth briefly describing, especially since the Chicago School had turned them into poster-children for its thesis that the antitrust laws should be all about efficiency and consumer welfare, and socio-political considerations should be ignored.

The first, *Brown Shoe Company v. United States*,<sup>436</sup> involved the government's challenge to a merger between the Brown Shoe Company and the G.R. Kinney Company. Brown and Kinney were both manufacturers and retailers of men's, women's, and children's shoes. In terms of sales volume, they were respectively the third and eighth largest shoe companies in the country. Brown owned or franchised 1,230 shoe stores; Kinney had 350 shoe stores.<sup>437</sup> The defendants argued that the merger would do no economic harm because the industry was highly fragmented. Even after the merger, the top four shoe manufacturers would produce only twenty-three percent of the nation's shoes, and the top twenty-four manufacturers about thirty-five percent of the nation's shoes.<sup>438</sup> At the time the government filed suit in 1955, Brown manufactured only four percent and Kinney 0.5% of the nation's shoes.<sup>439</sup>

There was, however, a trend toward consolidation in the industry. In 1947, there had been 1,077 independent shoe manufacturers in the United States; that number had decreased by ten percent over the subsequent seven years. Brown, specifically, had grown through mergers. Within the last four years, it had acquired seven shoe manufacturers, a company that operated 250 shoe departments in department stores, and other smaller retailers as well.<sup>440</sup>

In a unanimous decision, the Supreme Court held that the merger would violate the amended anti-merger provision of the Clayton Act. Writing for the Court, Chief Justice Earl Warren addressed the policy of the Celler-Kefauver amendments:

The 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. . . . Other considerations cited in support of the bill were the desirability of retaining 'local control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on

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436. 370 U.S. 294 (1962).

437. *Id.* at 297.

438. *Id.* at 298-301.

439. *Id.* at 298 (Kinney), 303 (Brown).

440. *Id.* at 302-03.

economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.<sup>441</sup>

The Court added:

It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. 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.<sup>442</sup>

The Court found the sizes of the two companies important. Brown sold twenty-five million pairs of shoes annually and had assets of more than \$72 million (the equivalent of \$260 million in 2014), while Kinney sold about eight million pairs of shoes and had assets of about \$18 million (the equivalent \$160 million in 2014).<sup>443</sup> Although the Court did not say so, these figures alone may have been sufficient grounds to deny the merger. Even though many competitors remained, and the merger was far from creating an oligopoly, the Court realized that if it approved this merger, "we might be required to approve future merger efforts by Brown's competitors seeking similar market shares."<sup>444</sup> This process would move the industry further toward oligopoly, and that was exactly what Congress sought to prevent. Indeed, noted the Court, "Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure."<sup>445</sup>

The Court also said that one of the most important factors to consider was the nature and motive of the merger.<sup>446</sup> Companies often pursue vertical integration to foreclose sources of supply or means of distribution to rivals.<sup>447</sup> There was evidence suggesting that Brown would use its control of Kinney's retail stores to force them to carry Brown's shoes, with a concomitant reduction in the distribution of competitors' shoes.<sup>448</sup> The government was not required to prove this would certainly be the case, for the language of

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441. *Id.* at 315–16.

442. *Id.* at 344.

443. *Id.* at 331–32.

444. *Id.* at 343–44.

445. *Id.* at 333, 344.

446. *Id.* at 329.

447. *See* Bok, *supra* note 426, at 335 n.321, and sources cited therein.

448. The trial court found that, in the industry as a whole, manufacturer-dominated stores were "drying up" available outlets for distributions for competitors. *Id.* at 301 (quoting

the Celler-Kefauver Act clearly indicated that courts were to be concerned with probabilities rather than certainties.<sup>449</sup>

The second case worth briefly describing is *United States v. Von's Grocery*.<sup>450</sup> In that case, the government alleged that Von's Grocery Company, a chain of twenty-seven stores in the Los Angeles area, violated the anti-merger provision of the Clayton Act by acquiring Shopping Bag, another grocery chain in the same area with thirty-four stores. Even though Von's Grocery and Shopping Bag were the third and sixth largest chains in greater Los Angeles, they together controlled only 8.9% of the market. In fact, there were more than 3,800 grocery markets in the L.A. metropolitan area at the time of the merger, and the top dozen chains controlled slightly less than half the market.<sup>451</sup> Moreover, these two companies were medium-sized regional firms, not large national firms such as the Brown and Kinney shoe companies. Yet, the Court noted, "the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business."<sup>452</sup> Congress sought to accomplish this goal by "arresting a trend toward concentration in its incipiency before that trend developed to a point that a market was left in the grip of a few big companies."<sup>453</sup>

There was, in fact, a trend toward consolidation in the relevant market—during the preceding ten years nine of the largest chains had acquired 126 stores—and thus the merger should be disallowed. In dissent, Justice Byron White wrote: "[T]he Court's opinion is hardly more than a requiem for the so-called 'Mom and Pop' grocery stores—the bakery and butcher shops, the vegetable and fish markets—that are now economically and technologically obsolete in many parts of the country."<sup>454</sup> Nonetheless, *Von's Grocery* was a 7-2 decision, and as the Court noted in a footnote, it was a decision consistent with a long line of cases applying the amended anti-merger provision of the Clayton Act.<sup>455</sup>

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district court). In addition, both Brown's history and testimony by its own president suggested that Brown intended to follow that course with Kinney's stores. *Id.* at 331.

449. The indication was made by using the term "*may* be to substantially to lessen competition" (emphasis added). *See id.* at 734, and *infra* note 432.

450. 384 U.S. 270 (1966).

451. *Id.* at 280.

452. *Id.* at 275.

453. *Id.* at 277.

454. *Id.* at 288.

455. *See id.* at 278 n.14 (listing six previous cases, including *Brown Shoe Co. v. United States*).

Robert Bork attacked both decisions in *The Antitrust Paradox*. They were, to him, examples of a “parade of horrors”<sup>456</sup> unleashed by the Supreme Court’s “disorientation.”<sup>457</sup> His argument can be boiled down to two points. The first was his unexamined assumption that companies want to merge to become more efficient, and that antitrust law—as applied in *Brown Shoe* and *Von’s Grocery*—was frustrating those attempts. But one might ask: If growth provides valuable benefits in efficiency, won’t companies denied the ability to grow via mergers grow internally instead? Why wouldn’t they invest the same funds they would have spent to purchase other firms on internal expansion?

The answer is that if a firm such as Von’s Grocery were to grow internally, it would have to compete with its rival Shopping Bag, while purchasing Shopping Bag eliminates that rival. Even if the cost of buying or building more stores were the same, Von’s Grocery probably would have calculated that it was more profitable to purchase a rival. The same holds true for manufacturers: internal growth increases total industry output, causing prices to fall. Purchasing a rival avoids the problem.<sup>458</sup> While vertical growth is different, it may eliminate an independent supplier who was a potential, if not an actual, supplier of goods or services to rivals. Bork never acknowledged that mergers almost always have implications beyond creating a larger, more efficient firm. He suggested that when companies want to grow through merger, they have simply calculated that is the less costly means of doing so. Forcing them to grow internally, therefore, is simply wasteful.<sup>459</sup>

Bork’s second point was that Congress never made a policy choice preferring an economy with small and medium-sized firms and non-concentrated industries to an economy dominated by larger firms. He wrote: “The courts need not take into account the facts of overall concentration as they are because Congress did not make any policy choice on the topic and did not write a law that speaks to the subject.”<sup>460</sup> However, even if economists were to claim that after a merger there would still be sufficient competition so

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456. BORK, *supra* note 75, at 218. *See also id.* at 56, stating the two cases are examples of hundreds of such cases.

457. *Id.* at 217.

458. It also reduces competition in the labor market. Von’s Grocery and Shopping Bag did not just compete for customers; they competed for employees. The larger, merged, more efficient enterprise may have resulted in lower consumer prices and lower wages.

459. *Id.* at 207. “Growth is preferable to merger only in one type of case: where merger would create a market share so large that the result would be restriction of output,” Bork declared. *Id.* at 206.

460. *Id.* at 203.



that consumer prices would not be projected to rise, there are social costs of an economy with fewer independent firms and greater industry concentration. History shows that neither Congress nor the American people have been indifferent to those costs.

The Warren Court era was the zenith of the socio-political model of antitrust. Indeed, in his 1960 book, *The Antitrust Laws of the United States of America*, British scholar A. D. Neale—who produced what may have been the best one-volume description of American antitrust law of the time—said that rationale of the American antitrust laws “is essentially a desire to provide legal checks to restrain economic power and is not a pursuit of efficiency as such.”<sup>461</sup>

But the Supreme Court’s enthusiasm for that model wound down as Earl Warren, Hugo Black, and William O. Douglas retired between 1969 and 1975. All three were strong supporters of the socio-political model, and had written opinions interpreting the amended anti-merger provisions of the Clayton Act as mandating that approach. Warren Burger and Lewis Powell, who respectively replaced Earl Warren and William O. Douglas, were supporters of big business. In fact, shortly before being named to the bench, Powell wrote a memorandum for the U.S. Chamber of Commerce arguing that business was imperiled by the political and social forces of the day.<sup>462</sup> Powell wanted major corporations and their CEOs to engage in aggressive political and propaganda efforts to defend business and the free enterprise system. As the Warren Court wound down, the Chicago School, and the broader but closely related law-and-economics movement, gathered strength, until they achieved not only dominance but hegemony within the field of antitrust.<sup>463</sup> In 1977, Justice Lewis Powell would write an antitrust opinion for the Supreme Court based on Chicago School theory that cited an article by Richard Posner no less than five times.<sup>464</sup>

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461. A.D. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 489 (2d ed. 1970). Neale observed that “it is tempting (and common) to regard antitrust policy simply as a kind of economic engineering project.” *Id.* at 429. However, Neale concluded, “[i]t seems likely that American distrust of all sources of unchecked power is a more deeply-rooted and persistent motive behind the antitrust policy than any economic belief or any radical political trend.” *Id.* at 430.

462. TELES, *supra* note 72, at 61–62.

463. Steven Teles writes: “Simply measured in terms of the penetration of its adherents in the legal academy, law and economics is the most successful intellectual movement in the law of the past thirty years, having rapidly moved from insurgency to hegemony.” *Id.* at 216.

464. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In a separate opinion, Justice Byron White argued that the Court was relying on Posner instead of its own precedent. *Id.* at 70. This was not a merger case. The issue was whether a particular restriction was a per se violation or should be analyzed under the rule of reason.

Six years later, Judge Patricia Wald of the United States Court of Appeals for the District of Columbia Circuit heard an antitrust case with two of her colleagues, Judges Robert Bork and Ruth Bader Ginsburg.<sup>465</sup> It was a unanimous decision, and Judge Bork wrote the opinion. Judge Wald wrote separately to note that the majority's reasoning assumed that "the only legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices," adding: "But I do not believe that the debate over the purposes of the antitrust laws has been settled."<sup>466</sup> But even if Judge Wald was right that the debate was not fully settled, the writing was on the wall. The agreement between liberal champion and future Supreme Court Justice Ruth Bader Ginsberg and Chicago School guru Robert J. Bork reflected the emerging consensus.

#### *F. Merger Policy Today*

Today antitrust policy is exclusively about consumer welfare. The FTC and Department of Justice jointly employ a mathematical formula to guide their merger decisions. The formula, known as the Herfindahl-Hirschman Index (HHI), is designed to measure the degree of industry concentration.<sup>467</sup>

The HHI is based on the theory that up to a certain point, increased industry concentration will not affect prices and output. The HHI is calculated by summing the squares of the individual market shares of all participants.<sup>468</sup> For example, if an industry included a total of five firms with equal market shares of twenty percent each, the HHI would be 2000.<sup>469</sup> If it included six firms with equal market shares, the HHI would be 1653.<sup>470</sup> If it included ten firms with equal market shares, the HHI would be 1000.<sup>471</sup> If an industry included two firms with fifteen percent of the market each plus ten additional firms with seven percent of the market apiece, the HHI would be 940.<sup>472</sup>

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465. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (1986). This was not a merger case. The issue was whether a practice that could be characterized as a boycott or concerted refusal to deal was a per se violation or should be analyzed under the rule of reason, and if so, if it offended the rule of reason.

466. *Id.*

467. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 18-19 (Aug. 19, 2010).

468. *Id.* at 18.

469. Calculated as follows:  $20^2 + 20^2 + 20^2 + 20^2 + 20^2 = 2000$ .

470. Calculated as follows:  $16.6^2 + 16.6^2 + 16.6^2 + 16.6^2 + 16.6^2 + 16.6^2 = 1653.36$ .

471. Calculated as follows:  $10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 = 1000$ .

472. Calculated as follows:  $15^2 + 15^2 + 7^2 + 7^2 + 7^2 + 7^2 + 7^2 + 7^2 + 7^2 + 7^2 + 7^2 = 940$ .

The regulators divide the HHI results into three regions:

HHI below 1,000	–	Unconcentrated Markets
HHI 1,000 to 1,800	–	Moderately Concentrated Markets
HHI above 1,800	–	Highly Concentrated Markets

If following a merger, the HHI will remain below 1,000, or the merger will increase the HHI by less than one hundred points, regulators assume that the merger will not have adverse competitive effects and will generally approve the merger without further examination. If a proposed merger will produce an HHI in the 1,000 to 1,800 range, and the proposed merger would increase the HHI by more than one hundred points, the merger is deemed to “potentially raise significant competitive concerns” and regulators will analyze specific features of the industry and the merging firms.<sup>473</sup> The same situation applies if the HHI is above 1,800 and the merger would raise the HHI between one hundred and two hundred points. If the merger will increase the HHI by more than two hundred points, regulators presume that the merger is “likely to enhance market power,” and is therefore likely problematic.<sup>474</sup>

However, the merger partners can rebut this presumption. For example, regulators will allow a merger if they are persuaded that the market is easy to enter so that the merging firms cannot raise prices without potentially drawing new rivals into the market.<sup>475</sup> Regulators also recognize the longstanding “failing firm” exception; that is, they will allow a merger if they are persuaded that one of the firms would otherwise go out of business.<sup>476</sup> Additionally, regulators will allow a merger if the participants persuade them that the merger will generate sufficient efficiencies to lower prices, improve quality, enhance service, or produce new products, with the benefits outweighing the anticompetitive effects.<sup>477</sup> Moreover, regulators must also decide where to deploy their limited resources. The number of mergers they confront is daunting. During the past decade,

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473. U.S. DEP’T. OF JUSTICE & FED. TRADE COMM’N, *supra* note 467, at 19.

474. *Id.*

475. *Id.* at 27–28. Regulators appear heavily influenced by this factor. During its 1999–2011 fiscal years, the FTC closed all forty-five of the merger examinations it conducted in which it concluded that market entry was “easy” without bringing a single enforcement action. John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 625 (2013).

476. The Merger Guidelines make this a stringent test. Participants must demonstrate failure is imminent, that the failing firm could not successfully reorganize in bankruptcy, and that it has unsuccessfully explored other alternatives that would keep its assets in the market. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 467, at 32.

477. *Id.* at 29–31.

more than 15,000 mergers were large enough to require that they be reported in advance to the Department of Justice and the FTC.<sup>478</sup>

This system has three important features. First, it focuses entirely on consumer welfare and ignores socio-political effects. Second, it permits the vast majority of mergers. Regulators ignore mergers that fall within HHI safe zones. Even when mergers have high HHI numbers, the merging parties are often able to persuade regulators—or failing that, courts—that a particular merger will not result in higher prices or will yield benefits that justify higher prices. And regulators may choose not to deploy their resources to challenge a particular merger. In fact, the Department of Justice and the FTC rarely challenge mergers if the post-merger HHI would be less than 2,000 or the merger will increase the HHI by less than three hundred points.<sup>479</sup> Those numbers are well above the levels that supposedly raise significant concerns under the merger guidelines.

Third, the system may fail to meet even its own limited objective of protecting consumer welfare. According to an evaluation of retrospective merger studies undertaken by economist John Kwoka of Northeastern University, 82.6% of mergers that were large enough to be reported to regulators but that were ultimately permitted resulted in price increases while only 17.4% yielded price reductions.<sup>480</sup> Netting out the increases and decreases yielded an average price increase of 7.29% of all of those mergers.<sup>481</sup> It is particularly striking that the average price increase for mergers that were cleared without any conditions by the Department of Justice and the FTC was roughly the same as that for mergers that were permitted if the merging firms divested themselves of portions of their operations.<sup>482</sup> This suggests that economists may not be able to reliably predict under what conditions firms will have sufficient market power to raise prices.

What became of Von's Grocery and Shopping Bag—the two medium-sized, Los Angeles-based chains that the Supreme Court stopped from merging in 1966—after the legal environment

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478. Kwoka, *supra* note 475, at 619.

479. *Id.* at 622.

480. *Id.* at 632. This was based on a small sample of forty-six mergers, two of which occurred in the 1970s, eight in the 1980s, thirty-two in the 1990s, and eleven after 2000. Nevertheless, this may be the most complete information available. Kwoka's figures result from a meta-analysis of all available retrospective studies of individual mergers.

481. *Id.*

482. Mergers cleared outright resulted in an average price increase of 7.40% while those subject to divestiture averaged 7.68%. Divestiture is generally considered the most rigorous precondition regulators impose. When regulators required other conditions, mergers resulted in an average price increase of 16.01%. *Id.* at 640.

changed? Von's Grocery is today part of Safeway Inc., a national chain with more than 2,000 stores, 250,000 employees, and \$36.6 billion in annual sales—which, incidentally, makes it only the second largest food retailer in the nation.<sup>483</sup> In 1972, Shopping Bag was acquired by Fazio's, a larger grocery chain, and rebranded as Fazio's Shopping Bag.<sup>484</sup> In 1978, Fazio's was in turn acquired by Albertsons, which in 1999 briefly became the largest grocery chain in the country with 2,500 stores, until it was surpassed by the even larger giant, Kroger's.<sup>485</sup> Today food retailing—like so many of industries—is dominated by behemoth chains with hundreds or even thousands of stores.

The story is similar for the Brown Shoe Company. When merger policy eased, Brown went on a buying spree—purchasing five companies in the period 1970 to 1974 alone, and following that up with a half dozen other major acquisitions in subsequent years.<sup>486</sup> Today Brown Shoe has annual sales of \$2.5 billion, operates more than 1,200 retail stores and fourteen branded e-commerce sites, and has more than 11,000 employees.<sup>487</sup> By today's standards, that makes it big, but not very big. Its annual revenue is only about half as much as the lowest-ranking firm in the Fortune 500.<sup>488</sup> Meanwhile, denied

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483. See *Our Story*, VON'S, <http://www.vons.com/ShopStores/Our-Story.page> (last visited Oct. 3, 2015) (regarding Safeway acquiring Von's Grocery in 1996–97); George Avalos, *Albertsons to buy Vons owner Safeway for \$9.2 billion, could mean closure of Southern California stores*, LOS ANGELES DAILY NEWS (July 26, 2014), <http://www.dailynews.com/business/20140726/albertsons-to-buy-vons-owner-safeway-for-92-billion-could-mean-closure-of-southern-california-stores> (stating number of Safeway stores and employees following merger with Albertsons in 2014); See *500 Largest U.S. Corporations*, FORTUNE, June 16, 2015, at F-31 (providing Safeway's revenue and industry rank).

484. *The Vons Companies Incorporated History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/the-vons-companies-incorporated-history>.

485. See *Fazio's California Adventure*, PLEASANT FAMILY SHOPPING (Apr. 12, 2008, 12:40 AM), <http://pleasantfamilyshopping.blogspot.com/2008/04/fazios-california-adventure.html> (stating Fazio's was acquired by Albertsons in 1978); 75th Anniversary Timeline, ALBERTSON'S, <http://www.albertsons.com/wp-content/uploads/2015/07/Albertsons-75-Anniversary-Timeline.pdf> (last visited Oct. 3, 2015) (stating Albertsons became one of nation's largest grocery chains in 1999); Dana Canedy, *Kroger to Buy Fred Meyer, Creating Nation's Largest Grocer*, N.Y. TIMES (Oct. 20, 1998), <http://www.nytimes.com/1998/10/20/business/kroger-to-buy-fred-meyer-creating-country-s-biggest-grocer.html> (stating Kroger replaced Albertsons as largest grocer).

486. FN Staff, *A Timeline of Brown Shoe's Building Blocks*, FOOTWEAR NEWS (Apr. 21, 2014), <http://footwearnews.com/2014/business/news/a-timeline-of-brown-shoes-building-blocks-143678/>.

487. Press Release, *Brown Shoe Company Celebrates 100 Years of Listing on the New York Stock Exchange* (April 23, 2014), available at <http://www.businesswire.com/news/home/20140423005074/en/Brown-Shoe-Company-Celebrates-100-Years-Listing#VfLsPvnBzRY>.

488. See *500 Largest U.S. Corporations*, FORTUNE, June 16, 2014, at F-21 (reporting that the company ranked number 500, United Rentals, had \$4.955 billion in revenues). In recent years, Brown Shoe has been struggling, and attempting to cut losses by downsizing and selling off brands. See *Brown Shoe Company Announces Sale of Avia and Navados*, DAILY FINANCE

the opportunity to merge with Brown Shoe in 1962, Kinney Shoe Company sold itself to the F.W. Woolworth the following year.<sup>489</sup> Woolworth, then a large five-and-dime department store chain, had not previously been in the shoe business, and therefore the transaction was not deemed to offend antitrust policy. Woolworth and its shoe division have since gone through a number of corporate reorganizations and name changes.<sup>490</sup> The surviving company, Foot Locker Inc., operates 3,460 retail stores under different brand names in twenty-three countries.<sup>491</sup> Its \$6.5 billion in annual sales places it at number four hundred on the Fortune 500.<sup>492</sup>

We will now turn to why having fewer companies and bigger companies matter.

### III. BIG PROBLEMS

In 1954, the combined revenues of the sixty largest public companies in the United States accounted for less than twenty percent of the gross domestic product (GDP). Today, the combined revenues of the *twenty* largest public companies account for more than twenty percent of the GDP.<sup>493</sup> The five hundred largest companies account for about seventy-three percent of the GDP.<sup>494</sup> Corporate bigness is undeniable. But is it, as Louis D. Brandeis suggested, really a curse?

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(May 14, 2013), <http://www.dailyfinance.com/2013/05/14/brown-shoe-company-announces-sale-of-avia-and-neva/>; AP, *S&P Downgrades Brown Shoe Co.*, BLOOMBERG BUSINESSWEEK, (Dec. 2, 2011), <http://www.businessweek.com/ap/financialnews/D9RCNFP80.htm>.

489. See *The History of Kinney Shoes*, KINNEY SHOE CO., <http://r-webdesign.com/kinney/memories.html>.

490. *Id.*; *Venator Group Inc.*, REFERENCE FOR BUSINESS, <http://www.referenceforbusiness.com/history2/94/Venator-Group-Inc.html>.

491. Press Release, Foot Locker Inc, to Report Second Quarter Financial Results on Friday, August 22, 2013 (Aug. 7, 2014), [http://www.footlocker-inc.com/pdf/2013/pr\\_2013\\_fl\\_2Q13\\_to\\_report\\_financial\\_results.pdf](http://www.footlocker-inc.com/pdf/2013/pr_2013_fl_2Q13_to_report_financial_results.pdf).

492. *500 Largest U.S. Corporations*, *supra* note 487, at F-17.

493. See CHARLES FISHMAN, *THE WAL-MART EFFECT* 242 (rev'd ed. 2011) (providing data for 1954 and 2004). According to my calculations, the combined revenues of the twenty largest public companies currently account for 20.12% of the U.S. GDP. See *500 Largest U.S. Corporations*, *supra* note 487, at F-1 (setting forth revenues of twenty largest public companies, totaling \$3,379,944 million); *GDP (current US\$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (listing 2013 U.S. GDP at \$16.8 trillion).

494. In 2013, the total combined revenue of the Fortune 500 companies was \$12.2 trillion. *500 Largest U.S. Corporations*, *supra* note 487, at F-21.

*A. What We Learned from the Banking Crisis of 2008*

In recent years, we have learned some important things about mergers and why corporate managers pursue them. Consider this story. Beginning in the 1980s, legal restrictions on the ability of banks to expand geographically—such as caps on the number of branches an intrastate bank may have, or the ability of a bank to have branches in more than one state—were relaxed. This ignited aggressive mergers among banks and financial institutions.

During the period 1980–1994, there were more than six thousand bank mergers.<sup>495</sup> Mergers occurred among banks of all sizes. Nearly half of the mergers occurred between large banks with more than \$1 billion in assets, and mergers also occurred among giants with assets of more than \$100 billion. In fact, during the period from 1988 to 1997, the share of nationwide assets held by the eight largest U.S. financial institutions increased from 22.3% to 35.5%.<sup>496</sup> Then in the following year—that is, in 1998 alone—eight of the nation’s largest financial institutions merged into four firms.<sup>497</sup>

Researchers studied these mergers.<sup>498</sup> They wanted to know whether mergers made the banks more efficient and more profitable. And they wanted to know whether mergers benefited customers: Did the mergers result in higher interest rates for depositors and lower interest rates for borrowers? Did the combined assets of the merged banks allow the enterprises to be less leveraged? Were the larger, merged banks less likely to fail? The researchers found that some mergers did increase their efficiency—but that was the case for small banks only.<sup>499</sup>

Researchers divided on whether mergers between larger banks had no effect on efficiency whatsoever or whether mergers actually made the banks less efficient, increasing their operating costs without improvements in service.<sup>500</sup> One might assume that a merger would improve efficiency by allowing the combined entity to serve

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495. John H. Boyd & Stanley L. Graham, *Consolidation in U.S. Banking: Implications for Efficiency and Risk*, tbl. 3 FED. RESERVE BANK OF MINNEAPOLIS, Working Paper No. 572 (rev’d Dec. 1996).

496. Allen N. Berger et al., *The Consolidation of the Financial Services Industry: Causes, Consequences, and the Implications for the Future*, 23 J. BANKING & FIN. 135, 138 (1999) (page 3 of unpublished draft).

497. Citicorp merged with Travelers; BankAmerica merged with Nations Bank; Banc One merged with First Chicago; Norwest merged with Wells Fargo. *Id.*

498. The researchers, John H. Boyd and Stanley L. Graham, were affiliated with the Federal Reserve Bank of Minneapolis and the Carlson School of Management at the University of Minnesota.

499. Boyd & Graham, *supra* note 495, at 12–15.

500. *Id.* at 8.

the same customer base with fewer branches. Surely when two banks serving common geographic areas merge, the new firm is able to close branches. Yet researchers discovered that banks that acquired other banks opened more branches than they closed.<sup>501</sup> Researchers also found that as size increased, average profitability declined and leverage increased.<sup>502</sup> Indeed, the data show that at least for the last forty years banks with assets of less than \$1 billion have consistently been more profitable than larger banks—and the least profitable banks have been those with \$10 billion or more in assets.<sup>503</sup> Banks with less than \$1 billion in assets were also less likely to fail than larger banks.<sup>504</sup>

Moreover, bank mergers do not serve the interests of consumers. When banking markets became highly concentrated, depositors received lower interest and borrowers were charged higher interest rates.<sup>505</sup> The researchers wrote: “Except for [small banks], we see little evidence that consolidation in the U.S. banking industry has been particularly helpful over any performance dimension.”<sup>506</sup>

Bank executives were undoubtedly aware of this data, and yet they continued to press for more and more mergers. “[I]t is vexing to explain consolidation in banking in response to market forces,” Federal Reserve researchers wrote.<sup>507</sup> “But it may be that managerial hubris, as opposed to ownership interests, is the driving force.”<sup>508</sup> Other researchers called the same thing empire building.<sup>509</sup> No matter the term, researchers said that the interests of management—executives’ status, ego, and income—drove mergers in banking. Data confirms what seems intuitive: top executives are able to successfully demand higher compensation for running larger enterprises.<sup>510</sup> That, in fact, has long been the case, not only in banking but throughout the corporate world. Economists Murray Weidenbaum and Mark Jensen put it succinctly: “In plain English, the bigger the company, the larger the rewards to top management.”<sup>511</sup>

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501. Arthur E. Wilmarth Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1014 (1992).

502. Boyd & Graham, *supra* note 495, at 9.

503. More profitable whether measured in terms of returns on assets or on equity. Wilmarth, *Too Big to Fail, Too Few to Serve?*, *supra* note 501, at 986.

504. *Id.* See also Boyd & Graham, *Consolidation in U.S. Banking*, *supra* note 495, at 9.

505. Wilmarth, *Too Big to Fail, Too Few to Serve?*, *supra* note 501, at 1020.

506. Boyd & Graham, *Consolidation in U.S. Banking*, *supra* note 499, at 17–18.

507. *Id.* at 18.

508. *Id.*

509. *Id.* at 8; Wilmarth, *supra* note 501, at 1005.

510. Berger, et al., *supra* note 496, at 146.

511. Weidenbaum and Jensen added:



Why were large banks either no more efficient or less efficient than medium-sized banks? Enterprises can become too big to manage effectively.<sup>512</sup> They become so complex and so far flung that top executives are not able to effectively understand their operations. Knowledge about customers and communities decreases. There has long been evidence that large banks lose ability to maintain quality control over lending.<sup>513</sup>

A dramatic example of the too-big-to-manage dynamic emerged in early 2012 when it was revealed that—notwithstanding everything that bankers should have learned from the 2008 crisis—JP Morgan had resumed trading in high-risk derivatives, and as a result of trades placed by its London office, had lost \$6.25 billion. JP Morgan had been considered America’s best-run bank, and Jamie Dimon, its CEO, was reputed to be the most capable and virtuous of bank executives. In an article titled “Why JP Morgan’s Jamie Dimon Is Wall Street’s Indispensable Man,” *Bloomberg Businessweek* asked: “If Jamie Dimon can’t run a bank without stuff blowing up, can anyone?”<sup>514</sup> It appeared that JP Morgan had become too big for Dimon to run, and if that were indeed the case, it was too big for anyone to run. Moreover, if a bank has become too large and complicated for its own top executives to understand and manage, it is likely also too complicated for regulators to understand.<sup>515</sup>

Bank executives have often argued that mergers are necessary to enable regional banks to compete with national banks or to permit U.S. banks to compete with foreign banks, but it is by no means clear that either gigantism or consolidation has been an advantage. At least one scholar observed that the relative diversification of banking had been a U.S. advantage. At the end of 1990, for example, none of the twenty largest banks in the world was a U.S. bank,

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The same factors that encourage managers to be generous to themselves in allocating corporate resources can also be the driving force behind corporate acquisitions. After all acquisitions do increase the amount of corporate resources in the winning management’s span of control. Studies by the Conference Board confirm with telling statistics what most people instinctively know: top executives in larger companies are paid more than their counterparts in smaller firms. Size of firm is the most compelling factor.

Murray L. Weidenbaum & Mark Jensen, *Introduction to the Transaction Edition* of ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* xvii (Transaction 1991) (rev’d ed. 1968).

512. STIGLITZ, *supra* note 50 at 114–15, 165.

513. Wilmarth, *supra* note 501, at 1009.

514. Nick Summers & Max Abelson, *Why JP Morgan’s Jamie Dimon is Wall Street’s Indispensable Man*, BLOOMSBURG BUSINESSWEEK (May 16, 2013), <http://www.bloomberg.com/bw/articles/2013-05-16/why-jpmorgans-jamie-dimon-is-wall-streets-indispensable-man>.

515. See, e.g., Floyd Norris, *The Perils When Megabanks Lose Focus*, N.Y. TIMES, Sept. 9, 2013, at B1 (observing that “the more complicated an institution is, the less likely regulators are to really understand it.”).

and yet the largest U.S. banks were more profitable and more innovative than their larger European and Japanese counterparts.<sup>516</sup> Economists Walter Adams and James W. Brock have persuasively argued that industry consolidation also made America less competitive against foreign firms in the steel<sup>517</sup> and automobile<sup>518</sup> industries.

Notwithstanding the evidence that showed it ill-advised, U.S. banks and financial institutions continued to merge. Placing more and more eggs in fewer and fewer baskets presented obvious risks. The chickens came home to roost in 1984 when the Continental Illinois National Bank & Trust Company, then the nation's seventh largest bank, sank into insolvency as the result of devastatingly bad loans.<sup>519</sup> The Federal Deposit Insurance Corporation (FDIC) decided that protecting depositors' accounts up to the limit allowed by law was not sufficient.<sup>520</sup> Allowing the bank to go out of business would destabilize the nation's financial system. And so the federal government took control of Continental Illinois and propped it up with billions of taxpayer dollars.<sup>521</sup> Those who followed congressional hearings about the bank's failure were introduced to a new term: *too big to fail*.<sup>522</sup> This was in 1984. At that time, the ten largest banks in the nation held less than thirty percent of all bank depositary assets; by 2012, that had grown to fifty-four percent.<sup>523</sup>

In a rational world, the government would have devised a strategy to avoid having to rescue banks with taxpayer money again. It is a cardinal principle of capitalism that failed enterprises should be allowed to go out of business, thereby making room for more needed, more innovative, more efficient, or otherwise superior enterprises. The economist Joseph Schumpeter called this natural and

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516. Wilmarth, *supra* note 501, at 1062–63.

517. WALTER ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* 237–52, 274–81, and 322–23 (2d ed. 2004).

518. *Id.* at 48–52, 64–71, 282.

519. Wilmarth, *supra* note 501, at 994. See also FDIC, *Continental Illinois and “Too Big to Fail,”* in *An Examination of the Banking Crises of the 1980s and Early 1990s*, [https://www.fdic.gov/bank/historical/history/235\\_258.pdf](https://www.fdic.gov/bank/historical/history/235_258.pdf); Richard J. Herring & Jacob Safra, WHARTON FIN. INSTS. CTR., *THE COLLAPSE OF CHICAGO ILLINOIS NATIONAL BANK AND TRUST COMPANY*, <http://fic.wharton.upenn.edu/fic/case%20studies/continental%20full.pdf> (last accessed Oct. 3, 2015).

520. Jonathan R. Macey & James P. Holdcroft Jr., *Failure is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 *YALE L.J.* 1368, 1376–77 (2011).

521. Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 *BROOK. L. REV.* 1295, 1329 (1995).

522. Wilmarth, *supra* note 501, at 994.

523. Steven M. Davidoff, *Weighing the Dodd-Frank Restrictions Against the Power of Big Banks*, *N.Y. TIMES*, Oct. 17, 2012, at B11.

continuing process the “perennial gale of creative destruction.”<sup>524</sup> Moreover, when firms recognize that the government perceives them as too big to fail, moral hazard takes hold and firms are emboldened to take great risks, secure in the knowledge that the government will save them should their choices prove disastrous.

But rather than taking action so that financial institutions were not too big to fail, the government did just the opposite. It continued to permit giants to grow ever larger through mergers. The largest bank in the nation today, JP Morgan Chase, is the product of mergers among Chemical Bank, Manufacturers Hanover, JP Morgan, Bank One, First Chicago, and the National Bank of Detroit—all of which have transpired since 1991.<sup>525</sup> Other banking giants—including Bank of America, Wells Fargo, Citigroup, Goldman Sachs, and Morgan Stanley—were also allowed to grow dramatically through post-1984 mergers.<sup>526</sup> Government itself sometimes actively made matters worse. The FDIC, for example, ultimately sold Continental Illinois to BankAmerica, thereby placing even more eggs in a single basket.

At the same time, the large financial institutions—aided by Chicago School theorists who argued that modern financial markets provide enough information so that traders take care of themselves—persuaded the Clinton administration and Congress to repeal the Glass-Steagall Act, which had separated commercial and investment banking since 1933.<sup>527</sup> This now allowed commercial banks to invest in high-risk ventures, including subprime mortgages and derivatives, and also sparked a new wave of bank mergers.<sup>528</sup> Meanwhile, no compensating regulatory measures were put in effect.<sup>529</sup> Quite the contrary: by the end of the 1990s, regulatory restrictions on banks had been reduced below pre-New Deal levels.<sup>530</sup> All of this led to the crisis of 2008.<sup>531</sup>

We had long known better, so why was this the case? The answer is not complicated. “The basic principle behind any oligarchy is

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524. ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES AND IDEAS OF THE GREAT ECONOMIC THINKERS* 302 (7th rev'd ed. 1999).

525. SIMON JOHNSON & JAMES KWAK, *13 BANKERS* 59 (2010).

526. *Id.* at 35.

527. *See id.* at 32–38 (regarding enactment of Glass-Steagall), 133–44 (regarding repeal of Glass-Steagall and ensuing activity by the banks). *See also* STIGLITZ, *supra* note 50, at 81–85.

528. HENRY M. PAULSON JR., *ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM* 95 (2010).

529. *Id.*

530. *See* JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 69 (referring to work by economists Thomas Philippon and Ariell Reshef). *See also* PAULSON, *supra* note 528 (noting that regulation had not kept pace with changes brought about by repeal of Glass-Steagall and the resulting wave of bank mergers).

that economic power yields political power,” write Simon Johnson and James Kwak.<sup>532</sup> Large enterprises have more political power. They can make large contributions to political campaigns, political parties, and advocacy groups, and they often can unite with their employees and their unions to lobby for what is in their interests.<sup>533</sup> They have the ears of the president and members of Congress, who wish to keep them happy. They have a greater capacity to capture regulatory agencies.<sup>534</sup> Power is further accentuated when a small number of firms dominate an industry, making it easier for them to reach consensus and lobby for what they perceive to be in their mutual interest.

Banking has become a true oligopoly in the United States. Today, eighteen commercial banks rank among the five hundred largest companies in the nation.<sup>535</sup> Although all eighteen of these banks are giants, the top four—JP Morgan Chase, Bank of America, Citigroup, and Wells Fargo—dwarf the industry. Their combined annual revenue is nearly \$390 billion while the combined revenue of the next fourteen largest banks is about \$239 billion.<sup>536</sup>

Political contributions by the financial sector laid the groundwork for the repeal of Glass-Steagall and lax regulation of the industry. In fact, political contributions from that sector quadrupled from 1990 to 2006, making it, by far, the highest-contributing group in the country (with the health care industry a distant second).<sup>537</sup> Key beneficiaries of this largesse were chairs of the Senate Banking Committee, including Alfonse D’Amato (R-NY), who chaired the committee from 1995 to 1998, and Phil Gramm (R-TX), who became chair in 1999, and was the prime sponsor of the legislation repealing Glass-Steagall.<sup>538</sup> Large contributions from the financial sector flowed to congressional members of both parties. In addition, during 1999 the financial sector spent over \$214 million lobbying.<sup>539</sup> In November 1999 the bill repealing Glass-Steagall Act

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531. See, e.g., James Rickards, *Repeal of Glass-Steagall Caused the Financial Crisis*, U.S. NEWS (Aug. 27, 2012), <http://www.usnews.com/opinion/blogs/economic-intelligence/2012/08/27/repeal-of-glass-steagall-caused-the-financial-crisis>.

532. *Id.* at 74.

533. ADAMS & BROCK, *supra* note 517, at ch. 21, “The Labor-Industrial Complex.”

534. STIGLITZ, *supra* note 50, 312–16, 337, 342 (2010).

535. *500 Largest U.S. Corporations*, *supra* note 488, at F-30.

536. *Id.*

537. JOHNSON & KWAK, *supra* note 525, at 90–91. The financial sector includes both the banking and securities industries.

538. *Id.* at 91–92. The Gramm-Leach-Bliley Act, 15 U.S.C. § 6810 *et seq.*, repealed most of the Glass-Steagall Act.

539. *Ranked Sectors*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/top.php?showYear=1999&indexType=c>. This figure comes from the Center for Responsive Politics,

was passed 90-8 in the Senate<sup>540</sup> and 362-57 in the House of Representatives.<sup>541</sup>

While the government injected billions of dollars into giant financial institutions through the Troubled Asset Relief Program (TARP), it provided no help to small banks holding the same kind of toxic assets, and more than three hundred small banks and credit unions failed.<sup>542</sup> The government was only rescuing financial institutions that were so large that their collapse would bring down the national economy.

As understandable as that rationale may be, a few things bear mentioning. First, small businesses depended on credit from those small banks. No one stepped in to fill this need, and as a result 170,000 small businesses went out of business during the crisis.<sup>543</sup> Second, the government hoped that the large banks would use TARP funds to extend loans to businesses, thereby stimulating the economy. That did not happen, at least not to the extent the government hoped.<sup>544</sup> Instead, the large financial institutions used much of the money to pay off their creditors, who were often other large financial institutions. Moreover, unlike most corporate reorganizations when creditors must accept less than the full amount of what they are due, the large banks were paid off at the rate of one hundred cents on the dollar.<sup>545</sup> Nearly \$13 billion in TARP funds provided to the American International Group (AIG) were, in turn, paid over to Goldman Sachs, which was AIG's largest creditor.<sup>546</sup> Even after being rescued from its mismanagement by American taxpayers, AIG infamously paid \$168 million in bonuses to its top executives.<sup>547</sup> Some of the TARP money was simply held by the large financial institutions. Precious little of the TARP funds were used to provide credit to American businesses and assist national recovery. Most relevant for our purposes, the large financial institutions used some of their TARP funds to acquire other financial institutions, thereby exacerbating the too-big-to-fail problem.<sup>548</sup>

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and represents lobbying expenses by firms in what it classifies the financial/insurance/real estate sector.

540. *S. 900 (106th): Gramm-Leach-Bliley Act*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/106-1999/s354> (Vote on Nov. 4, 1999 to approve the conference committee report).

541. *Id.*

542. ELIZABETH WARREN, *A FIGHTING CHANCE* 124 (2014).

543. *Id.*

544. *Id.* at 111–12. *See also* STIGLITZ, *supra* note 50, at 125 (stating that “U.S. banks carried on paying out dividends and bonuses and didn’t even pretend to resume lending.”).

545. JOHNSON & KWAK, *supra* note 525, at 169–70. *See also* WARREN, *supra* note 542, at 111.

546. WARREN, *supra* note 542, at 111.

547. *Id.* at 104.

548. *Id.* at 112.

I am not arguing that in the exigency of the 2008 crisis government regulators should not have combined failing banks. The nation faced imminent economic collapse, and emergencies sometimes require making a bad choice when the only alternatives are worse. Nevertheless, the history that led up to the crisis, choices made during the crisis, and what we have done since the crisis demonstrate that companies can be too big to regulate. Prior to the crisis, regulators permitted banks to merge themselves into entities that were too big to fail even while recognizing both the risks and the fact that mergers were not yielding the benefits that the banks claimed. During the crises, the government should have insisted on tougher terms.<sup>549</sup>

Government regulators claimed they had limited authority to demand more stringent terms. “But that is not a complete explanation,” write Simon Johnson and James Kwak, “because there is little evidence that the government attempted to force the issue.” It was not only that the government had a weak hand; it was that the government negotiators came to the table largely in agreement with the bankers’ view of the world.<sup>550</sup> In other words, regulators were psychologically captured by the big banks.<sup>551</sup>

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549. For example, the government might have received greater assets in return for the TARP funds; required that bank creditors be paid off at discounted rates, as would have occurred had the banks gone through reorganization; and prohibited bank executives from receiving bonuses. *See, e.g., id.* at 104 (arguing that the government overpaid for the assets it received).

550. JOHNSON & KWAK, *supra* note 525, at 185.

551. For example, Treasury Secretary Henry Paulson and five of his top aides, including the man placed in charge of the TARP program, had previously worked at Goldman Sachs. *Id.* at 94 and 185.

I say the regulators were psychologically captured, but the term scholars generally employ is “cognitive capture.” STIGLITZ, *supra* note 50, at 384 n.57. Regulatory capture, cognitive and otherwise, has been a subject of wide interest for more than half a century. The literature on the topic is vast. *See, e.g.,* Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221 (2012), Gerald Caprio Jr., *Regulatory Capture: How it Occurs, How to Minimize It*, 18 N.C. BANKING INST. 39 (2013), and sources cited therein. *See also* BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA, *supra* note 111, at 138–72 (describing how regulatory agencies are weakened through a confluence of factors including capture, cycling, and ossification).

George Stiglitz argues that the banking crisis weakened faith in democracy. He writes:

In the developing world people look at Washington and see a system of government that allowed Wall Street to write self-serving rules, which put at risk the entire global economy, and then when the day of reckoning came, Washington turned to those from Wall Street and their cronies to manage the recovery—in ways that gave Wall Street amounts of money that would be beyond the wildest dreams of the most corrupt in the developing world. They see corruption American-style as perhaps more sophisticated—bags of money don’t change hands in dark corners—but just as nefarious.

After the financial crisis was over, we should have found a way to disaggregate these institutions so that today no bank is too big to fail. We had too many eggs in too few baskets in 2008; we have more eggs in even fewer baskets now. The official government position is that we solved the too-big-to-fail problem through regulation by enacting the Dodd-Frank Act.<sup>552</sup> That legislation is designed to identify “systemically important”—i.e., too-big-too-fail—financial institutions, and provide government regulators with authority to ensure that they will not fail or, if they do, that the government can seize the institutions and liquidate the interests of their stockholders and bondholders.<sup>553</sup> The merits of this immensely complex legislation are beyond the scope of this Article. However, astute observers argue that bank lobbyists succeeded in weakening Dodd-Frank to the point where it is unlikely to prove an adequate safeguard in future crises, and are continuing to weaken it still further.<sup>554</sup>

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STIGLITZ, *supra* note 50, at 225–26. It bears mentioning that TARP ultimately produced a net profit for taxpayers. Cokie Roberts & Steven V. Roberts, *Why Obama’s Economic Policies Are Working*, PITTSBURGH POST-GAZETTE, Jan. 9, 2015, at A8. This does not detract from Stiglitz point about public perceptions.

552. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2011, P.L. 111-203, 124 Stat. 1376 (2010). For the official White House position, see *Wall Street Reform: The Dodd-Frank Act*, THE WHITE HOUSE, <http://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform>.

553. *Id.* See also Arthur E. Wilmarth Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 954 (noting that the Act’s preamble states that one of its main purposes is “to protect the American taxpayer by ending bailouts”); and STIGLITZ, *supra* note 50, at 335–38.

554. See, e.g., Larissa Roxanna Smith & Victor M. Muñoz-Fratocelli, *Strategic Shortcomings of the Dodd-Frank Act*, 58 ANTITRUST BULL. 617, 632 (2013) (arguing that fines authorized by the Act have limited deterrent value, and the threat of liquidating failing firms lacks credibility); John C. Coffee Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Seems to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1081 (2012) (arguing that government regulators are “far better at prosecuting outliers and crooks than in controlling reckless ambition by those at the top of the corporate hierarchy,” and that while Dodd-Frank is not likely to provide adequate protection); Wilmarth., *supra* note 553. See also Elizabeth Warren, John McCain, Maria Cantwell, & Angus King, *We Need to Rein In Too Big To Fail Banks*, CNN OPINION (July 17, 2014), <http://www.cnn.com/2014/07/17/opinion/warren-mccain-big-banks>; Gretchen Morgenson, *Bailout Risk, Far Beyond the Big Banks*, N.Y. TIMES, Jan. 12, 2014, at BU-1 (stating that “[e]veryone knows that the largest of our nation’s banks would be destined for a taxpayer bailout if they ran into trouble anytime soon”); Anat R. Admati, *We’re All Still Hostage to the Big Banks*, N.Y. TIMES, Aug. 26, 2013, at A21; Gary Rivlin, *How Wall Street Defanged Dodd-Frank*, NATION (May 20, 2013), <http://www.thenation.com/article/174113/how-wall-street-defanged-dodd-frank>; Steven M. Davidoff, *supra* note 523 (stating “[t]he bottom line is that there are real problems with Dodd-Frank”); George F. Will, *Break Up the Banks*, WASH. POST, Oct. 12, 2012, at A21; Sherrod Brown, *Break Up the Big Banks*, WASH. POST, June 7, 2012, at A23. Cf. Paul Krugman, *Obama’s Other Success: Dodd-Frank Financial Reform is Working*, N.Y. TIMES (Aug. 3, 2014), <http://www.nytimes.com/2014/08/04/opinion/paul->

Immediately after Republicans won control of the Senate in the 2014 elections—giving them majorities in both houses of Congress—their first order of business was repealing the Dodd-Frank provision that forbade banks from investing FDIC-insured funds in high-risk instruments such as default swaps and trading derivatives and commodities.<sup>555</sup> As a matter of public policy, the repeal was, as one former Treasury official said, “outrageous.”<sup>556</sup> Investments of this kind were a key cause of the 2008 financial crisis.<sup>557</sup>

Nevertheless, the president backed the initiative.<sup>558</sup> The White House argued that it had cut a deal with Republicans in which, in return for the president’s support, Republicans would not seek to repeal other provisions of Dodd-Frank as well.<sup>559</sup> All of this was very telling. The repeal was patently antithetical to capitalist principles, which hold that those who take market risks should reap the fruits or suffer the losses of their decisions. But by being able to bet taxpayer-insured money on high-risk investments, the big banks will own any profits generated by the investments while taxpayers will cover losses. Why then did the Republicans want to do this—indeed, make it the very first thing they sought to do after winning an election—and why did the Democratic president capitulate?<sup>560</sup>

The reason was simple: Citigroup, JP Morgan, and Bank of America lobbied heavily for it.<sup>561</sup> Indeed, *New York Times* reported that Citigroup drafted the legislation.<sup>562</sup> Those banks—gigantic and immensely powerful—have the clout to get what they want, even if it is patently counter to the public interest.

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krugman-dodd-frank-financial-reform-is-working.html?\_r=0 (concluding that although reform did not go far enough, the fact that banks are continuing to lobby hard to gut the law still further must mean that “it’s an important step in the right direction”).

555. Steven Mufson & Tom Hamburger, *Large U.S. Banks Said to Press Officials on Easing Dodd-Frank*, WASH. POST, Dec. 12, 2014, at A22.

556. *Id.*

557. The official went on to say: “This was the epicenter of the crisis. This is what brought AIG down, what brought Lehman Brothers down.” *Id.*

558. *Id.*

559. *Id.*

560. The effort to weaken regulation corporate trading regulation extended beyond Dodd-Frank. The first bill enacted by the 114th Congress was the Terrorism Risk Insurance Program Reauthorization Act of 2015. Large corporations—including Koch Industries, which has one of the largest derivative trading businesses in the world—successfully lobbied Congress to include into that legislation an unrelated provision that prohibits commodity regulators from mandating collateral and margin requirements for large corporate derivative trades. Lee Fang, *Congress Incorporated: A Surge of Corporate Officials and Lobbyists Have Seized Control of Legislative Power*, NATION, March 2/9, 2015, at 12, 14.

561. *Id.*

562. Eric Lipton & Ben Protess, *Bank Lobbyists Help in Drafting Financial Bills*, N.Y. TIMES (May 23, 2013), <http://dealbook.nytimes.com/2013/05/23/banks-lobbyists-help-in-drafting-financial-bills>.



*B. The New Serfdom*

When Brandeis and Woodrow Wilson talked about big businesses turning Americans into serfs, they focused on what it was like to work for huge bureaucracies, particularly the lack of autonomy for mid-level managers. But a second route to serfdom has more recently become apparent—a route not for the people directly employed by big businesses but for the owners and operators of small firms who do business with the giant corporations. In this case, the men and women who find themselves at first ensnared and ultimately imprisoned in a modern serfdom are often the very people who valued their independence.

The industrial meat producing industry offers a prime example. Let's start with chicken production—a story superbly told by investigative journalist, Christopher Leonard, in his recent book.<sup>563</sup>

Today chickens are grown from baby chicks to slaughter-ready size in chicken houses that may be as long as three football fields, and equipped with computer-controlled feeders, water troughs, and ventilation systems. A chicken farmer who owns a facility consisting of a number of such houses raises tens of thousands of chickens simultaneously. That farmer appears to be an independent, self-reliant businessperson. He has borrowed funds from a bank to build and equip his chicken houses, which cost hundreds of thousands apiece, or about two million dollars for a complete facility, and is responsible for meeting his payments on the loan.<sup>564</sup> He raises the chicken himself, through his own labors and those of his own family and employees. The profits or losses from the operation are his. Nevertheless, his independence is an illusion.

The typical chicken farmer is a cog in a mammoth machine operated by one of two companies, Tyson Foods or Pilgrim's Pride. Both of these corporations are giants. Tyson, the ninety-third largest company in the country, has annual revenues of about \$34.5 billion.<sup>565</sup> Pilgrim's Pride, which had \$8.1 billion in sales in 2012, is part of an even larger entity, JBS S.A., a Brazilian multinational and the world's largest beef producer, selling its product under a number of brand names including Swift.<sup>566</sup>

If the chicken grower were, in fact, an independent businessperson, he would be able to sell his chickens on the open market to

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563. CHRISTOPHER LEONARD, *THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA'S FOOD BUSINESS* (2014).

564. *Id.* at 23.

565. *500 Largest U.S. Corporations*, *supra* note 488, at F-31.

566. JBS owns 75.5% of Pilgrim's stock. *See About Us*, PILGRIM'S, <http://www.pilgrims.com/our-company/about-us.aspx>.

Tyson, Pilgrim's Pride, or someone else. But the typical chicken grower cannot sell his chickens on the open market. In fact, they aren't even *his* chickens. The typical chicken farmer—or as he may more accurately be called today, chicken grower<sup>567</sup>—raises chickens under multi-year contracts for either Tyson or Pilgrim's Pride.<sup>568</sup> If the grower has a standing arrangement with Tyson, every eight weeks or so Tyson delivers to him tens of thousands of baby chicks.<sup>569</sup> He never takes ownership of those chickens; they remain Tyson's property and are at the grower's facility on consignment.<sup>570</sup> The grower raises those chicks under strict supervision from Tyson. He feeds the chickens Tyson chicken feed, and Tyson field technicians periodically visit the chickens on his farm. About eight weeks after delivery, Tyson returns and picks up the now ready-for-slaughter chickens.

Back at its own facility, Tyson weighs the chickens, and then pays the grower a sum that is based on a formula that takes into account how much weight the chickens gained and how much feed they consumed, and then compares those figures to chickens raised by other chicken growers in the same geographic area.<sup>571</sup> If the grower's chickens are below average in terms of weight gained relative to feed consumed (what Tyson calls "feed conversion"), he will receive a reduced payment.<sup>572</sup> It is a tournament system, pitting growers against each other. Yet the grower has limited control over the result.<sup>573</sup> He must accept whatever chicks are delivered to him. They have been bred by Tyson. Some batches are genetically stronger or simply healthier than others. He must feed them the food that Tyson supplies, and raise them in environmental conditions that Tyson dictates.

Today Tyson Foods Company is a vertically-integrated firm that, with one exception, spans the entire spectrum of chicken production. Tyson owns the hatcheries, feed mills, slaughterhouses,

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567. Farmer is still the term used, mainly for reasons of tradition. LEONARD, *supra* note 563, at 17.

568. Regarding the combined market share of Tyson and Pilgrim, *see id.* at 266 (noting that by 2008 Tyson's and Pilgrim Pride controlled more than forty percent of the national chicken market) and at 266 (describing evidence that suggests that has been sufficient to give the two companies the power to reduce total industry production and increase prices). Regarding the multi-year aspect of at least some contracts, *see id.* at 138 (describing a three-year contract between Tyson and a grower). Nevertheless, Tyson may cancel a grower's contract at any time. *Id.* at 24.

569. *See id.* at 17–20 (describing the process).

570. For a brief description of the contracts and relationships between Tyson and its chicken growers, *see id.* at 23–25. For a more extended description, *see id.* at 113–32.

571. *Id.* at 115–22, 131–32.

572. *See id.* at 114–22 (describing tournament system).

573. *Id.* at 23–38, 117, 131, 132–37.

processing plants where the meat is packaged for the supermarket shelves or processed for ready-to-eat products such as those for McDonald's, distribution centers, and even the trucking enterprises that transports the chickens between all of these facilities.<sup>574</sup> This vertical integration builds high barriers to entry for potential new rivals. Anyone else entering the chicken business would be forced to build their own hatcheries, slaughterhouses, and processing plants because the existing ones are largely controlled by Tyson or Pilgrim's Pride.<sup>575</sup> Shutting out potential new competition is, in fact, one of the things that makes vertical integration so attractive to large companies. The one link in the vertical chain that Tyson has not internalized is growing the chicks until they are ready for slaughter. Chicken growing is extremely labor-intensive and therefore potentially costly.<sup>576</sup> The chickens have to be attended to constantly. Although the automated systems make it possible to raise vast numbers of chickens at one time, there are many matters that require constant attention, such as removing clogs in the feed troughs and the carcasses of dead birds. This makes chicken growing costly, especially if the workers are entitled to minimum wage, overtime pay, and benefits.<sup>577</sup> It is for this reason that both Tyson and Pilgrim's Pride contract out farming.<sup>578</sup>

Because it depends on chicken farms, one might expect that Tyson would want that business to be profitable. But that is not the case. Power wants to suppress countervailing power. Tyson does not want chicken growers to be capable of organizing, bargaining collectively, or hiring lawyers or lobbyists.<sup>579</sup> It is better for Tyson if chicken growers lack the time, energy, and financial resources to

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574. *Id.* at 5, 62, 106–07, 288.

575. *See id.* at 6, 108.

576. Tyson decided to externalize the chicken growing part of the business because it “realized that chicken farming was a losing game.” *Id.* at 22. Moreover, it found chicken growing unprofitable even though it successfully prevailed in litigation with the Department of Labor, successfully arguing that it did not have to pay workers minimum wage because farms are exempt. *Id.* at 83.

577. Should a feed or water line temporarily stop working, for example, chickens will start pecking themselves to death. *Id.* 30. Growers need to also constantly remove dead birds from the houses. *Id.* at 126. Consequently, a “seven-day workweek [is] required for chicken farming.” *Id.* at 32.

578. *Id.* at 22. Tyson experimented with owning its own farms but found it difficult to incentivize employees to do the hard work of chicken farming. *Id.* at 71.

579. After forming the Northwest Poultry Growers Association, a group of farmers believed that Tyson was cancelling their contracts in retribution. *Id.* at 79, 84–85. The U.S. Department of Agriculture sought to intervene on the farmers' behalf, but Tyson successfully argued that the Department lacked statutory authority to do so. *See Arkansas Valley Indus. Inc. v. Freeman*, 415 F.2d 713 (8th Cir. 1969); and LEONARD, *supra* note 563, at 256 (reporting that farmers remain afraid that Tyson will cancel their contracts if they band together in a union or association).

seek to improve their relationships with Tyson. Tyson therefore calibrates the levels at which it pays chicken growers so that, at best, chicken growers scrape by but are constantly fretting about paying their bills. It doesn't look this bleak to people who are considering chicken farming. The potential new chicken grower is led to expect that with hard work his enterprise will be profitable.<sup>580</sup>

But once they are in the system growers discover the harsh realities of the tournament. Other growers are also working hard, and it is difficult to consistently keep winning the tournament. Even if all of the growers perform superbly and have excellent feed conversion rates half of them will nonetheless fall below the average.<sup>581</sup> Tyson can manipulate the rankings in many ways, such as by simply picking up chicks a few days earlier from one farm than from another. Tyson does not disclose to the growers much of the key information on which their payments are based. It does not identify the other farms against which one is being ranked, and its contracts have stringent confidentiality provisions that prohibit growers from comparing their payment information with each other.<sup>582</sup>

Overall, chicken growers have long been receiving a constantly-shrinking fraction of the money that consumers spend on chicken while Tyson's share keeps increasing.<sup>583</sup> Christopher Leonard writes: "Tyson exercises [its] power in a way that systematically depresses the prices it pays to many growers, creating a new breed of high-tech sharecroppers who live on the ragged edge of bankruptcy."<sup>584</sup> Some individuals whose families farmed for generations have left farming entirely, either because they were driven into bankruptcy or decided that scraping by at a bare subsistence level is not worth backbreaking work and never-ending anxiety.<sup>585</sup>

Meanwhile, immigrant families have entered the business, believing that because they are used to hard work, seven-day workweeks, and sacrifice, they could succeed.<sup>586</sup> In parts of Arkansas, for example, Laotian immigrants took up chicken farming while native

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580. *See id.* at 45–46 (describing how the business looked good on paper to a prospective new chicken farmer).

581. *Id.* at 122.

582. *Id.* at 117.

583. *Id.* at 7. *See also id.* at 34–35 (reporting that chicken farmers' revenue has been generally flat for decades even though their expenses have risen dramatically).

584. *Id.* at 114–15. Many farmers wind up in bankruptcy. *See id.* at 38–40, 45, 137–38, and 188 (describing farmer bankruptcies).

585. *See, e.g., id.* at 25–32 and 38–45 (describing how Jerry Yandell took over chicken farming in Arkansas from his father and hoped to pass on the farm his sons, who grew up helping him in the business, only to be driven into bankruptcy and out of farming entirely), and 125–27 (describing how Greg and Donna Owens were driven into bankruptcy by Tyson's tournament system).

586. *Id.* at 113–15.

Arkansans left the business.<sup>587</sup> However, they too soon discovered the harsh realities of the tournament contract farming.<sup>588</sup> Despite operating large farms with tens of thousands of chickens, some of the Laotian chicken growers have budgeted as little as six dollars per day—or in some cases, even less—to feed each member of their family.<sup>589</sup>

If a chicken grower does not like doing business with Tyson, why doesn't he give up contract farming, raise his own chickens, and sell them on the open market? That is often impossible. The chicken business is an oligopoly.<sup>590</sup> Two companies, Tyson and Pilgrim's Pride, control nearly half of all chicken production in the United States.<sup>591</sup> In many areas of the country, there is no chicken market apart from these two companies.<sup>592</sup> As a practical matter, many chicken farmers are forced to deal exclusively with either Tyson or Pilgrim's Pride. There is simply no one else close enough with whom to do business.<sup>593</sup>

Tyson reached its present size and power through mergers. Between 1962 and 1997, Tyson acquired no less than thirty-three separate companies.<sup>594</sup> Some of these were vertical mergers and acquisitions, the kind that the Chicago School argues should not concern antitrust law. In 1994, for example, Tyson purchased Cobb-Vantress, a venerable Massachusetts firm that specialized in poultry breeding and had developed genetic lines of chickens that grow faster and have bigger breasts.<sup>595</sup> This allowed Tyson to effectively own the DNA of more-profitable chickens.

Tyson also made large horizontal acquisitions. Like Amazon and other powerful companies, it found ways to acquire firms that decidedly did not want to be absorbed by Tyson. In the early 1980s, for example, Tyson wanted to purchase Valmac Poultry, a major

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587. See, e.g., *id.* at 45–46, 113–15, 119–20, 123–25, 127–39 (describing the experiences of Laotian immigrants).

588. See, e.g., *id.* at 127–39 (describing how the Laotian farmers found themselves “beset by bankruptcy and failures”).

589. *Id.* at 142–43.

590. Christopher Leonard argues each of the two companies has the ability to manipulate market prices. *Id.* at 270–71, 313. Cf. *In the Matter of Pilgrim's Pride*, 728 F.3d 457, 462 (5th Cir. 2013) (per curiam) (reversing a district court finding that in 2008 Pilgrim's Pride cut production to drive up prices, finding instead that the company cut production because it had been producing more chicken than the market demanded, which had been suppressing prices).

591. See LEONARD, *supra* note 563, at 266.

592. Leonard explains that “many farmers live close enough to only one chicken company with which they can do business.” See *id.* at 136–37.

593. See *id.*

594. *Id.* at 110. See also *id.* at 93.

595. *Id.* at 108–09.

competitor that was then processing 153 million chickens annually.<sup>596</sup> Valmac's owners wanted to remain independent and refused to sell. At a time when Valmac was short of cash and behind on its payments, Tyson purchased from a third party a \$10 million Valmac note collateralized by Valmac stock, and called in the loan. Wishing at all costs to avoid being taken over by Tyson, Valmac declared bankruptcy, and persuaded the bankruptcy court to allow the investment firm Bass Brothers Enterprises to purchase it. That maneuver was for naught. Tyson immediately offered Bass Brothers a price that was significantly higher than it had paid for Valmac's stock, and within thirty days Tyson owned Valmac after all. Some might argue that this is a desirable result because wealth is destroyed if a firm cannot be sold to the highest bidder. However, a firm such as Valmac is worth more to an oligopolist than to some other purchaser who would not have an oligopolist's share of the market because it is more profitable to control a market than to do business in a highly competitive market.

Chicken farming is not unique. Oligopolies control beef, pork, grain, and seed production as well. Thirty years ago there were hundreds of small meatpackers, and the four largest firms controlled no more than about a third of the beef market.<sup>597</sup> Today that market is also controlled by four firms—Tyson, JBS, Cargill Incorporated, and National Beef Packing Company, LLC—which collectively purchase eighty-five percent of all of cattle sold in the United States.<sup>598</sup> Christopher Leonard reports that “[t]here is ample evidence that the big four meatpackers have chosen to divvy up the market, picking territories where they can buy all the cattle from a feedlot without facing a competing bid.”<sup>599</sup> Once again, industry consolidation resulted from many mergers, with big fish swallowing small fish, and then in turn being swallowed by even bigger fish.<sup>600</sup>

Smithfield Foods is the largest company in pork production.<sup>601</sup> It is a multinational corporation operating in the U.S., Mexico, and throughout the world. According to one source, Smithfield has more sows in the U.S. than the next three largest pork producers

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596. For the Tyson-Valmac story, see LEONARD, *supra* note 563, at 100–01.

597. *See id.* at 212 (stating that in 1980 the four largest “controlled just 36 percent of the cattle market”). *But see id.* at 171 (stating that by 1980 the four biggest beef companies “controlled only about 25 percent of the total market”).

598. *Id.* at 208.

599. *Id.* at 209.

600. For example, Iowa Beef Packers (IBP) became a giant in its industry by acquiring dozens of rivals. *Id.* at 171. Tyson purchased IBP in 2001. *Id.* at 176.

601. Smithfield Foods's annual revenues total \$13.2 billion, placing it at number 214 on the Fortune 500. *500 Largest U.S. Corporations*, *supra* note 488, at F-11.

combined.<sup>602</sup> Like Tyson, Smithfield achieved its present size and dominance through multiple mergers.<sup>603</sup> In 1999, for example, Smithfield acquired Murphy Farms, which was itself so large that contract farmers in Iowa were raising 900,000 pigs for Murphy Farms.<sup>604</sup> As is the case in the chicken industry, the large pork producers are also vertically-integrated enterprises.<sup>605</sup> Indeed, Seaboard Corporation, one of the biggest pork producers with \$6.67 billion in annual revenues, boasts that it “controls every step” of an “integrated food system.”<sup>606</sup> The Tyson-style contract-farming method has become so pervasive in pork production that only two percent of all hogs in the United States are sold through negotiated prices in the market.<sup>607</sup> Here too the large producers continually squeeze the growers economically. Thirty years ago, hog farmers received about half of the money that consumers paid for pork. Today they receive less than twenty-five cents of the consumer’s dollar.<sup>608</sup>

The grain and seed markets are, if anything, even more highly concentrated. Archer Daniels Midland and Cargill Incorporated control the lion’s share of the grain market.<sup>609</sup> These firms are both super-giants. Archer Daniels Midland’s revenues are nearly triple, and Cargill’s nearly quadruple, Tyson’s revenues.<sup>610</sup> Meanwhile, the biotechnology company Monsanto dominates the seed industry.<sup>611</sup>

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602. *Top 25 U.S. Pork Powerhouses 2013*, SUCCESSFUL FARMING, [http://www.agriculture.com/uploads/assets/promo/external/pdf/PP2013\\_03.pdf](http://www.agriculture.com/uploads/assets/promo/external/pdf/PP2013_03.pdf).

603. LEONARD, *supra* note 563, at 168.

604. *Id.* at 240.

605. Tyson and Cargill and also large pork producers. Another giant, Hormel Foods, is also involved in pork production but mostly produces consumer foods. It too continually grows through mergers. Hormel’s most recent acquisitions include Skippy (2013) and Muscle Milk (2014). *See Milestones in Our History*, HORMEL FOODS, <http://www.hormelfoods.com/About/History/Company-History/>.

606. *History*, SEABOARD FOODS, <http://www.seaboardfoods.com/About/Pages/History.aspx> (last visited Oct. 3, 2015). For revenue, *see 500 Largest U.S. Corporations*, *supra* note 488, at F-17. Seaboard Foods is a division of Seaboard Corporation. Its consumer brands are Daily’s and Prairie Fresh.

607. LEONARD, *supra* note 563, at 202. *See also id.* at 236 (reporting more than seventy percent of hogs in Iowa are raised through contract farming).

608. *Id.* at 204.

609. *See id.* at 235.

610. *See 500 Largest U.S. Corporations*, *supra* note 488, at F-31 (reporting Archer Daniel Midland’s revenues are \$89.8 billion); *At a Glance*, CARGILL, <http://www.cargill.com/company/glance/index.jsp> (reporting Cargill’s revenues are \$134.9). Because Cargill is a private company it is not ranked by *Fortune* magazine, but it if were, it would place at number eleven on the Fortune 500, just ahead of AT&T.

611. Monsanto’s revenues are \$14.9 billion, placing it at number 197 in the Fortune 500. *500 Largest U.S. Corporations*, *supra* note 488, at F-9. Monsanto achieved its monopoly position in many products—including transgenic corn, canola, soy, and cotton seeds—not merely through patents but through a series of mergers with other companies. *See, e.g., Monsanto Signs Five Corn Seed Deals*, CHEMICAL WK. (Sept. 7, 2005), available at 2005 WLNR 25475530.

It is monopsony power that has enabled the big meat producers to turn farmers into serfs. Monopsony is the flip side of monopoly. Monopoly refers to the ability of a single seller to control a market; monopsony refers to market dominance by a single buyer.<sup>612</sup> From the consumer's point of view, the large meat companies are oligopolists, but from the farmer's point of view, they are oligopsonists. In either case, there is not sufficient choice for a free market to operate. Someone who must buy or purchase is essentially forced to do so on terms dictated by the other, more powerful party. It is worth making the distinction between monopoly and monopsony, however, because modern antitrust law often ignores the coercive power of the monopsonists. Its single-minded focus on consumer welfare seeks to protect citizens in their roles as consumers while often ignoring their at least equally important roles as workers and entrepreneurs.

The largest monopsonist in America today is also the largest corporation in the nation, namely, Walmart Stores.<sup>613</sup> Walmart also turns small and medium-sized businesses into modern-day serfs. As is the case with the large meat companies, the Walmart road to serfdom can be seen as a commercial version of the classic morality play about selling one's soul to the devil. Businesses start down the road voluntarily but wind up ensnared and unable to either exercise independence or escape. They may have been lured by an invitation to become Walmart's main supplier of a particular product.<sup>614</sup> That can be extremely seductive. Walmart is so enormous that being its main supplier will generally make Walmart a manufacturer's largest customer—by far. So, the business accepts. To meet Walmart's volume requirements, the manufacturer may have to significantly increase its production. It may have to open new plants, and borrow funds to do so. It may also have to suspend deliveries to existing customers because it cannot ramp up fast enough to serve both Walmart and its other customers, and now it must give Walmart priority.<sup>615</sup> It seems well worth it at first.

Walmart, however, is all about low prices—and it seeks to continuously lower its prices. In the second year, therefore, Walmart asks

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612. See HOVENKAMP, *supra* note 89, at 14 (describing monopsony power).

613. See *Fortune 500*, *supra* note 488, at F-1 (reporting Walmart's annual revenues at \$473 billion and ranking it the largest corporation in the America by that measure).

614. See FISHMAN, *supra* note 493, at ch. 4 (describing the process).

615. Proctor & Gamble and Gillette were forced to merge, in part, to achieve the economies of scale necessary to meet Walmart's demands. *Id.* at 12. Walmart is so critical to its business, that Proctor & Gamble has an office with 250 employees near Walmart's headquarters in Bentonville, Alabama dedicated to servicing its most important customer. Indeed, more than seven hundred companies have offices in or near Bentonville in order to service Walmart. *Id.* at 63.



the supplier to reduce its wholesale price because Walmart wants to cut its retail price. The supplier works at becoming more efficient, and may be able to do so. In the third year, though, Walmart wants another price cut. It is willing to provide advice about how its supplier can increase efficiency further, and with Walmart's assistance, the supplier may succeed in reducing its costs enough to offset the price cut that it must give Walmart.<sup>616</sup>

But Walmart's pressure to lower prices is relentless. The company demands another price reduction in the fourth year, the fifth year, and every year.<sup>617</sup> At some point, the manufacturer hits the wall and cannot increase efficiency further.<sup>618</sup> It is now selling to Walmart at a loss; but it is addicted to Walmart's cash flow and cannot terminate the relationship and survive. In some instances, Walmart will tell its supplier that it can reduce production costs further by moving its factories overseas, and many manufacturers have done so.<sup>619</sup> Others are driven into bankruptcy. Indeed, about half of the Walmart's ten largest suppliers in 1994 ultimately went bankrupt.<sup>620</sup> When that happens, Walmart simply begins again with a new main supplier. One might think that based on the unhappy experience of its rival, Walmart would have trouble luring a replacement. But greed and hubris are powerful magnets; it can be surprisingly easy to persuade oneself that he will succeed where others have failed.

There is nothing inherently evil in Walmart's approach. Walmart is dedicated to making a profit, which is what we expect companies to do. Moreover, much good flows from Walmart's approach. It provides low consumer prices, and consumers are grateful, which is why Walmart is so successful. The problem lies not with Walmart's agenda or its business ethics but with its size.

It is, in fact, difficult to grasp how large and influential this company has become. Walmart is the largest retail seller of just about every consumer product in the country. Dial Soap, to take just one

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616. Walmart will work with new suppliers to help them lower costs. For example, it might partner with a supplier to use Walmart trucks that are running empty on a return trip to move goods destined for Walmart. *Id.* at 64-65. The general rule is that for price savings achieved through such partnerships, the supplier keeps one-third, Walmart gets one-third, and one-third is passed onto to customers in retail price reductions. *Id.* at 65-66.

617. *See id.* at 88 (stating that Walmart often insists that manufacturers of basic consumer products cut their wholesale price by five percent per year).

618. *Id.* at 106.

619. *Id.* at 102-06. Companies that sell more than twenty-five percent of their output to Walmart have much thinner profit margins than those that sell no more than ten percent of their output to Walmart. *Id.* at 163.

620. *Id.* at 160.

example, sells thirty percent of all of total output to Walmart, approximately equal to the amount it sells to its next ten largest customers.<sup>621</sup> About forty-five percent of all Americans visit a Walmart store each week.<sup>622</sup> There has never been anything like that in the world—one company with which nearly half of the nation’s residents trade that frequently.

What about Walmart’s impact on employment? When it opens a new store, does it add or subtract jobs from the local community? It appears that Walmart adds jobs, but just a smidgeon. According to one study, a new Walmart store will employ 150 to 350 workers, but within five years of opening it will put four retail stores out of business and cause other retailers to reduce the number of their employees.<sup>623</sup> And because Walmart handles its own distribution, it will cause wholesalers to reduce the number of their employees as well.<sup>624</sup> On average, there is a net gain of thirty jobs.<sup>625</sup> But there is nonetheless a loss in the number and diversity of employers.

Just as consumers benefit from competition among sellers, workers benefit from competition among employers. Just as competition in production tends to reduce prices, competition among employers tends to increase wages. An absence of healthy competition for workers not only tends to reduce wages as an absolute matter but also increases the gap between average workers and top executives. “Diminished competition . . . increases inequality by empowering corporations to hold down the income of workers,” two commentators have written.<sup>626</sup> Moreover, just as a diverse group of sellers provide an assortment of products for different consumer tastes, a diverse group of employers provide an assortment of work environments. Alternative places of employment are of immeasurable value to a worker who, for example, has a personality clash with a supervisor. When one’s present employer is, as a practical matter, the only possible employer, that individual is a serf. Freedom expands with the number of realistic alternatives.

As F.A. Hayek observed, a diversity of employers is also essential to national productivity.<sup>627</sup> Just as a healthy economy depends on a

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621. *Id.* at 87.

622. *See id.* at xxxi (reporting that 145 million Americans visited a Walmart store each week in 2010); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock> (reporting that as of Dec. 31, 2010 the U.S. population was 310,537,757).

623. *See* Fishman, *supra* note 493, at 142–46 (citing Emek Basker, *Job Creation or Destruction? Labor Market Effects of Wal-Mart Expansion*, 87 *REV. ECON. & STAT.* 174 (2006)).

624. FISHMAN, *supra* note 493, at 142–46.

625. *Id.*

626. Lina Khan & Sandeep Vaheesan, *The Great Unequalizer*, *WASH. POST*, June 15, 2004, at B1.

627. F.A. Hayek, *Competition as a Discovery Procedure*, 5 *Q.J. AUSTRIAN ECON.* 9, 21 (2002).

diversity of producers so that prices may change in response to changing circumstances, it also depends on a diversity of employers so that relative wages may be sensitive to changes.<sup>628</sup> Wages tend to be rigid when there is not a diversity of employers, and rigid wages tend to produce decreases in real earnings. Hayek wrote: “A completely rigid wage structure is . . . liable to lead to a gradual decrease in the level of real wages at which full employment can be realized.”<sup>629</sup>

If these structural issues do not cause enough problems for citizens in their roles as workers, a 2010 Department of Justice investigation discovered that a small group of giant tech firms, including Google, Apple, Intel, and others, secretly agreed not to recruit software engineers from each other so as not to have to compete in wages.<sup>630</sup> This case is hardly unique.<sup>631</sup> Companies in concentrated markets have the same incentives to conspire on labor issues as they do to conspire on matters of production and prices. Antitrust regulators will take action if they discover that employers are actively colluding to fix wages, but they should also consider how company size and industry concentration affect employment opportunities and national productivity.

### C. Too Big To Regulate and Crony Capitalism

Both state and federal governments tried ameliorating the effects of the tournament contract farming system through regulation. In the fall of 2000, Iowa’s attorney general, Tom Miller, proposed the Producer Protection Act to protect farmers from the oligopsonists that purchase their livestock, crops, or milk.<sup>632</sup> Among other things, the legislation would require that the contracts written by the big

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628. Although Hayek was thinking principally about the ratio of wage structures changing among different industries in response to changing circumstances, much of his point applies also to the ability of wages to react to changed circumstances within a particular industry. *See id.*

629. *Id.*

630. The Department of Justice said the conspiracy deprived the software engineers of information that could have led them to better job opportunities and “disrupted the normal price-setting mechanisms that apply in the labor setting.” *In re High-Tech Employee Antitrust Litigation*, 289 F.R.D. 555, 560 (N.D. Cal 2013).

631. *See, e.g., Cason-Merenda v. VHS of Mich., Inc.*, 296 F.R.D. 528 (E.D. Mich. 2013) (alleging a conspiracy among Detroit-area hospitals to hold down wages of registered nurses); *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (alleging conspiracy to hold down wages in energy industry).

632. *See LEONARD, supra* note 563, at 244–52 (describing history of proposed legislation).

corporations be in plain English, and that all material risks be disclosed in a cover sheet.<sup>633</sup> It would prohibit tournament payment systems,<sup>634</sup> void confidentiality provisions that preclude farmers from discussing their contracts with each other (and arguably even with their lawyers and financial advisers).<sup>635</sup> The legislation would also give farmers the right to join associations,<sup>636</sup> and the right to have a representative present when their livestock or crops were being weighed to determine their compensation.<sup>637</sup> It allowed farmers to sue for violations of these and other enumerated rights, and to recover damages plus reasonable attorney's fees if they prevailed.<sup>638</sup>

At first, Iowa legislators seemed favorably disposed to the bill.<sup>639</sup> It would, after all, protect Iowa farmers from out-of-state corporations. The attorneys general of fifteen other states also urged their state legislatures to enact the proposed legislation. However, the large food companies quietly but powerfully began lobbying against the legislation, and it ultimately failed to pass in any state.<sup>640</sup> Senator Tom Harkin of Iowa introduced similar legislation in Congress, but the proposed federal bill failed to even get a floor vote.<sup>641</sup>

Ten years later, U.S. Secretary of Agriculture Tom Vilsack sought to address the livestock and poultry farmers' plight through administrative regulation. At his urging, an agency within the Department of Agriculture—the Grain Inspection, Packers and Stockyards Administration (GIPSA), which, fittingly, was originally established in 1921 to regulate the “meat trust” of that time<sup>642</sup>—gave notice that it was considering promulgating a regulation to ban tournament compensation systems for chicken growers unless it provided for a predictable base payment for growers.<sup>643</sup> Vilsack, who had been a popular, two-term governor of Iowa, understood the issues well. He was urged to act by President Barack Obama, who learned about the brutality of the tournament contract farming system while

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633. MODEL PRODUCER PROTECTION ACT § 4, <http://www.flaginc.org/wp-content/uploads/2013/03/poultry5.pdf>.

634. *Id.* § 9b(5).

635. *Id.* § 6.

636. *Id.* § 9a(2)(a).

637. *Id.* § 9b(4).

638. *Id.* § 13c(1).

639. See LEONARD, *supra* note 563, at 250.

640. *Id.* at 252.

641. *Id.*

642. In 1921, five companies dominated the meat market and were threatening to control the milk and egg industries as well. The original agency was the Packers and Stockyards Administration. *Id.* at 246; see also Thomas J. Flavin, *The Packers and Stockyards Act, 1921*, 26 GEO. WASH. L. REV. 161 (1958).

643. See LEONARD, *supra* note 563, at 261–303 (chronicling the history of the proposed rule).

campaigning for the 2008 Iowa Democratic presidential caucuses. In 2009, GIPSA promulgated regulations that required the poultry companies to disclose some important, though still limited, information to farmers before entering into tournament contracts with them. Among other things, these regulations would have permitted growers to disclose information to their legal and financial advisers, and perhaps most significantly, to other growers for the same company, notwithstanding confidentiality provisions that poultry companies included in their contracts.<sup>644</sup>

Vilsack and his team intended to go much further. In 2010, GIPSA formally proposed rules to require that tournament contracts ensure minimum base payments to poultry growers, and to provide growers with other important protections.<sup>645</sup> But the power of the meat companies was too great. Tyson, Smithfield, JBS, Cargill, and other large meat companies, together with their trade associations, spent millions lobbying in 2010.<sup>646</sup> On July 20, 2010, the House Subcommittee on Agriculture held a hearing on the proposed rules, and both Republican and Democratic members catered to the big meat companies by flaying a hapless GIPSA witness who had been selected to explain the proposed rules.<sup>647</sup> The rhetoric from industry and members of Congress who echoed its talking points was that by interfering in the free market “big government” would “hamstring” industry and drive up prices.<sup>648</sup>

In the end, under intense pressure from the meat industry, members of Congress, and the Office of Management of Budget—which evaluates whether proposed regulations pass a cost-benefit test and is another focal point for industry lobbying—Vilsack relented and eliminated the most important provision from the proposed rule,

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644. GIPSA Poultry Contracts Final Rule, 74 Fed. Reg. 63271 et seq. (Dec. 3, 2009), amending 9 C.F.R. § 201.100(b) (regarding confidentiality provisions), § 201.100(c)(3) (regarding information disclosures), <http://www.gipsa.usda.gov/federal%20register/fr09/12-3-09.pdf>.

645. See News Release, USDA, June 18, 2010, [http://www.usda.gov/wps/portal/usda/!ut/p/c4/04\\_sb8k8xllm9msszpy8xbz9cp0os\\_gac9-wmj8qy0mdpxbda09nxw9dfxcxq-caa\\_2cbedfaeuojoe!/?contentidonly=true&contentid=2010/06/0326.xml](http://www.usda.gov/wps/portal/usda/!ut/p/c4/04_sb8k8xllm9msszpy8xbz9cp0os_gac9-wmj8qy0mdpxbda09nxw9dfxcxq-caa_2cbedfaeuojoe!/?contentidonly=true&contentid=2010/06/0326.xml). (describing the proposed rules); see also LEONARD, *supra* note 563, at 284.

646. Collectively the meat companies and their trade associations spent \$7.8 million lobbying in 2010. *Id.* at 286.

647. *Id.* at 289–90.

648. See, e.g., Cindy Zimmerman, *GIPSA Proposal an Example of Flawed Regulation*, AGWIRED (Sept. 14, 2011), <http://agwired.com/2011/09/14/gipsa-proposal-an-example-of-flawed-regulation> (quoting a small farmer who testified that “[w]e do not need big government setting up shop on our farms and ranches”); Cindy Zimmerman, *GIPSA Dominates Senate Committee Hearing*, AGWIRED (June 29, 2011), <http://agwired.com/2011/06/29/gipsa-dominates-senate-committee-hearing> (quoting Senator Pat Roberts, R-KS, as saying that the GIPSA rule would “hamstring” the industry).

namely, the requirement for a base minimum payment to tournament payment systems. Although GIPSA went forward with the other provisions, the battle did not end there. The big meat companies kept up lobbying, and in 2011 Congress included provisions in a spending bill that prohibited GIPSA from spending money to enforce the rules.<sup>649</sup> In the end, all that survived was a provision that gave farmers the right to sue the meat companies over contract disputes notwithstanding contract arbitration provisions.<sup>650</sup>

Big businesses do not merely use their political muscle to fend off regulation; they also use it for rent seeking, that is, to obtain a wide variety of special favors, benefits, and subsidies from local, state, and federal governments.<sup>651</sup> Tyson, for example, benefits indirectly—but enormously—from a federal program that provides taxpayer-subsidized loans to farmers, including Tyson’s chicken growers. These loans are dispensed by the Farm Service Agency (FSA), within the Department of Agriculture.<sup>652</sup> As it squeezes existing chicken growers into insolvency, Tyson is able to lure fresh individuals into the business by helping them get loans to purchase the land, buildings, and equipment for chicken farms. The loans are dispensed by local banks; but if the borrower defaults, FSA pays the bank more than ninety percent of the amount of default.<sup>653</sup>

As a result, the banks are lax in reviewing loan applications to ensure that borrowers have the capacity to repay their loans. Christopher Leonard reports that FSA-guaranteed loans became the “pipeline for credit” for the Laotian chicken growers that Tyson lured into chicken growing as native Arkansas farmers left the business.<sup>654</sup> The best information available is that the FSA guaranteed \$568.9 million to poultry farmers over a two-year period, and that it paid out \$468 million to banks to cover defaulted loans by all farmers for the same two-year period.<sup>655</sup> It may appear the FSA program is benefitting small farmers, and of course, for those small farmers who succeed, the FSA program may be a genuine benefit. But as chicken farming illustrates, the FSA program can also be seen as a form of crony capitalism benefitting big companies such as Tyson.

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649. LEONARD, *supra* note 563, at 302.

650. Although the final rule also contained guidelines as to when meat companies could terminate growers or require that they make capital improvements to their facilities, these were, in effect, unenforceable suggestions. *Id.* at 302; *see also* Cindy Zimmerman, *Congress Restricts Implementation of GIPSA Rule*, AGWIRED (Nov. 18, 2011), <http://agwired.com/2011/11/18/congress-votes-to-restrict-implementation-of-gipsa-rule>.

651. *See supra* notes 62–69 and accompanying text.

652. *See* LEONARD, *supra* note 563, at 139–45.

653. *Id.* at 140–41.

654. *Id.* at 141.

655. *Id.* at 143–44.

The FSA program is undoubtedly just one of countless obscure programs that are well understood by big companies and their lobbyists but invisible to the public-at-large.

The meat industry is a run-of-the-mill example of how big companies can be too politically powerful to regulate or keep from grazing at the public trough. The inability to disaggregate the giant banks in the wake of the 2008 crisis, discussed earlier, is a more visible example. It should be no surprise that in the wake of that crisis politically connected banks were more successful at getting the federal government to purchase their toxic assets than other banks.<sup>656</sup>

Another example is a federal program to help small businesses with economically or socially disadvantaged owners compete for government contracts worth up to \$6.5 million.<sup>657</sup> The program has long been plagued by schemes in which the small businesses that apply are, in reality, fronts for large companies. One common scheme was to have the small business that is awarded the job subcontract most of the work to a large company. New government regulations were promulgated to end that practice by requiring that firms awarded contracts perform at least half of the work themselves.<sup>658</sup> Nevertheless, a Government Accounting Office investigation revealed that the government departments that award the most contracts under the program have ignored the regulation.<sup>659</sup> Even if this loophole is closed, another will be opened. Big businesses will find ways to get what they want—perhaps not everywhere, and not all the time, but more often than not, especially where the stakes are high and visibility is low. Small businesses may complain to their elected representatives, but the meat industry illustrates how that is likely to pan out.

As everyone knows, the amount of money contributed to political candidates, parties, and political action committees is enormous. During the 2012 election cycle, companies in the securities/investment sector contributed \$286 million to political campaigns, and

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656. See JOHNSON & KWAK, *supra* note 525, at 168, 273 n.31 (describing a study by Jowei Chen and Connor Raso titled “Do TARP Bank Bailouts Favor Politically Connected Firms?”).

657. This is known as the 8(a) Business Development Program. See *About the 8(a) Business Development Program*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/about-8a-business-development-program>.

658. Moreover, a 2013 statute subjects violators to a minimum penalty of \$500,000. J.D. Harris, *Small-Businesses Contracting Rules Aren't Being Enforced, Probe Finds*, WASH. POST, Sept. 22, 2014, at A13.

659. The Department of Defense, the Department of Homeland Security, and the Department of Health and Human Services collectively award three-quarters of such contracts. The GAO found that eight out of ten contract officers failed to monitor the amount of work performed by subcontractors, despite red flags of possible abuse. *Id.*

commercial banks contributed an additional \$40 million.<sup>660</sup> With this level of political support, it is hardly surprising that Congress has not broken up the too-big-to-fail banks. Compared to large financial institutions, Tyson Foods is a relatively small political player; yet is still quite potent.

During the 2012 election cycle, Tyson and its PAC contributed to more than sixty members of Congress,<sup>661</sup> and top Tyson executives supplemented those contributions with their own individual, bundled contributions. During the 2012 election cycle, Tyson Foods, its PAC, and its executives contributed a combined \$22,234 to Congressman Steve Womack (R-AR).<sup>662</sup> Tyson's political contributions were well targeted. During the 2012 election cycle, it contributed to sixteen members of the House Agriculture Committee,<sup>663</sup> nine members of the Appropriations Committee,<sup>664</sup> and five members of the Ways and Means Committee,<sup>665</sup> including the chairs of all those committees. Tyson also contributed to nine members of the Senate Agriculture Committee, including its chair,<sup>666</sup> and to the chair of the Agriculture Subcommittee of the Senate Appropriations Committee.<sup>667</sup> Altogether, Tyson contributed \$373,761 to candidates, PACs, and political parties during the 2012 election cycle.<sup>668</sup>

In addition, and perhaps far more importantly, Tyson spent \$1.9 million on lobbying during the same period. It took full advantage of the power of the revolving door; seven of its eleven registered lobbyists previously held government jobs, and two were powerful

660. See *Commercial Banks: Long-Term Contribution Trends*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/totals.php?cycle=2010&ind=F03>.

661. Tyson's smallest contribution, \$500, was given to Senator Amy Klobuchar (D-MN). That was an outlier. All of its other contributions were between \$1,000 and \$9,734. See *Tyson Foods, Profile for 2012 Election Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/summary.php?id=D000000460&cycle=2012>.

662. *Id.*

663. Dennis Cardoza (R-AR), Rick Crawford (R-AR), Rodney Davis (R-IL), Scott DeJariasis (R-TN), Bob Goodlatte (R-VA), Vicky Hartzler (R-MO), Timothy Johnson (R-IL), Steven King (R-IA), Larry Kissell (D, NC), Frank Lucas (Chair, R-OK), Mike McIntyre (D-NC), Kristi Noem (R-SD), Collin Peterson (Ranking Minority Member, D-MN), Reid Ribble (R-WI), Mike Rogers (R-AL), and David Scott (D-GA).

664. Robert Aderbolt (R-AL), Sanford Bishop (D-GA), Henry Cuellar (D-TX), Tom Graves (R-GA), Jack Kingston (R-GA), Tom Latham (R-IA), Alan Nunnelee (R-MS), Hal Rogers (Chair, R-MS), and Steve Womack (R-AR).

665. Xavier Becerra (D-CA), Diane Black (R-TN), Charles Boustany (R-LA), Dave Camp (Chair, R-MI), and Tim Griffin (R-AR).

666. John Boozman (R-AR), Saxby Chambliss (R-GA), Kent Conrad (D-ND), Joe Donnelly (D-IN), Amy Klobuchar (D-MN), Mitch McConnell (R-KY), Ben Nelson (D-NE), Pat Roberts (R-KS), and Debbie Stabenow (Chair D-MI).

667. Mark Pryor (D-AR).

668. *Tyson Foods*, *supra* note 661. The largest single recipient was Mitt Romney and his PAC (Restore our Future), which together received \$76,200 from Tyson. See *id.*



former members of Congress.<sup>669</sup> Tyson contributes at the state level too.<sup>670</sup> It is little wonder that chicken growers never stood a chance battling Tyson politically.

In all of these things, Tyson is typical of giant corporations. Business contributes about seventy percent of the hundreds of millions of dollars contributed to political campaigns. Moreover, big business contributes not merely to candidates for the political branches of government—federal and state—but increasingly to state judicial campaigns as well.<sup>671</sup> In the post-*Citizens United/McCutcheon* world, the power of big business will only grow stronger.<sup>672</sup> Dark money—i.e., contributions that do not need to be disclosed—pouring into politics now exceeds disclosed contributions to PACs. Thus, we may know less and less about corporate political influence.<sup>673</sup>

Money, of course, is power, but so is information and expertise. An underappreciated part of corporate power involves the increased influence of corporate lobbying—which, in part, has been a deliberate consequence of twenty-year-old strategy. When, in 1995, Newt Gingrich became the first Republican Speaker of the House since the Eisenhower administration, he laid off about eight hundred lawyers, economists, policy and budget analysts, and researchers working for House committees, reducing committee professional staffs by more than one-third.<sup>674</sup> The Republican Senate leadership made significant, though somewhat smaller, cuts to the professional staffs of Senate committees that same year. Meanwhile, the professional staffs of both Congressional Research

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669. The two former members were Senators John Breaux (D-LA) and Senate Majority Leader Trent Lott (R-MS).

670. For example, during the 2012 election cycle it contributed \$10,000 to the Democratic Party of Arkansas. *Tyson Foods*, *supra* note 661.

671. See Adam Liptak, *Judges on the Campaign Trail*, N.Y. TIMES (Sept. 27, 2014), <http://nyti.ms/1rASXNn> (reporting that \$152 million were spent on judicial elections over the past three election cycles). Even when large corporations may choose not to contribute directly, money may flow indirectly through bundled contributions by executives and through contributions from trade associations such as the Chamber of Commerce. See Dan Eggen, *The Influence Industry: Judicial Elections, Corporate Policies Give Glimpse into 2012*, WASH. POST, (Oct. 26, 2011), [http://www.washingtonpost.com/politics/the-influence-industry-judicial-elections-corporate-policies-give-glimpse-into-2012/2011/10/26/gIQAeOWzJM\\_story.html](http://www.washingtonpost.com/politics/the-influence-industry-judicial-elections-corporate-policies-give-glimpse-into-2012/2011/10/26/gIQAeOWzJM_story.html) (reporting that while some corporations have policies against making these contributions, the Chamber of Commerce and its affiliates are large contributors to judicial elections).

672. I refer to *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) and *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1334 (2014).

673. Nicholas Confessore, *Secret Money Fueling a Flood of Political Ads*, N.Y. TIMES, Oct. 11, 2014, at A1.

674. Paul Glastris & Haley Sweetland Edwards, *The Big Lobotomy: How Republicans Made Congress Stupid*, WASH. MONTHLY, (June/July/Aug. 2014), [http://www.washingtonmonthly.com/magazine/junejulyaugust\\_2014/features/the\\_big\\_lobotomy050642.php?page=all](http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/the_big_lobotomy050642.php?page=all).

Service and the Government Accountability Office, which serve both houses of Congress, were also cut by one-third.<sup>675</sup>

In part, the cuts were designed to bleed power away from committee chairs and centralize it in the Speaker's and Senate Majority Leader's offices. However, the cuts were also intended to perform a partial "self-lobotomy," as one former congressional staff member described it.<sup>676</sup> Reducing its own professional staff forced Congress to rely more heavily on outside expertise, which corporate lobbyists are only too happy to supply.<sup>677</sup> Although Democrats made efforts to redress the balance during periods of their control, congressional professional staffs remain smaller today than they were in 1994.<sup>678</sup> Meanwhile, over the past three decades, corporations have vastly expanded their lobbyists in Washington, D.C. Indeed, since 1983, organizations have increased their total lobbying expenses (controlled for inflation) by nearly sevenfold, with more than seventy-five percent of that money being spent by corporations.<sup>679</sup> "As a result," writes political scientist Lee Drutman,

[congressional] staffers must rely more and more on the lobbyists who specialize in particular policy areas. This puts those who can afford to hire the most experienced and policy-literate lobbyists—generally large companies—at the center of the policymaking process.<sup>680</sup>

Drutman goes on to observe that corporate political activity "increasingly re-directs" the political system.<sup>681</sup> Because corporations so often work to stop government from doing things they don't like, democracy "is increasingly unable to tackle large-scale problems," he writes.<sup>682</sup> And because corporations increasingly rely

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675. Among other things, these cuts eliminated Legislative Service Organizations (LSOs), in which members of Congress worked together, often on a bipartisan basis, to study and discuss issues of interest outside of the committees. There was no longer enough staff support for LSOs. *Id.*

676. The former congressional staffer is Lorelei Kelly, who now works for the New America Foundation. *Id.*

677. In addition to corporations and trade associations, Congress increasingly relies on outside think tanks and advocacy organizations. Although think tanks span the ideological spectrum, those most congenial to big business are often lavishly funded. *See generally* TELES, *supra* note 72 (describing how corporations and related foundations—particularly the Olin, Bradley, and Scaife Foundations—funded conservative and libertarian think tanks).

678. "[E]very single House standing committee had fewer staffers in 2009 than in 1994." Glastris & Edwards, *supra* note 674.

679. LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 8 (2015).

680. *Id.* at 220.

681. *Id.* at 218.

682. *Id.*

on the political system to grant them favors that enrich their bottom lines, we now have “a political economy that that too often rewards lobbying over innovation.”<sup>683</sup>

Company size translates directly into political muscle. It is not small or medium-sized enterprises that elected officials heed; it is the giant companies. The larger a firm is in terms of revenue and assets, the more politically influential it can become. Corporations will use their political power to both resist regulation and to engage in rent seeking. That is not evil or nefarious; it is the natural order of things. Nevertheless, crony capitalism works to the disadvantage of small businesses and the public at large. Regulation will never, by itself, be sufficient to curtail crony capitalism. No matter what rules Congress and the regulatory agencies are able to promulgate, big corporations will also find (if not help create) loopholes. It is necessary to curtail crony capitalism by curtailing corporate size.

#### CONCLUSION

Teddy Roosevelt had a reasonable position in 1912 when he argued that a strong government could effectively regulate big corporations. But history has shown that Woodrow Wilson was closer to the truth when he maintained that ultimately big corporations would be too powerful for the government to effectively regulate. The fundamental problem is that in a modern democracy, where money heavily influences the political process, giant companies have great political power. I am not suggesting that big corporations are all-powerful. They are not. Sometimes they get what they want; sometimes they don't. But they are able to get what they want far more often than not—even in instances where an omniscient observer would say that what they wanted was not in the public interest.

The proof in the pudding is the financial crisis of 2008. Regardless of what may have been necessary to avoid a collapse of the entire economic system in the heat of the crisis, once the financial system stabilized it was necessary to cure the too-big-to-fail problem by disaggregating the largest banks and financial institutions. Three Federal Reserve Bank presidents publicly advocated that position.<sup>684</sup> Even Alan Greenspan—who, during his tenure as chairman of the

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683. *Id.*

684. They were James Bullard, Thomas M. Hoenig, and Richard W. Fisher, who were respectively presidents of the Federal Reserve Banks of Saint Louis, Kansas City, and Dallas. BERNIE SANDERS, *THE SPEECH: A HISTORIC FILIBUSTER ON CORPORATE GREED AND THE DECLINE OF THE MIDDLE CLASS 189–90* (2011).

Federal Reserve Board of Governors from 1987 to 2006, had favored deregulating the banks—concluded after the crisis that the big banks should be broken up. “If they are too big to fail, they are too big,” Greenspan said.<sup>685</sup>

Why has the nation not done so? The answer, quite simply, is that the political power of the giant financial institutions makes proposing to break up the big banks politically infeasible. Leaders of neither of the two major political parties can afford to make their party the political enemy of the big banks.<sup>686</sup> The modern history of banking resolves the debate between Roosevelt and Wilson. That history involves decades of mergers despite empirical evidence showing that large mergers benefitted only the executives. It also includes the repeal of the Glass-Steagall Act, the failure to disaggregate the big financial institutions today, and current efforts to weaken the Dodd-Frank Act. This long and deep history demonstrates that corporations can, in fact, be too big to regulate.<sup>687</sup>

Antitrust law needs to be concerned with consolidated power, and giant companies have a great deal of consolidated power. However, although I am arguing that antitrust policy should be concerned with corporate size, I am not arguing that antitrust should be used to break up companies based on size alone. (Large financial institutions are a special case. They should be disaggregated so that taxpayers do not have to again rescue too-big-to-fail banks in order to avoid economic collapse.<sup>688</sup>

To take the prime example, I am not arguing that Walmart, which is presently the largest corporation in the United States, be broken up under the antitrust laws. That is not because Walmart’s size does not present problems. It presents considerable problems, as discussed above.<sup>689</sup> I am not arguing that Walmart should be broken up simply—but importantly—because there is long and strong American tradition of not penalizing firms that grow internally. Antitrust law must reflect our national values and mores, and those

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685. He added: “In 1911, we broke up Standard Oil. So what happened? The individual parts became more valuable than the whole.” *Id.* at 192 (quoting Greenspan).

686. Senator Bernie Sanders of Vermont, who is not a leader nor even a member of a political party, explains: “We have not been able to [break up the banks] because Wall Street sends their lobbyists down here in droves and Wall Street provides zillions of dollars in campaign contributions and Wall Street fights like the dickens to make sure that any strong provisions that some of us might bring up are defeated.” *Id.* at 190.

687. See, e.g., STIGLITZ, *supra* note 50, at 40, 131, 335–39 (2010) (arguing that companies can be too big to regulate; Gar Alperovitz, *Wall Street is Too Big To Regulate*, N.Y. TIMES, July 23, 2012, at A19; see also Neil Irwin, *Were CEOs ‘Too Big To Jail?’*, WASH. POST, Sept. 15, 2013, at G1.

688. The banks should be broken up by new legislation by through existing authority vested in the Federal Reserve or the Treasury Department, if such authority exists, but not under the antitrust laws.

689. See *supra* notes 613–24 and accompanying text.

hold that growing by outperforming rivals is not the same thing as growing by buying rivals. So long as a company grows by building the proverbial better mousetrap, our longstanding national values say that the company should not be broken up based on size alone. It would, of course, be another matter if a company became a monopoly or attempted to monopolize through predatory practices. Walmart's growth within the United States has been entirely internal, and thus despite the significant problems caused by its great size, I do not advocate breaking it up.

Regulators and courts should, however, take a far more stringent approach to corporations growing through mergers and acquisitions. Antitrust law should not, as Robert Bork advocated, be indifferent to whether growth occurs internally or externally. For many reasons, growth through mergers and acquisitions is less socially desirable than internal growth.

First and foremost, the nation is better served by having more rather than fewer companies, and every merger and acquisition causes at least one firm to disappear. Even if consumers might benefit from a corporate merger, there are fewer employment options for workers and fewer opportunities for suppliers. Antitrust laws are about competition, but properly conceived antitrust policy should also be about ensuring all forms of commercial competition—including in labor and up-chain commercial markets—and not merely about competition between rivals for customers. The reduction of opportunities for employees, suppliers, and contractors in the industry diminishes individual freedom in real and meaningful ways.<sup>690</sup> The plight of the poultry growers is one example.

Second, the ready availability of mergers and acquisitions suppresses research and development. Steve Jobs is reported to have said that every merger represents a failure of innovation.<sup>691</sup> Rather than investing heavily in research themselves, large companies often find it more efficient to buy up smaller companies that create valuable new products or processes. Conversely, the entrepreneur's dream increasingly is not to grow and sustain a vibrant, independent business but—having developed something new and valuable—to cash in by selling out to a corporate giant.<sup>692</sup> This may

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690. See *supra* notes 45, 197–200, 224, 246–48, 287–299, 355, 563–631 and accompanying text.

691. Sarah Cohen, *Apple's Acquisition Aspirations: Think Again*, FORBES (Apr. 25, 2012), <http://www.forbes.com/sites/mergermarket/2013/04/25/apples-acquisition-aspirations-think-again>.

692. Laurie Segall, *The Start Up Choice: Get Big or Get Bought*, CNN MONEY (Dec. 1, 2011), [http://money.cnn.com/2011/11/30/technology/startup\\_acquisitions](http://money.cnn.com/2011/11/30/technology/startup_acquisitions).

be profitable for the parties directly involved, but it is not good for the nation.

Third, mergers and acquisitions often do considerable damage to local communities. The community that loses a business that is headquartered there loses not only jobs but civic leadership and philanthropy. Corporate executives are often leaders in local civic institutions. They sit on the boards of trustees of museums, theaters, orchestras, ballets, schools, libraries, philanthropies, and the like.<sup>693</sup> One study found that the presence of corporate headquarters is associated with the existence of elite nonprofit cultural institutions in a community.<sup>694</sup> When top corporate executives are relocated elsewhere, their expertise, energy, and civic concerns are relocated with them. Local communities lose philanthropic support as well. Another study found that companies that are headquartered in a community contribute more to local charities such as the United Way than do comparable businesses headquartered elsewhere.<sup>695</sup> Corporate delocalization, therefore, has significant ramifications for the civic fabric of the nation. Once again, antitrust policy should concern itself not merely with competition between sellers but with other areas of competition as well, including competition among cities and states for jobs and economic activity. Communities with large companies that grow by devouring smaller firms enjoy powerful advantages in those struggles.<sup>696</sup>

Fourth, there are too many false positives in proposed merger analyses. That is, the predicted net benefits for consumers often are not realized.<sup>697</sup> The real driving force behind many mergers is increased compensation and prestige for top executives.<sup>698</sup> Even when a merger proposal is supported by elaborate analyses, claims of future synergies and efficiencies may be camouflage designed to persuade regulators, courts, and the stock market about the benefits of the merger. Indeed, the supporting analyses can also be a tool of self-delusion for the top executives themselves, who want to believe that a merger will produce remarkable benefits. Regulators are often persuaded that a merger will produce efficiencies that will

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693. Brunell, *supra* note 14, at 162–66.

694. *Id.* at 170.

695. *Id.*

696. Requiring that the corporate headquarters of a previously-independent firm not be relocated would probably have limited utility. Such a requirement would have an expiration date, after which desires for efficiency would dictate that the subsidiary's headquarters would be combined with the parent company's headquarters.

697. See *supra* notes 480–82- and accompanying text.

698. See *supra* notes 53–57, 60–61, 115, 510–14 and accompanying text.

benefit consumers when, in fact, those predictions will not materialize. It is easy to put too much faith in the ability of economic models to predict the future. Markets are in constant flux. They are driven by a complex multiplicity of forces—technological, social, cultural, demographic, and economic—that cannot possibly be foreseen. The assumptions upon which any economic model is based will inevitably, and sometimes quickly, become outdated.

Fifth and perhaps most important, citizens are better off with more, smaller companies than with fewer, larger firms. Citizens are not merely consumers. They are also workers who benefit from a diversity of employers. And small and medium-sized businesses are better off with a diversity of potential suppliers and customers.

It is tempting to be lured by the Siren song of economists that promises objectivity. It is comforting to believe that antitrust has become a scientific (or at least semi-scientific) discipline based on ideologically-neutral economic principles. But this lure has led us into an age of oligopolies, giant corporations, and consolidated power.

Take for example the telecommunications industry. We live in a world that depends upon data and content being delivered to us either through cables or without them. The stories of consolidation in both the wired and wireless markets consists of a dizzying array of mergers and acquisitions of all kinds—horizontal, vertical, and conglomerate—some successful and permanent, and some that later resulted in spins offs.<sup>699</sup> As of this writing, Charter Communications is seeking to acquire Time Warner, along with Bright House Networks, a smaller cable company.<sup>700</sup> Meanwhile, two of the largest firms in the wireless television market, AT&T and DirecTV are seeking permission to merge.<sup>701</sup> Charter, Time Warner Cable, AT&T and DirecTV are all corporate giants.<sup>702</sup> Someone unfamiliar with the process might be flabbergasted that such competitors would even entertain the possibility that the FCC would allow them to merge; but, in fact, the companies' expectations of approval are quite reasonable. In her book about mergers and monopoly power in the telecommunications industry, Susan Crawford writes: "Just

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699. See generally SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOMMUNICATIONS INDUSTRY AND MONOPOLY POWER IN THE NEW GUILDED AGE* (2013).

700. Michael J. de la Merced, *Cable TV Merger Signals a Shift in the Industry*, N.Y. TIMES, May 26, 2015, at A1.

701. Roger Yu, *AT&T Pays \$48.5B for DirecTV*, USA TODAY, May 19, 2014, at 1A; Roger Yu, *AT&T-DirecTV Deal Could Reshape Pay-TV Industry*, USA TODAY, May 19, 2014, at 1B.

702. AT&T and DirecTV rank, respectively, eleventh and ninety-eighth in the Fortune 500. Times Warner Cable and Charter Communications rank forty-fourth and 331st respectively. Comcast ranks forty-third. *500 Largest U.S. Corporations*, *supra* note 486, at F-35.

two major media-telecommunications mergers have been rejected by the FCC in the twenty-first century. . . . Both rejections were unusual.”<sup>703</sup> Crawford notes that the FCC even approved the merger of Sirius and XM, even though the combined firm would monopolize the satellite radio market.<sup>704</sup>

Merger mania is not limited to telecommunications. It is rampant everywhere.<sup>705</sup> Coca-Cola recently bought a share of Monster Beverage;<sup>706</sup> and the company that produces Chicken of the Sea tuna is buying Bumble Bee.<sup>707</sup> Antitrust regulators approved airline mergers between Delta and Northwest in 2008, United and Continental in 2010, Southwest and AirTran in 2011, and American and US Airways in 2013.<sup>708</sup> Facebook recently acquired WhatsApp;<sup>709</sup> Kraft Foods and H.J. Heinz have agreed to merge;<sup>710</sup> Reynolds American is seeking to purchase tobacco rival Lorillard;<sup>711</sup> Halliburton is buying its rival oil Baker Hughes;<sup>712</sup> Actavis, the world’s largest generic drug manufacturer, has reached an agreement to acquire Allergan;<sup>713</sup> Dollar Tree is seeking to buy Family Dollar;<sup>714</sup> Staples wants to purchase Home Depot, which itself acquired OfficeMax in 2013;<sup>715</sup> and health insurer Anthem wants to buy its rival Cigna.<sup>716</sup> These represent only a fraction of recent and proposed

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703. *Id.* at 208. Strong public opposition to the Comcast-Time Warner Cable merger reportedly spooked regulators, who were said to be either leaning against the merger (DOJ) or prepared to scuttle the deal by delaying it (FCC). Roger Yu & Mike Snider, *How Comcast, Time Warner Deal Unraveled*, USA TODAY, (Apr. 25, 2015), available at <http://www.usatoday.com/story/money/2015/04/24/how-comcast-deal-to-buy-time-warner-cable-fell-apart/26313471/>.

704. CRAWFORD, CAPTIVE AUDIENCE, *supra* note 699, at 208–09.

705. See David Gelles, *Mega-Mergers Popular Again on Wall Street*, N.Y. TIMES, Nov. 18, 2014, at A1 (reporting on “one of the biggest booms in mergers and acquisitions”).

706. David Gelles, *Coca-Cola Buys Stake In Monster Beverage*, N.Y. TIMES, Aug. 15, 2014, at B3.

707. Bumble Bee Seafoods was the last major American company in the canned-tuna market. Chicken of the Sea is owned by a Thai company, and a South Korea company purchased Starkist in 2008. Roberto A. Ferdman, *Seafood Giant is Poised to Reel in Bumble Bee*, WASH. POST, Dec. 20, 2014, at A12.

708. See Jad Mauawad, *Merger of American and US Airways is Waived Ahead*, N.Y. TIMES (Nov. 27, 2013), <http://nyti.ms/1ysDXAW>; Jad Mauawad, *Merger of American and US Airways is Waived Ahead*, N.Y. TIMES, Aug. 15, 2013, at B1 (reporting on the earlier mergers).

709. *Id.*

710. David Gelles, *A Mega-Bet on Processed Foods*, N.Y. TIMES, March 26, 2015, at B1.

711. *Id.*

712. *Id.*

713. *Id.*

714. Michael J. de la Merced, *Dollar Tree Bids for Family Dollar To Help Compete With Big Retailers*, N.Y. TIMES, July 29, 2014, at B3.

715. Liz Hoffman & Dana Mattioli, *Staples, Office Depot in Advanced Talks to Merge*, WALL ST. J., Feb. 2, 2015, <http://www.wsj.com/articles/staples-office-depot-in-advanced-talks-to-merge-1422937999>.

716. Jeffrey Cane & Reed Abelson, *Anthem Makes \$47 Billion Offer for Rival Cigna*, N.Y. TIMES, June 21, 2015, at 4.



mergers between very large companies.<sup>717</sup> Some of the currently proposed mergers may never be consummated, and others that are unconsummated may prove temporary. But the point remains: As was the case in the original Gilded Age, we are living in another era of merger mania, and it is time for a wide-ranging debate about what corporate size—and especially corporate growth through merger—means for the nation.

At bottom, antitrust policy is about values. It is about what kind of society we wish to live in. Antitrust policy both reflects and affects national values. We, as a society, value efficiency and consumer welfare. But those are not our only values. If we have one value that transcends all others, it is freedom. Consolidated power—both governmental and commercial—threatens freedom. Just as constitutional law is a key tool for limiting consolidated governmental power, antitrust law is a key tool for limiting consolidated commercial power. An antitrust policy that forgets that reneges on one of its most critical historical roles.

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717. See, e.g., Peter Eavis & David Gelles, *Deemed Safe to Merge: A Stampede of Takeovers Could Mean Growth Ahead, Or Just a Rise in Irrationality*, N.Y. TIMES, Aug. 8, 2014, at B1; James B. Stewart, *Big Mergers In Media Deserve Wary Eye*, N.Y. TIMES, July 26, 2014, at B1.