The Curse of Bigness
Antitrust in the New Gilded Age

The Right to Live, and Not Merely to Exist

Louis Brandeis, the advocate, reformer, and Supreme Court Justice, has been done a particular kind of disservice. He is still known as a great jurist; his writings on the First Amendment and privacy are exalted. But what Brandeis really cared about was the economic conditions under which life is lived, and the effects of the economy on one's character and on the nation's soul.

This book aspires to resurrect and try to renovate the lost tenets of the Brandeisian economic vision. It envisions a vigorous, healthy economy, a skepticism of the self-serving rhetoric projecting the romance of big business or the inevitability of monopoly, and, above all, a sensitivity to human ends. Brandeis took matters like bigness and concentration as inseparable from the very nature of democracy, and the conditions under which its citizens would live. They determined what kind of country we would live in and what kind of environment that country would provide for its citizens.

Louis Brandeis was born in 1856, in the mid-sized town of Louisville, Kentucky, the son of entrepreneurial immigrants. As is probably true of most of us but is easier to see in Brandeis, these early years would have an important influence over what he thought an economy should ideally look like in a democracy.

His father, Adolph, was born in Prague, to a middle-class family. Adolph decided to take his chances in the Midwest at what was then the American frontier. He was not a particularly good farmer, but found greater success as a grain merchant in Kentucky, and grew to be a prosperous small-business owner. Brandeis's mother Frederika, the daughter of a Polish court physician, was a devotee of eighteenth-century German authors like Friedrich Schiller and Johann Wolfgang von Goethe, and a moralist who pushed her children to develop "a pure spirit and the highest ideals as to morals and love."

The town of Louisville would figure essentially in what Brandeis would come to stand for. Louisville was no world capital, nor the seat of any corporate empire, but nonetheless a flourishing regional center, in a United States far more economically decentralized than today's. It was, economically speaking, dominated by no few large concerns but a multitude of small producers. While the state still suffered the curse of agricultural slavery, Louisville was, at least to Brandeis, an "idyllic" place, one free from the "curse of bigness," representing an "economic democracy"—that is, a place of industrial freedom and openness to competition, yet with an economy that yielded adequate spoils for all. "Louisville [during his youth]" writes Brandeis biographer Melvin

Urofsky, "seemed the quintessential democratic society, in which individuals, like his father and Mr. Crawford, could do well by dint of their intelligence and perseverance. There were no large factories employing thousands of people, but rather many small endeavors—farms, stores, professional offices. People knew one another, their lives entwined in a strong sense of community."

After high school, Brandeis studied in Germany, achieved famously high grades at Harvard Law School, and developed a passion for canoeing and horseback riding. He decided to make his career in Boston, built a distinguished legal practice, and might have otherwise lived a completely uneventful life had he not been stirred into politics and action by his outrage to that which was happening around him. For in the 1890s, by the time he reached his forties, the Trust movement had begun its full march on the American economy, acquiring and demolishing smaller businesses and independents right and left. Many of Brandeis's clients were small-business owners with whom he had a personal relationship. They became the targets of the economic eugenics movement, seen as too unfit to deserve industrial life. In his resistance to the Trust movement, which at times he seemed to compare to a pogrom, Brandeis gained his identity and formulated the principles of economic decentralization that are now his legacy.

Brandeis's views crystalized during a battle with a tributary of the Morgan empire. Among Morgan's many projects was the consolidation of the Northeastern rail and ferry transportation into one monopoly—the New Haven Railroad. Morgan and his anointed lieutenant, Charles Mellen, sought to combine some 336 firms, including Boston's local railroad, the Boston and Maine, to forge a new system. Brandeis would become the monopolization campaign's leading public opponent.

Brandeis, who was a business lawyer by trade, and did insurance work in his earlier years, was hardly unsympathetic to the role business played in society. He was happy to praise good businesses that grew organically and built dignified operations beloved by customers and partners—the model provided by his own father. But during his fight with Morgan and the New Haven railroad, he developed a distrust, even a disgust with the new class of corporate monopoly. For behind the happy talk and big promises, his own investigations suggested that the New Haven was building its monopoly by lying to investors, bribing politicians, and paying off journalists and professors. "Lying and sneaking are always bad, no matter what the ends" said Brandeis later, privately. "I don't care about punishing crime, but I am implacable in maintaining standards."

Over time, he came to believe the New Haven represented the evils of what he called "excessive bigness." As he put it, "the evils of excessive bigness are something distinct from and additional to the evils of monopoly. A business may be too big to be efficient without being a monopoly; and it may be a monopoly and yet (so far as concerns size) may be well within the limits of efficiency. Unfortunately, the so-called New Haven system suffers from both excessive bigness and from monopoly."

But Brandeis's opposition to the New Haven monopolization campaign was, at first, a failure. He was just one man against Morgan and his resources—and Mellen, a charismatic charmer, who won over the press and locals by promising New England "progress and prosperity." As for Brandeis, Mellen discounted him this way: "Yellow dogs will bark and snap at the wheels of progress as they have since the beginning of time. Men will come and go, but the system of transportation has been built up to endure." But Brandeis knew the New Haven had, in fact, been built on a house of cards. As with many mega-mergers, organizational chaos soon followed the consolidation. Morgan's aggressive firing of workers and other cost-cutting measures were necessary to generate returns promised to shareholders, but they led to wrecks, derailments, and delays. There were 24 deaths and 105 injuries in 1911 alone. As the railroad fell into decline, the press began to turn on the New Haven and Morgan. One newspaper owner wrote: "Mr. Morgan holds the gun of monopoly at the head of business, and business, as a rule, prefers to give up its money and preserve its life."

The chaos prompted new investigations, and in 1913 the Federal Interstate Commerce Commission unearthed evidence of serious accounting fraud and illicit payouts in the monopolization drive. As the Commission wrote, the consolidation campaign had "meant the reckless and scandalous expenditure of money; it meant the attempt to control public opinion; corruption of government; the attempt to pervert the political and economic instincts of the people in insolent defiance of law." The Justice Department threatened an antitrust lawsuit in 1914 and the New Haven was broke, dissolved back into its major pieces.

Through the New Haven experience, Brandeis discovered a stronger faith in decentralized systems, in the organic growth of business, and, for want of a better word, in "smallness." He prized, indeed lionized, the human scale that had been the trademark of business and farming in America. Despite the bold promises of men like Mellen and Morgan, Brandeis feared that the new trusts being crafted by combining entire industries were not really the progress that was promised. Instead, he watched them exterminate other businesses, mistreat workers, defraud investors, and, especially in the case of the New Haven, actually hide gross inefficiencies with their size—all in the service of profits for bankers and speculators. He feared that as the corporations became large and powerful, they took on a life of their own, becoming increasingly insensitive to humanity's wants and fears. He put it this way in 1911: "We are in a position, after the experience of the last twenty years, to state two things: In the first place, that a corporation may well be too large to be the most efficient instrument of production and of distribution, and, in the second place, whether it has exceeded the point of greatest economic efficiency or not, it may be too large to be tolerated among the people who desire to be free."

If pre-industrial Louisville represented Brandeis's idea of what a democracy and economy might look like structurally, we can also gain from his later writings some idea of what Brandeis thought a democratic economy was *for*. Nowadays, we may think that the economy serves to make us rich, or at least to pay the bills. Democracy, meanwhile, is about voting for a government that reflects our preferences.

Brandeis demanded more from the economy and democracy. For him, the very purpose of life was the building of good character and the development of self. The "ideal" of democracy, he once said, should be "the development of the individual for his own and the common good." He was in accord with the position taken by contemporary philosopher Wilhelm Von Humboldt, who wrote that "the true end of man, or that which is prescribed by the eternal or immutable dictates of reason . . . is the highest and most harmonious development of his powers to a complete and consistent whole."*

That view had important implications for what the nation and its laws should look like. A worthy nation was one that served as cauldron for character and self-development, one that "compels us to strive for the development of the individual." Importantly, Brandeis didn't think that such personal growth was something that just happened: He believed that it required the right conditions. As he said: "The 'right to life' guaranteed by our Constitution" should be understood as "the right to live, and not merely to exist. In order to live men must have the opportunity of developing their faculties; and they must live under conditions in which their faculties may develop naturally and healthily."

A good country and a good economy, therefore, would be one that provided to everybody sufficient liberties and adequate

*His lofty ideals may make Brandeis sound like some kind of demigod walking the earth, but he was not without defects. The small businesses he praised were, after all, often his clients. And while warm and loving to his family members, he appears to have been a distant and aloof figure who had a way of making others feel inadequate in his presence, particularly in his later years. The jurist Learned Hand recalls his meetings with Brandeis this way: "I used to leave him [Brandeis] feeling [of myself], 'You are a self-indulgent, inadequate person.' . . . You sit around and talk a good deal, haven't any very definite convictions. You're not spending your life trying to leave the world better for being in it. You like to drink too much."

support to live meaningful, fulfilling lives. He thought the American founders had understood this, that "[t]hey valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty." Hence a worthy nation should protect men and women from any forces, public or private, that might stifle the opportunities for thriving and life. That would include, of course, government censorship and oppression—hence the importance of free speech, free association, and other liberties. But it also meant freedom from industrial domination, exploitation, or so much economic insecurity that one could not really live without fear of unemployment and poverty. "Men are not free," he wrote, "if dependent industrially on the arbitrary will of another." Economic security was a foundation on which one could really be free in a meaningful sense—hence the importance of steady but not oppressive work, of education, time and space for leisure, parks, libraries, and other institutions.

What Brandeis noticed is something we often ignore. We like to speak of freedoms in the abstract, but for most people, a sense of autonomy is more influenced by private forces and economic structure than by government. For many if not most people, the conditions of work determine how much of life is lived—such basic matters as the length of hours worked, the threat of being fired, harassment or mistreatment by a boss, and for some jobs, questions as fundamental as personal safety or access to a bathroom. Beyond work, our daily lives are shaped profoundly by economic matters like rent, access to transportation or groceries, and health insurance, even more so than any abstract freedoms. That is why Brandeis saw real freedom as freedom from both public *and* private coercion.*

Brandeis saw an economy dominated by giant corporations as tending to a certain inhumanity. He feared that working in a giant corporation might rob the American people of their character: "far more serious than even the suppression of competition is the suppression of industrial liberty, indeed of manhood itself." He grew to detest the growing American culture of overwork, whether self-inflicted, as in the private lawyer's case, or more menacingly, in the growing class of large firms who worked their employees past the limits of human endurance. As he once wrote of the oppressive conditions and long hours at the new industrial firms, they threatened to create "a life so inhuman as to make our former Negro slavery infinitely preferable."

Instead what Brandeis really believed was that business could be a high calling and that a good career was one that created the conditions for human thriving. He thought for most people, a truly successful career consisted in developing a skill or a craft, or building a good business, and practicing as best one could, while aspiring to live by high principles in both personal and business affairs. That was the path to career happiness, yet was too often forgotten by those trying to gain an advantage or making the grave error of taking income or wealth as the measure of success. "A large income is the ordinary incident of

* An insensitivity to private intrusions on human freedom is a major blind spot for contemporary libertarianism, which is rightly concerned with government overreach but bizarrely tolerant of mistreatment or abuse committed by so-called private actors.

success" he wrote "but he who exaggerates the value of the incident is apt to fail of real success." Instead, the honorable professions "select as their test, excellence of performance in the broadest sense—and include, among other things, advance in the particular occupation and service to the community. . . ."

How did Brandeis's principles manifest themselves more broadly, as economic policy? Brandeis took the view that government's highest role lay in the protection of human liberty and the provision of securities consistent with human thriving. That meant a commitment to civil liberties, like rights of free speech and privacy, protected by the courts. But it also meant a commitment to the protection of workers, and an open economy composed of smaller firms—along with measures to break or limit the power of monopolies.

Hence, if the antitrust laws might decentralize the economy, so much the better. If other laws might do the same, that was good, too. Beyond that, Brandeis thought there should be no business exception for ethics, but that government should punish those who used abusive, oppressive, or unconscionable business methods to succeed. That's why some of his greatest ire was reserved for abusive consolidation campaigns that offended both his sense of ethics and economics, where businesses were forced into sales to avoid being bankrupted or destroyed by a powerful rival.

On the positive side Brandeis was an advocate of measures designed to make life worth living, or foster a republic of good character and true citizenry. That meant good public education, steady but not outrageous work hours, pensions for the aged, and sufficient time for leisure and study. He wanted child labor to be banned, and the imposition of maximum work hours for others. In short, he wanted the nation to be a place with room for citizens to thrive, not merely to survive.

We have now some general, though incomplete idea of Brandeis' life and ideals.* Politically, he does not easily fit into contemporary categories. He worked as an advocate for business and business groups, yet also supported unions in their struggle with large employees, and believed that workers should fight for constant work and their fair share of the economic returns. He distrusted big government almost as much as big business, especially at the federal level, but felt that antitrust laws needed to be vigorously enforced. If he had a unifying principle, politically and economically, it is what we have said: that concentrated power in any form is dangerous, that institutions should be built to human scale, and society should pursue human ends. Every institution, public and private, runs the risks of taking on a life of its own, putting its own interests above those of the humans it was supposedly created to serve.

*Brandeis is not without his critics. Historian Thomas McCraw took his best shot at Brandeis in his book *Prophets of Regulation* (1984), portraying him as too rigid and unwilling to accept the potential for efficiency and consumer benefits in new, giant businesses being built. Unfortunately, McCraw makes several basic errors in his attack, like confusing horizontal price-fixing with retail price maintenance. And McCraw seems to have misunderstood the role of a public advocate: Brandeis was fighting against a well-funded campaign to transform the American economy based on what he believed to be a false narrative of progress. What McCraw calls rigidity can also be called principle; what has sustained interest in Brandeis for so long is his adherence to ideals in a manner that transcended day-to-day politics, without being so removed as to be irrelevant.

Brandeis's importance lies in his lasting vision of what an economy should be for. But while he fought the good fight, particularly against large mergers, the credit for actually activating the antitrust laws belongs elsewhere. In particular, it belongs to the man who would soon use the antitrust laws as his big stick.

The Trustbuster

There are many ways that the history of both the United States and the world might have been different had not a strange man named Leon Czolgosz, using a pistol concealed by a handkerchief, shot President William McKinley twice in the abdomen on September 6, 1901, while shaking his hand at the Temple of Music in Buffalo. This much is certain: American economic history changed decisively in that moment.

Under President McKinley, *laissez-faire* was the unannounced, but nonetheless evident, economic policy of the United States. As biographer Edmund Morris puts it, McKinley "tacitly acknowledged that Wall Street, rather than the White House, had executive control of the economy. . . . This conservative alliance, forged after the Civil War, was intended to last well into the new century, if not forever." The doctrine of *laissez-faire,* a cousin to Social Darwinism, suggested that economic problems would tend to work themselves out, and hence government intervention would usually do more harm than good. Its American translation was, "Let well enough alone!"

That was the faith, and as such it took on Constitutional dimensions. For it dictated that not even Congress or elected representatives were to "interfere" with the economy; the economy had its own sovereignty. Laws seeking to ban child labor, or set maximum work hours were, by this thinking, unconstitutional intrusions into the economy's natural operation.*

McKinley's *laissez-faire* views had left the Sherman Act, then a newly enacted antitrust law, in a stillbirth from which it was not clear it would ever emerge. Men like McKinley took the law as merely symbolic, a resolution meant to appease the populist wings of both parties. Others thought it simply reaffirmed pre-existing practices of the courts, and hence did not change anything. McKinley's main concession to growing public arousal and unrest in the late 1890s was to discuss the "Trust problem" in one State of the Union speech, and suggest it was something Congress really ought to deal with some day. It was as if the Sherman Act did not exist.

That impression was only confirmed, in 1901, when it became known that J. P. Morgan was now planning to buy out Andrew Carnegie and create the U.S. Steel trust. While it was a flagrant violation of the Sherman Act, the McKinley White House offered no public comment and instead held a dinner in Morgan's honor.

But now President McKinley lay dying, suffering from gangrene, after surgeons failed to locate the bullet lodged in his body. A firsthand report of Morgan's reaction to the news

*In subsequent years, the courts would strike down such laws as unconstitutional, in cases like *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a law setting maximum work hours) and *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding a ban on child labor unconstitutional).

of McKinley's shooting has him seizing the arm of the reporter from the *New York Times*: "What?" and then slumping into a desk chair, exclaiming: "This is sad, sad, very sad news." Upon his death, Senator Mark Hanna, one of McKinley's closest friends and conservative allies, publicly declaimed, "Now look—that damned cowboy is President of the United States!" And Morgan was right to be concerned, for the death of McKinley did change everything, putting economic policy in the hands of an entirely different kind of man.

Theodore Roosevelt may not need a full introduction. He was born to a wealthy family, but was a man whose democratic leanings were unmistakable. In his storied career, in his rise from New York City police commissioner to Assistant Secretary of the Navy to the Presidency, he managed to combine an imperial temperament with an ear for public sentiment. He was not anti-business, but strongly insistent on punishing villainy when he saw it, and most of all he believed that a majoritarian government must lead the country. His determination that the public was ruler over the corporation, and not vice versa, would make him the single most important advocate of a political antitrust law.

Roosevelt's revolt and rejection of *laissez-faire* was actually evident two weeks before McKinley's assassination. He gave a landmark speech in Minnesota asserting that it was time for the State to assert its authority over the trusts. "The vast individual and corporate fortunes, the vast combinations of capital which have marked the development of our industrial system," he said, "create new conditions, and necessitate a change from the old attitude of the State and the nation toward property."

But Roosevelt's legacy lies not merely in his rhetoric. A law like the Sherman Act is, without enforcement, a dead letter.

That's why a focus on enforcement of the law is so critical to the story of the war against the trusts. And here Roosevelt was not a man to content to play around at the edges. As president, he would soon directly confront the two greatest monopolists of the age, who were the very backbone of the trust movement—J. P. Morgan, and then John D. Rockefeller—in what can only be described as acts of enormous courage.

His offensive against Morgan came first, and it was sparked by the latter's railroad monopolization. In 1901, at just about the time Roosevelt was taking the presidency, Morgan and another railroad magnate, James J. Hill, were effecting the monopolization of Western railroad transportation. Morgan forged a truce among former rivals (including Rockefeller), embodied in a new trust, the Northern Securities Company, representing a new, unified monopoly over all of the Western railroads, instantiated in a New Jersey Trust corporation. It was what is today called a "merger to monopoly" and clearly violated the Sherman Act.

Had he still been in power, President McKinley would almost certainly have "let well enough alone," as he had the U.S. Steel merger, or perhaps asked Morgan, in confidence, for a few concessions. But Roosevelt, in one of his first main actions as president, ordered his Attorney General Philander Knox to begin an investigation of the Northern Securities Company, and to review its legality under the Sherman Act. Knox, perhaps prodded by Roosevelt, stunned the political and financial world with an announcement: "In my judgment, [the Northern Securities Company] violates the provisions of the Sherman Act of 1890."

Why did Roosevelt order the investigation? Roosevelt was far less wary of size as a danger unto itself than a man like Brandeis. He held a real affection for the greatness and majesty of large institutions. Nor did he hold a personal animus toward Morgan himself—they were both of the New York aristocracy, and he'd personally invited Morgan to White House dinners.

For Roosevelt it was a matter of political democracy. He plainly saw the growing power of the trusts as a serious political question, as a threat to the basic proposition of democratic rule. To Roosevelt, economic policy did not form an exception to popular rule, and he viewed the seizure of economic policy by Wall Street and trust management as a serious corruption of the democratic system. He also understood, as we should today, that ignoring economic misery and refusing to give the public what they wanted would drive a demand for more extreme solutions, like Marxist or anarchist revolution. Hence, as he later said, "When aggregated wealth demands what is unfair, its immense power can be met only by the still greater power of the people as a whole." And, as he wrote to a friend at the time, "the absolutely vital question" was whether "the government has the power to control the trusts."

A few weeks after Knox's determination, at the direction of Roosevelt and his cabinet, the United States filed suit against the Northern Securities Company, beginning the first great judicial attack, by the federal government, on a private trust and on the personal economic power of J. P. Morgan himself.

Later in life, Roosevelt would give his account of Morgan's reaction.* Soon after suit was filed, an indignant and angry Morgan arrived at the White House and demanded to see the

*We don't have Morgan's account of the meeting, and Roosevelt tended to tell stories in a manner so as to make himself look courageous, so the account given should be taken with a grain of salt.

president. He was granted an audience, where Morgan complained of the lack of notice, and proposed that their lawyers meet to settle the matter. "If we have done anything wrong," said Morgan, "send your man to my man and they can fix it up." But Roosevelt responded, "that can't be done," and Knox added, "we don't want to fix it up, we want to stop it." Morgan, quietly furious at the challenge to his power, demanded to know whether his prize creation, U.S. Steel, would also be coming under attack. "Certainly not," said Roosevelt, "unless we find out that in any case they've done something we regard as wrong." When Morgan had left, Roosevelt summarized the meeting this way: "Mr. Morgan could not help regarding me as a big rival operator who either intended to ruin all his interests or could be induced to come to an agreement."

It was at around this time that the word "trust-buster" (and its occasional synonym, "octopus hunter") came into widespread popular usage. It became Roosevelt's appellation; he became the trustbuster incarnate. It was the image inhabited by Roosevelt in print and editorial cartoons, given color by the President's bold declarations. Over the summer of 1902, during the campaign against Morgan, he gave a speech in Rhode Island where he announced that "a man of great wealth who does not use that wealth decently is, in a peculiar sense, a menace to the community." He added that the "trusts are the creatures of the State, and the State not only has the right to control them, but it is in duty bound to control them wherever need of such control is shown."

And so here begins the trust-busting tradition in its hour of greatest glory. Its significance cannot be overstated. A law like the Sherman Act, like the Constitution, is so broadly worded and unclear in its application that it does not take real meaning or shape without an enforcement tradition. In the person of Roosevelt was born the archetype: the courageous government official unafraid of the massive private power represented by the trusts, the incorruptible sheriff of economic justice. As the *Washington Star* put it, "The President of the United States is the original 'trust-buster,' the great and only one for this occasion."

In the century to follow, the trustbuster mantle would be something like a magic cape, or perhaps suit of armor, emboldening its wearer, that would be passed down through the generations. It would be inhabited first by Taft, Roosevelt's successor, who was even more aggressive that Roosevelt. It would be worn by prominent Justice Department officials, including, among others, Robert Jackson, who would also be a Nuremberg prosecutor, and by Supreme Court Justice Thurman Arnold, the Wyoming "cowboy" and Yale professor who became the New Deal's most aggressive trustbuster. It also belonged to Joel Klein, who in the 1990s faced off with Bill Gates.

Along with the mantle and the archetype came a tradition, one that lasted at least to the 1990s, of bringing "battleship" cases against giant, industry-spanning monopolists. These declarations of war against giant firms were not for the faint of heart. The cases could last years, if not decades, and demand resources that strained even the richest government on Earth. They also tended to yield political attacks and efforts to ruin government agencies like the Justice Department and the Federal Trade Commission, not to mention personal attacks as well.

The Northern Securities litigation itself went relatively quickly: The Justice Department asserted that the establishment of the firm was an attempt to monopolize the railroad business, in violation of Section 2 of the Sherman Act. The company's main defense was that the federal government had no authority to stop its mergers; it had no right to punish the mere transfer of property and establishment of a new state corporation. In the alternate, it responded that its goals were, in fact, entirely beneficent: It wished to enhance and extend commerce across the West, and benefit the public through a better railroad.

After two full trials (one contested by Minnesota), the case eventually made its way to the Supreme Court. In a major victory for Roosevelt, the antitrust law, and the Congress of 1890, the merger was blocked. The opinion was written by Justice John Marshall Harlan, a great antitrust absolutist, who spoke for the agrarian and populist spirit behind the Sherman Act's creation, and would become a leading judicial voice supporting the early trust-busting tradition.

Harlan read the Sherman Act as a literal ban on trusts, which, as he would later say, presented the danger of a "slavery that would result from aggregations of capital in the hands of a few individuals and corporations." With the *Northern Securities* opinion he effectively awoke the Sherman Act's anti-monopoly powers. For him, the western railroad trust was a blatant violation of the Sherman Act's prohibitions. For it "placed the control of the two roads in the hands of a single person, to wit, the Securities Company, . . . [and] destroy[ed] every motive for competition between two roads . . . by pooling the earnings of the two roads for the common benefit of the stockholders of both companies."

Despite Harlan's certainty, the decision was a close one, won on a 5–4 vote, and the famous dissenter, Justice Oliver Wendell Holmes, took the view that the Sherman Act was not, in fact, meant to outlaw the trusts or even to protect competition. Instead, according to Holmes, "it was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared." In other words, Holmes held the bizarre idea that ruinous competition was the concern of the Sherman Act, a theory hard to square with its text or history.*

In the end, *Northern Securities* was an important victory for Roosevelt and his premise that the trusts must obey the state, for he had challenged and humbled a man, J. P. Morgan, who had once seemed beyond the reach of any law, a man who nations might obey rather than order. As Roosevelt later reflected, "it was imperative to teach the masters of the biggest corporations in the land that they were not, and would not be permitted to regard themselves as, above the law."

Political Antitrust

When Roosevelt activated the Sherman Act, his goal was as much political as economic. He saw enforcement of the Act as essential to making clear that, in a democracy, the elected

*As a matter of legal method, Holmes's reading is hard to support, and his opinion is in direct tension with his views, expressed in later opinions (like his *Lochner* dissent) that favored the majority's right to decide economic policy, no matter what the judiciary might think. Perhaps he thought that the Sherman Act was only ever meant to be symbolic, the kind of strong but unenforceable statement legislatures occasionally make to placate the public. It is also the case that Holmes had himself become sympathetic to the idea that the trusts were an evolutionary improvement over "wasteful" competition. In a private letter he wrote that "there are great wastes in competition, due to advertisement, superfluous reduplication of establishments, etc. But those are the very things the trusts get rid of."

 representatives ultimately had the final say, and saw the antitrust laws as one antidote to danger of private economic power that might rival public power. As Justice William Douglas would later put it, "power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy." Hence the idea that antitrust would play a Constitutional role.

But what does it mean to say that antitrust plays a "Constitutional" role? As every American schoolchild knows, the U.S. Constitution is comprised of a system of checks and balances. The legislature is supposed to check executive power, and vice versa; the judiciary provides checks on the legislature, the executives, and the states as well. Hence, antitrust law was serving as a new kind of limit: a check on *private* power, by preventing the growth of monopoly corporations into something that might transcend the power of elected government to control. His pursuit of this goal makes it fair to call Roosevelt the pioneer of political antitrust.

In our times, when concerns about corporate influence over government have reached a fever pitch, the political importance of antitrust as a check on private power might seem more obvious than ever. Yet over the last few decades, the very idea of political role has all but disappeared, as antitrust's focus has become exclusively and narrowly economic. It isn't as if the laws have been amended: The legislatures repeatedly expressed fear and concern with the accumulation of private power in competition with government. As recently as 1962, the Supreme Court pointed out that the antitrust laws respond to a "concentration of economic power" and also a "threat to other values," like the independence of smaller businesses or local control of industry.

The retreat, rather, is best attributed to a combination of fear and uncertainty among those who enforce and interpret the laws—especially departments of government and federal judges. Political values, the argument goes, are just, well, too political or too vague to be considered part of enforcement policy.

This is not a good excuse. No one denies that economic considerations are what should govern any individual case. But the broad tenor of antitrust enforcement—the broader goals of enforcement—should be animated by a concern that too much concentrated economic power will translate into too much political power, and thereby threaten the Constitutional structure. Or, as Robert Pitofsky put it, we should always be concerned that "excessive concentration of economic power will breed antidemocratic political pressures."

Let's make plain what both Roosevelt and Pitofsky noticed: The compatibility of extreme industrial concentration and democratic government is an uncertain proposition. At some level the point is obvious: Private economic power is a rival to the power of elected governments, and firms may also seek to control politics for their own purposes. Increased industrial concentration predictably yields increased influence over political outcomes for corporations and business interests, as opposed to citizens or the public. But let us take a moment to see how political scientists have developed this point.

In a representative democracy, lawmaking is supposed to roughly match what the majority wants. If that is unclear or disputed, then we might expect or hope they'd reflect the interests of the "swing" voter—that is, the middle-of-the-road man or woman. But research shows that, for the vast majority of policy matters, that isn't how things work at all.

It was a scholar named Mancur Olson at Harvard who, in the 1960s, upended the understanding of political influence by pointing out that, in fact, large majorities don't get what they want on many issues. Instead, they consistently lose out to small, closely-knit groups with discrete interests around which they organize—of which the "industry association" is the best example. A group like "the middle class" or "consumers," while impressive in numbers and even theoretical economic power, faces major disadvantages in the actual political process. That follows because political influence—lobbying—requires organization, financial resources, time, and yields rewards that are not limited to those who put in the effort. Olson's memorable conclusion is that the small and organized will dominate the large and disorganized.

There are always a few inspired members of the public who devote their lives to political change. But their numbers pale in comparison to the paid ranks of corporate lobbyists, working at industry organizations, whose incentive is not altruism but generous salaries for achieving payouts through lawmaking. If one simply regards lobbying as an investment in political outcomes, the rewards are copious, and more than justify the money and effort. Consider, for example, the case of the pharmaceutical industry in the United States. In 2003, the industry invested $116 million in convincing Congress to ban America's largest federal-run insurance program, Medicare, from negotiating for lower drug prices. That $116 million was, to be sure, a major investment. However, the enactment of the negotiation ban has benefited the industry (and cost consumers) an estimated $90 billion per year. As an investment, it returns some

77,500 percent, and is a gift that keeps on giving. In recent years, when President Donald Trump, in a populist mood, proposed changing the law and forcing negotiations, the money began to flow, and lo and behold, the proposal went away.

Everyone knows that lobbying works. But a key and neglected point is that the relative consolidation of industry has an important influence on it. That follows because the fewer members of the industry, the fewer among whom the gains are split. Take the industry organization "Airlines for America." It has a limited number of members—three major airlines and seven smaller ones. The fruits of any policy success—say, preventing a cap on baggage and change fees—are immediately shared among the members.

Concentrated industries have good reasons to invest political influence. Consider, by contrast, the problem of collective action that faces "the middle class," a large group with some 100 million members. A middle-class tax cut might save each member $500 a year. However, it might also require someone to invest $50 million to lobby and ensure passage of that tax cut. As the math makes clear, there is no individual member of the middle class that has the incentive to make that investment. Even if it were just a $20 million lobbying price tag, there would still be no investment. This is the problem of collective action, and it predicts that large groups—the majority—will often be losers in the legislative process.

Advanced empirical research has begun to demonstrate that these predictions bear out. A Princeton and Northwestern group in 2014 tested various theories of politics and concluded that a theory of "biased pluralism" best explained outcomes—that the public policies "tend to tilt toward the wishes of corporations and business and professional associations."

How does antitrust's approach to concentration relate to this? Simply enough: The more concentrated the industry, the fewer who need to coordinate, and the fewer among whom the stakes need be divided. If an industry has sixty or eighty firms in it, they may squabble, be incapable of acting as a group, and also face the problem of collective action. But, after consolidation, we might be speaking of just six firms, and the prospects for political cooperation improve. And after a merger to monopoly, there is no need to cooperate at all.

The simplest—if slightly overstated—way to put this is as follows. The more concentrated the industry, the more corrupted we can expect the political process to be. Here, by corrupted, we mean a political system that does not serve its stated goals—service of the public's interests—but instead favors a few groups at the expense of the general public.

All of this amounts to just a more fancy way of demonstrating Roosevelt's point: Concentrated private power can serve as a threat to the Constitutional design, and the enforcement of the antitrust law can provide a final check on private power. This, by itself, provides an independent rationale for enforcement of the antitrust laws.

The Abusive Trust

Roosevelt's confrontation with J. P. Morgan's western railroad monopoly in 1904 was neither timid nor trivial. But if blocking the formation of a new monopoly trust was one thing, what about all the trusts that were already running the economy? To put the question more bluntly, what about Standard Oil?

For there, unmolested, sat Standard Oil, the very first trust. It held its monopoly for nearly twenty-five years. At the time, it was the largest private firm in the world. Standard Oil's patriarch, John D. Rockefeller, was in fact the wealthiest single American in history, with an accumulated capital between $300 and $400 billion in today's dollars.

Quite a feat for a man born poor, to a father who was little more than a confidence man. Once upon a time, in the late 1860s, "the Standard" had been just a mid-sized Cleveland operation with no particular technological advantages over its rivals. It did, however, have the strategic genius of Rockefeller and his particular talent for industry conquest. As journalist Ida Tarbell would write of him, Rockefeller "was like a general who, besieging a city surrounded by fortified hills, views from a balloon the whole great field, and see how, this point taken, that must fall; this hill reached, that fort is commanded. And nothing was too small: the corner grocery in Browntown, the humble refining still on Oil Creek, the shortest private pipe line. Nothing, for little things grow."

For more than two decades Standard Oil had batted aside any would-be challengers with a mixture of strategies and tactics that would have made Sun Tzu nod his head in approval. In this respect, the Standard was actually in a slightly a different category than the trusts built by J. P. Morgan. If Morgan used carrots—splitting the proceeds of monopoly—Rockefeller preferred a big stick—the exclusionary cartel, ruinous railroad prices, predatory refining prices, and the passage of laws designed to exclude any would-be competitor. Rockefeller liked to offer his smaller rivals the choice first popularized by Genghis Khan: Join the empire, or face complete destruction.

In fact, the continued existence of Standard Oil threatened to make a mockery of the antitrust law. For if the law would tolerate Standard Oil, the original trust, an abusive monopoly, how could it be said to be an "anti" trust law at all?

Roosevelt, as we've said, was determined to demonstrate that government was sovereign over even the mightiest corporations, even Standard Oil. But Roosevelt was politically savvy enough to understand that he needed an angle. His opportunity was created by the publication, in 1904, of a sensational and widely read history of Standard Oil in *McClure's* magazine by reporter Ida Tarbell.

The History of the Standard Oil Company, nineteen parts in total, was a product of extensive reporting, and it told the full story of both Standard Oil's rise to power and its quashing of threats to its rule. Carefully researched and written in a balanced fashion, yet dark in its implications, the series reached a large audience and provoked national outrage. Tarbell discovered and documented previously unknown abuses—particularly, in the use of railroad rates—and revealed a certain darkness at the heart of the trust. Here is an example of an exchange she published:

> "But we don't want to sell," objected Mr. Hanna [an independent refiner.]
>
> "You can never make any more money, in my judgment," said Mr. Rockefeller. "You can't compete with the Standard. We have all the large refineries now. If you refuse to sell, it will end in your being crushed."

Among the objections to the Trust movement, as we've seen with Brandeis, was the observation that the drive to bigness and monopoly also seemed inevitably to come with its own morality, one that either displaced or replaced Christian or other moral strictures, at least for matters of business. But the drives toward monopoly were rough affairs, inevitably demanding a departure from practices previously considered moral or ethical in personal dealings. They tended to involve deception, bribery, and manipulation, and at worst, sabotage, bankrupting of rivals, and even the killing of workers to quell unrest.

The trusts seemed to come with a new system—a "dual morality," which arguably came to its fullest flower later in the writings of novelist Ayn Rand. It was a morality that would come to celebrate brutality in commerce, and the holding of one set of ethical or moral rules for personal dealings, and another very different set of rules for business. Indeed they were sometimes quite the opposite: The more extreme the piety of personal views, the more extreme the commercial abuses.

Tarbell noticed exactly this tendency in John D. Rockefeller. As she wrote "there was no more faithful baptist in Cleveland than he . . . He gave to its poor. He visited its sick." And yet "he was willing to strain every nerve . . . to ruin every man in the oil business." She felt that "religious emotion and sentiments of charity . . . seem to have taken the place in him of notions of justice and regard for the rights of others."

The split personality characteristic of this dual morality was if anything more acute in J. P. Morgan. "A man always has two reasons for the things he does," Morgan once told an associate. "A good one and the real one." At home in New York, he was a pious family man who attended church twice on Sundays. He was the senior warden of St. George's Church in Manhattan, and in his will he described his soul as free of sin. Yet while overseas or aboard his massive steamship yacht, *The Corsair,* he seemed to adopt a completely different set of ethics, enjoying cruder pursuits, cutting secret deals to bankrupt rivals, bribing government officials, and enriching himself and friends. He also enjoyed a steady stream of female visitors on his ship, and maintained a well-documented collection of mistresses, many of whom seem to have been well-compensated for their attention to such a strikingly ugly man. At times, he seemed to have more freely mixed his interests in religion with his playboy lifestyle. While cruising down the Nile at age seventy-four, his "party had included, characteristically, a bishop and several attractive ladies." The latter (and maybe the former) he showered with gold jewelry purchased in Cairo—"help yourselves," he said.

Times have not changed so much, and business magnates do not stand alone in compartmentalizing their morality. But what was new were the lengths taken to justify certain conduct, as opposed to hiding it, making the unethical into the necessary, indeed the proper.

The revelation of Standard Oil's abuses was particularly important for Roosevelt and his approach to enforcement. For the story of Roosevelt the trustbuster is the simple story, and the simple story is sometimes the more important one. It unquestionably describes Roosevelt in his first term. But as we have hinted, Roosevelt was, in fact, far more conflicted about the antitrust laws then he liked to let on. For while thought that the trusts needed to brought to heel, made accountable to the public, he also worshiped size and power as much as any man. The early Roosevelt made peace with his internal contradictions using a simple but vitally important distinction: a line between the "bad trusts" and the "good trusts." In other words, he would bust only the bad trusts, those engaged in abuse of competitors, corruption of politic process, and general villainy. But, as he put it "we grudge no man a fortune which represents his own power and sagacity" he said, if "exercised with entire regard to the welfare of his fellows. . . ."*

Given an opening by Tarbell, and with the patience of a hunter, President Roosevelt directed his newly created Bureau of Corporations (the predecessor of the Federal Trade Commission) to investigate Standard Oil's practices. After two years of fact-finding, Roosevelt transmitted a report to Congress, echoing Tarbell's findings but going deeper, offering a damning account of abuse of competitors over a long time. Having cornered his opponent, Roosevelt announced that his Justice Department would now be taking up the question of prosecution.

What had Standard Oil done, according to investigators and the courts? While the record is lengthy, we can concentrate on two main periods. Over the 1870s Rockefeller monopolized oil refining, and did so not just by growing, but through a mixture of exclusionary cartels, the leverage of railroad pricing power, and a bold program of acquisitions. Rockefeller began

*The idea of a simple line between the good and bad monopolist may seem too simplistic for such a vital question but it is also not necessarily easy to improve upon. If we leap forward to consider the tech monopolies of our times, we can see that the good/bad question is inescapable. More than a hundred years later, a version of Roosevelt's line remains the centerpiece of the U.S. Supreme Court's test for assessing whether monopolization violates the Sherman Act, albeit in much drier, lawyerly language. The test, from *United States v. Grinnell,* condemns "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

by banding together with the other large refiners in Cleveland and Pittsburgh, and they collectively struck a deal with the major railroads that guaranteed lower rates for their shipments while fixing prices higher for anyone out of the club—that is, would-be independents or smaller competitors.* This part of his strategy exactly reflects today's battles over Net Neutrality, for Rockefeller used the key economic network of his time (the railroads) to ensure a major disadvantage for his smaller rivals. The cartel system was discovered and illegalized, but Rockefeller and his allies turned to secret "rebates" on railroad prices with the same effect. Eventually most of the states and the federal government enacted common carriage law, which mandated charging standardized carriage rates, but Standard Oil still found ways to secretly violate the law.

The exclusionary railroad cartel had more than one purpose, for it also served as a club. Rockefeller embarked on an industry shakeout, using the threat of higher railroad rates to begin forcing smaller refineries to sell out to him at a loss. Once he'd bought out his smaller rivals, he turned on his larger partners as well, bringing them all into a single trust under his control. In just over a decade, Rockefeller drove the market share of Standard Oil from 10 percent to over 90 percent.

Building a monopoly is one thing, but Standard Oil then managed to defend the monopoly and its profits for the next

*Why would the railroads agree to the plan (which after all, lowered their prices)? Given the collective bargaining power of the major refineries, they may have given them little choice. But the deal also gave them guaranteed volume, and perhaps the opportunity to ward off their own competitors. In later years, Rockefeller would take substantial ownership interests in the railroads, which may have later played a factor.

thirty years, even in the face of disruptive new technologies, like the oil pipeline, which, as many important technologies do, threatened to bring new competition and lower prices to the industry. Rockefeller identified and met the challenge of pipelines directly, by building his own and ensuring the ruin of his new pipeline challengers. He prevented many pipelines from being built in the first place, or bankrupted and acquired those that managed to be built, a process that tended to scare off would-be competitors. Among the tactics used to keep competitors at bay were regionalized pricing strategies (strategically overpaying for crude in some markets, lowering prices in others), and the assertion of political influence, such as ensuring that government would prevent rival pipelines from getting the rights-of-way they might need or even banning competing pipelines altogether. Contrary to revisionist history, "predatory pricing" was not the only or the main method used by Standard Oil; it mastered the many ways of fighting dirty to keep its grip on the industry.*

Armed with copious evidence of these various abuses and exclusions, the Justice Department filed a 170-page complaint in 1906. Among various behaviors indicted were the exclusive cartel deals with the railroads, abuse of its pipeline monopoly,

*A longstanding revisionist history suggests that Standard Oil was a more efficient refiner that was unfairly condemned for having "lower prices." Support comes from a 1958 study by economic historian John McGee, who concluded that Standard Oil had not, in fact, been proved to engage in below-cost pricing. (1 J. L. & Econ. 137.) Yet in fact Standard Oil relied on a menu of exclusionary tactics, not just predatory pricing, to gain and maintain monopoly. In 2012, Christopher Leslie reexamined the data relied upon by McGee, finding both distortions and also new data suggesting that the Standard did, indeed, price below cost. (85 S. Cal. L. Rev. 573.)

 and predatory pricing—conduct that, to the ears of a contemporary antitrust lawyer, violates the ban on monopolization (Section 2 of the Sherman Act), and restraints on trade (Section 1 of the Sherman Act).

With this the stage was set, but one thing is important to know, for it portended the future. Roosevelt, just before pulling the trigger, summoned Standard Oil's leadership to the White House for a secret meeting. There he put a different option into consideration: Might the world's largest oil company be willing to accept government oversight, promise to clean up their act, and even, perhaps, become the first "public" trust?

This offer reflected the fact that Roosevelt's primary concern was not so much decentralization, but the supremacy of elected government. It was an interesting possibility—imagine the United States government in active control of the world's largest oil company, now reformed to serve as a public utility. In some ways, it might have made the United States more like Saudi Arabia, where Saudi Aramco, the state-controlled oil company, forms a major part of the economy, and currently has an estimated value of some $1.4 to $2.1 trillion (in comparison, Apple, the world's most valuable public company, is worth $1 trillion). But this alternative history was not to pass, because Standard Oil rebuffed him entirely. It would be many years until another firm said "yes" to a similar offer—AT&T, the telephone monopolist. In any case, facing mounting evidence of villainy, Roosevelt adjudged Standard Oil to be what he called a "bad trust" and decided it was time, again, to go to war.

In the summer of 1906, President Roosevelt and the cabinet unanimously agreed to bring suit against Standard Oil. By that time, Standard Oil also faced a flurry of state antitrust actions, as well as an investigation into railroad rate manipulation that made criminal prosecution possible. The case went to trial, and 1,371 exhibitions were entered into evidence, while the government called 444 witnesses. The lower courts adjudged Standard Oil guilty, and faced with overwhelming evidence, it was not particularly hard for the Supreme Court to conclude in 1911 that Standard Oil was the kind of abusive and anti-competitive trust that the Sherman Act had been designed to illegalize. The Court, most importantly, affirmed the remedy: a breakup of the firm into some 34 constituent parts.

Among scholars, and among its critics, the Supreme Court's decision is usually remarked upon for its implication that only "unreasonable" restraints of trade or combinations were illegal. That dictum was undoubtedly important. It set up one of the greatest questions for antitrust: are all monopolies forbidden, or only the "abusive" among them? In Roosevelt's usage, did the law ban all trusts, or just "bad trusts?" But this much was clear: A monopoly with a track record of exclusion and abuse like Standard Oil warranted the dissolution of the firm.

Justice Harlan concurred in the dissolution of Standard Oil, but was incensed by the Court's implicit holding that a "reasonable" conduct might not be condemned. In memorable fashion, he restated the origins and purposes of the Sherman Act:

> 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 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.

Economies and *Diseconomies* of Scale

Standard Oil was broken into its constituents parts, among them seven "majors," many of which remain among the most valuable and powerful firms on Earth, including, notably, Standard Oil of New Jersey (Exxon), Standard Oil of New York (Mobil), and Standard Oil of California (Chevron). In the aftermath of the breakup, stock was divided proportionately, and, to the surprise of many observers, within a year, the value of what had been Standard Oil had doubled, and in several years, had increased five-fold.

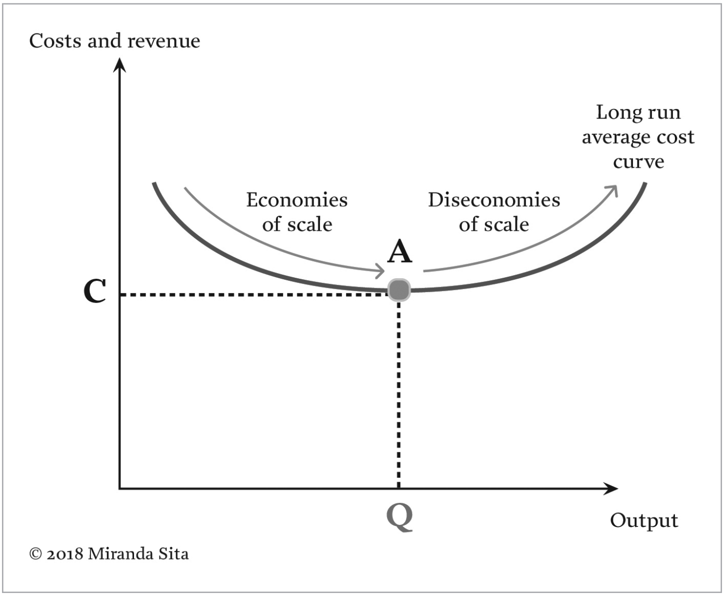
The story of Standard Oil raises what is perhaps the central economic question we shall confront. The proponents of the trust argued that their size and monopoly control was natural and necessary: that the larger firm was simply more efficient than the small operators of old. The economic phrase that captures this idea is that of "economies of scale," and it simply suggests that larger producers will outperform smaller ones. If this is true, is the whole enterprise of antitrust and decentralization misguided?

Let us examine this question carefully. It is true that a large factory, operating at volume, will usually produce goods at lower cost than a mom-and-pop operation. That's why cars are produced on large assembly lines, not at the neighborhood craft automobile manufacturer. It is something also witnessed in the tech world. In the age of Amazon and Google it often seems that the company which has the most servers or collects the most data necessarily has the better product.

But the economics of the last century have made it clear that the basic proposition—that bigger is better—is subject to both limitations and caveats that make the full picture complex. First, at some point, economies of scale "run out"—that is, increasing size no longer creates further efficiencies. A car plant needs to be a certain size to be efficient, but after that, it no longer becomes any more efficient. That point varies by product and industry. Making pizza efficiently requires little more than an industrial oven, giving a massive operation no efficiency advantage over a neighborhood store. The advantages, if any, are those related to size, power, reputation, and so on—compare the Domino's chain to the local pizzeria—but are not actually related to the ability to make a better product.

The size problem is made more complex by two more factors. One is that as the size of the operation increases, "dis-economies" of scale begin to creep in, as economists since Alfred Marshall in the 1920s have suggested. For example, as a firm adds more and more employees, it needs to add more managers, and ever-more complex systems of internal control, which tend, at some point, to begin making the firm less efficient. Managers in larger firms may start to yield to the temptations of seeking their own personal enrichment and power as opposed to the interests of the firm. Sometimes great size yields a short-term advantage, but creates "dynamic" disadvantages: A larger firm may also become cumbersome, unable to adapt to changing market conditions. Consider that General Motors was thought a paragon of efficiency in the 1950s, but by the 1980s had become an unwieldy monster that eventually went bankrupt.

Hence the premise that productive efficiency usually has a U-shaped relationship with scale, as pictured here:



This is the curse of bigness illustrated. The point is intuitive to anyone who has actually worked in an enormous organization of some age and wondered where the phrase "efficiencies of scale" could have come from. As business tycoon T. Boone Pickens once put it, "It's unusual to find a large corporation that's efficient. I know about economies of scale and all the other advantages that are supposed to come with size. But when you get an inside look, it's easy to see how inefficient big business really is."*

It was these creeping inefficiencies in sprawling firms that Brandeis thought of as comprising part of the curse of bigness. But there is another side to the curse, one associated with growing power. It is this: As a business gets larger, it begins to enjoy a different kind of advantages having less to do with efficiencies of operation, and more to do with its ability to wield economic and political power, by itself or conjunction with others. In other words, a firm may not actually become more efficient as it gets larger, but may become better at raising prices or keeping out competitors.

*If an oversized firm starts to suffer from the curse of bigness, why would a firm ever grow past its optimal size? This is not mysterious to any student of empire, or of human ambition; in contemporary economic theory it is usually described, as representing the difference between the interests of the corporation and its management. The owners of a corporation, the shareholders, may prefer a smaller profitable operation, but executives and founders prefer to run a great empire and conquer their rivals, an ambition that can easily overcome any effort to have a firm that operates at "efficient" size. As economist Michael Jensen, a founder of "agency theory" dryly explains: "Managers have incentives to cause their firms to grow beyond the optimal size" because "growth increases managers' power by increasing the resources under their control."

The large firm, alone or in cooperation, can and usually does invest in "moats"—the business school term for barriers that are designed to keep out new competitors who might have better-quality products or cheaper prices. There are myriad methods of doing so—like control of scarce resources, exclusive or preferential deals with retailers or distributors, government licenses, and so.

Meanwhile, the growth of individual firms through mergers usually correlates with increased "concentration"—that is, fewer firms in the industry. And once an industry is composed of just a few majors, it becomes easier for them to jointly extract a cost to society. The easy way is by coordinating on higher prices. The fewer members in the industry, the easier it is to cooperate on building a "joint moat"—perhaps the "walled city" is a better metaphor—designed to keep out any would-be invaders. Finally, as we have seen, giant firms, often in cooperation with their counterparts, have great incentives to invest in the political process to obtain the passage of laws that either fortify the moat or just transfer wealth to the industry, like tax cuts or subsidies.

The effects of size and concentration are not limited to mere self-preservation. The larger and more powerful firm has a clearer bargaining advantage over its workers; the monopolist most of all. Back in the nineteenth century, the power of large firms enabled them to drive workers harder and longer, for less money, and also provided the resources to break unions with violent attacks, sometimes by even hiring their own armed militias. Today, concentrated economic power is used to avoid raising wages, to insist on intense conditions of employment, to abuse of "non-compete" agreements, and to hire part-timers instead of full-time employees. The more power a firm or industry enjoys, the easier it is to prevent employees from getting too much of the returns.

To be sure, there are some private checks on bigness, or of the building of empire for empire's sake. The firm's owners or board of directors may order management to stop expanding for no good reason but their own welfare. Smaller, more efficient competitors do sometimes manage to kill a bloated dinosaur, or the firm may be taken over by a corporate raider who sees value in breaking the firm into smaller pieces. But unfortunately, these market-based checks on bigness can and do fail, and their mythology can outmatch their real effectiveness. For they are, at all times, counterbalanced by the advantages and attractions of power, and the allure of monopoly profit. For that reason, oversized, inefficient firms can persist for decades, effectively immunized from the need to improve products or lower prices. Instead, like American domestic airlines, the industry can happily offer a product that continues to get worse and cost more.

That monopoly can be an inefficient form was a lesson from the Standard Oil case, for in the end, the breakup of the oil industry was a boon to its further expansion. That isn't unusual: the break-up of the original film-trust sparked the rise of the American film industry; and in more recent times the campaigns against AT&T and IBM sparked a momentous boom in the telecommunications and computing industries. The cries of doom, gloom and economic catastrophe are often overblown, for some industries can benefit from a breakup. Indeed, as the example of the Standard suggests, while the patient may protest, the government is sometimes doing it a favor.

Antitrust's Constitutional Moment

Roosevelt's cases against Standard Oil and J. P. Morgan were his most dramatic; but in total, he filed forty-five cases and achieved numerous breakups. The trustbusting campaign continued under his successor, President William Howard Taft, who pursued a total of seventy-five cases, including cases targeting U.S. Steel and AT&T, two of J. P. Morgan's other creations. By the end of the 1910s, just about every one of the major trusts had been broken into pieces or had some encounter with the antitrust law, making it, for a while at least, a primary level of federal economic policymaking. In this sense Roosevelt achieved his goal—demonstrating the primacy of the elected government over the structure of the economy.

However, as we've already said, Roosevelt's views of monopoly and size were more complex that the trustbuster moniker allows. He had an incurable admiration for that which was grand, mighty, and powerful, like the new U.S. Navy he helped build. He could not help feeling affection for the sheer power of big businesses, but at the same time he believed that elected government must be sovereign over business.

In his earlier years, Roosevelt's faith in law enforcement won the day, but in his later years he lost patience. When running for president in 1912 as the head of his own party, Roosevelt became the advocate of a different approach—one then new to American history, but with a difficult legacy in the twentieth century. Roosevelt campaigned on a platform he called "New Nationalism," where he promised not to break up, but to nationalize or supervise the remaining trust monopolies. In other words, Roosevelt proposed abandoning the very idea of a competitive or decentralized economy, in favor of one dominated by monopolists who were then, in turn, subject to the direction and regulation of the state—the paradigm of "regulated monopoly." Roosevelt's approach, later termed "corporatism" by political scientists, was at some level not really so different from the Crown monopolies loyal to the British King, nor, as we discuss more in a moment, was it that much different than the corporate-state alliances adopted by Japan, Germany, and Italy in the 1930s.

There was more here than a rejection of antitrust: It was a rejection of the entire idea of a competitive economy, and that is what makes the 1912 election so important to our story. With Roosevelt and the socialist candidate Eugene Debs both calling for state-supervised monopolies, it became one of the few elections in history where the public was clearly engaged with and voting on what kind of economic order they wished to live in. On the one hand, here was candidate Roosevelt promising a future of monopolies supervised by an all-powerful federal government—as he said, "to give the National Government complete power over the organization and capitalization of all business concerns." On the other, Taft, the Republican, and Wilson, the Democrat, both promised to restore a competitive economy by fighting the trusts with the antitrust law and new regulations—ironically, doubling down on the model Roosevelt himself pioneered. Debs, the socialist candidate, called the antitrust law "silly" and "puerile," for he believed in an economy composed of monopolies controlled by the people. As he put it, "Monopoly is certain and sure. It is merely a question of whether we will be collectively owned monopolies, for the good of the race, or whether they will be privately owned for the power, pleasure, and glory of the Morgans, Rockefellers, Guggenheims, and Carnegies."

It is interesting to speculate on how the history of the United States might have turned out had Roosevelt won. Perhaps it would have amounted in the end to little more than the selective nationalization of most of their public utility and telecommunications providers practiced by other Western democracies like Britain and France. But Roosevelt had promised to go further, to accept regulated monopolies across the entire economy, suggesting something similar to the extreme approaches taken by the Italian and German governments over the 1930s. What Roosevelt was proposing amounted to a union of political and economic power unknown even to the greatest of ancient emperors. All commerce would be controlled by a small group of monopolists, who would be, in turn, controlled by government (or perhaps vice versa). If Roosevelt had won the 1912 election, and managed to enact his program, the history of the United States would have been profoundly different, and probably far darker, given the fact that such cooperation was so closely linked to the rise of fascism in other countries. Unfortunately, the monopolist and dictator tend to have overlapping interests.

But Woodrow Wilson won the 1912 election, based on economic and antitrust policies directly taken from Louis Brandeis, his economic advisor—which the latter labeled "regulated competition." The Roosevelt-Debs proposal of supervised monopolies was not popular: the competing candidates took some 65 percent of the popular vote.

After Wilson's victory, Congress proceeded to fortify the antitrust laws with a series of new statutes. The Clayton Act of 1914 ratified and toughened the Sherman Act and explicitly criminalized particular anticompetitive practices. That same year, Congress created a specialized competition and consumer protection agency named the Federal Trade Commission and gave it powers to investigate and bring suit against any "unfair methods of competition."* The importance of these new laws lies not just in their specific provisions, but in their democratic resolution of the uncertainty surrounding the purpose of the Sherman Act. The new laws were a Congressional ratification of the view that the antitrust laws were meant not to be merely symbolic, or just to benefit small producers or consumers. When we add up the popular vote for President and the subsequent passage of stronger antitrust laws in 1914 it becomes clear that the Wilson-Brandeis economic antitrust program enjoyed a powerful democratic validation—one arguably of Constitutional significance.†

In short, in the 1910s, it is fair to say that the United States made a choice. As Brandeis would later say, the nation had picked decentralization over concentration, and competition over monopoly. That choice has never been repealed, by democratic means anyhow.

*The originally intended role of the Federal Trade Commission has always been slightly unclear. Historian Gerald Berk argues persuasively that Brandeis wanted the FTC to facilitate a middle ground between ruinous competition and monopolization—so-called "regulated competition." See Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900–1932* (2009).

†Based on the theory, popularized by Bruce Ackerman, that the Constitution undergoes de facto amendments during times of intense popular attention to questions of Constitutional significance. See Bruce A. Ackerman, *We the People, Vol. 1: Foundations* (1991).

Peak Antitrust and the Chicago School

It was during the postwar years, over the 1950s and 1960s, that strong antitrust laws became most clearly identified as part of a functional democracy, and in that sense reached the fullest extent of their power, influence, and political support. Reflecting the mood, President Kennedy's antitrust chief, Lee Loevinger, would testify before Congress as follows: "The problems with which the antitrust laws are concerned—the problems of distribution of power within society—are second only to the questions of survival in the face of threats of nuclear weapons." As he told Robert Kennedy in a job interview, "I believe in antitrust almost as a secular religion."

The road to peak antitrust was not entirely smooth. The laws did suffer a near-death experience in the early 1930s, at a time when nationalization and central planning were in fashion around the world. During FDR's first New Deal, Congress effectively suspended the laws in a failed effort to generate economic recovery.* But the law began its recovery under a succession of prominent and effective Neo-Brandeisians, including Robert Jackson, the future Supreme Court Justice, and the legendary Thurman Arnold, the Wyoming Cowboy, who inherited Theodore Roosevelt's trustbuster mantle, and who brought about a "shock treatment" campaign amounting to an astonishing 1,375 complaints in 213 cases involving 40 industries.†

But the real political support for the laws in the postwar period came from the fact that they were understood as a bulwark against the terrifying examples of Japan, Italy, and most of all the Third Reich. As antitrust scholar Daniel Crane writes, "the post-War currents of democracy-enhancing antitrust ideology arose in the United States and Europe in reaction to the role that concentrated economic power played in stimulating the rise of fascism." Thurman Arnold was more blunt: "Germany became organized to such an extent that a Fuehrer was inevitable; had it not been Hitler it would have been someone else."

*The National Recovery Act of 1933 allowed industries to submit their own codes of competition, and offered an exemption from the antitrust laws in exchange.

†The law also received a boost from the famous *Alcoa* decision, a condemnation of the persistent aluminum monopoly written by judge Learned Hand. In *Alcoa*, Hand articulated a better repudiation of monopoly than Brandeis himself had ever managed, writing that a "possession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." Congress, said Hand, had chosen 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."

Hitler's rise and exercise of power were facilitated by the German Republic's tolerance of monopolies in key industries, including the Krupp armaments company, Siemens railroad and infrastructure, and, most of all, the I.G. Farben chemical cartel. As a report by the Secretary of War concluded: "Germany under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal, and other materials. The monopolies soon got control of Germany, brought Hitler to power, and forced virtually the whole world into war." That conclusion came from the observation that the main German monopolists, over the 1930s, threw their weight behind the Nazi regime when it lacked support among other key groups, and that each ultimately became deeply allied with and enmeshed in the German war effort. As a U.S. military report concluded in 1945, I.G. Farben became "a colossal empire serving the German State as one of the principal industrial cores around which successive German drives for world conquest have been organized." Ultimately some twenty-four Farben executives were tried for war crimes at Nuremberg, for practicing human enslavement in occupied territories, among other offenses. As for I.G. Farben, it was subject to an American style breakup into nine firms, including three large ones: Bayer, Hoechst, and BASF.*

* American war efforts had also been hindered by a series of international cartel agreements in areas like synthetic rubber and aluminum that became essential to the buildup of American forces. There had been, as the *New Republic* alleged, "a Corporate International, joining the Communist International and Fascist International, seeking to undermine the free world." The cartels were alleged to be part of Germany's plan for world domination. German-run international cartels, the theory went, limited production while Germany prepared for war, part of an alleged "Peace at Düsseldorf."

Concerns that excessive corporate concentration undermined democracy prompted Congress to once again strengthen the antitrust laws, in a new "Anti-Merger Act." Politically, the law was explicitly styled as a reaction to the German and Soviet examples. As Senator Estes Kefauver put it:

> I think we must decide very quickly what sort of country we want to live in. The present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development . . . Through monopolistic mergers the people are losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political future.

He then turned to antitrust's relationship to democracy.

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.

The Anti-Merger Act, nicknamed the "Celler–Kefauver Act," passed by large majorities in 1950, and gave the government new tools to prevent the buildup of giants firms in advance, by controlling—or undoing—mergers. Instead of trying to break up the giants decades later, its idea was to prevent their formation in the first place. The Justice Department and the Federal Trade Commission now had a powerful new tool for controlling bigness—one that was, in fact, potentially the most powerful.

It was over the same period that the European Community (predecessor to the European Union) adopted its own antitrust, or competition, system, modeled on the American Sherman Act.* As in the United States, it too was backed not just by the sense that the law would facilitate economic development, but also the belief that breaking up monopolies and prohibiting cartels was essential to democratic governance, human thriving, and a prevention of a return to the despotism of the 1930s and 1940s. The new European laws found support with an intellectual movement, the Ordoliberals, originally a German school that had faced repression during the Nazi-era based on its belief in economic freedoms. The Ordoliberal beliefs aligned closely with those of the Neo-Brandesians—with a commitment to free markets operating within a strong social, political, and moral framework. Like Thurman Arnold, Estes Kefauver, and other Americans, the Ordoliberals believed that the true origins of Nazi totalitarianism were the concentrations of economic power that began under Bismarck. In this sense, the European competition law was entwined, from the beginning, to the commitment to democracy and human freedom.

*In contrast, efforts to transplant U.S. antitrust laws to Japan during the same period were not particularly successful. The U.S. occupation authority forced passage of an antitrust law, and created an agency to enforce it, but the law was overshadowed by the economic planning practiced by other agencies. See Etsuko Kameoka, *Competition Law and Policy in Japan and The EU* (2014), pp. 5–6

By the 1960s, the antitrust laws and an anti-concentration mandate were broadly accepted as part of a functioning democracy. To be sure, the laws had become far more complex and technocratic, and no longer the subject of a popular movement, nor were they the subject of contested electoral politics, as in the 1912 election.* But a broad political, legal, and intellectual consensus saw excessive economic concentration and monopolization as both economically dubious and politically dangerous.

However, a new intellectual opposition to antitrust was brewing, in a different form than before, and in an unexpected place. It formed at the University of Chicago, the school founded by John D. Rockefeller, and in the person of a professor named Aaron Director, and a particularly brilliant student of his named Robert Bork.

The Rise of the Chicago School

Since at least Adam Smith's day, economists have favored competition and condemned monopoly. For most of the twentieth century, antitrust enforcement was, therefore, broadly supported by the economic profession in its home country. As Donald Dewey writes, "not a single American-trained economist of any prominence questioned the desirability of antitrust in the interwar years." Given this baseline, the fact that mainstream antitrust economics would come to tolerate and even celebrate monopoly makes for an extraordinary tale.

*In the early 1960s, historian Richard Hofstadter would famously remark that antitrust was no longer a popular movement but that it "now runs its quiet course without much public attention."

By the postwar period, when antitrust reached its heights, there remained strong intellectual backing for antitrust laws among both conservative and liberal economists.* Liberal economists tended to support antitrust as a counter to the domination of big business. Conservatives feared "a road to serfdom," in Friedrich Hayek's phrase, resulting from central planning accomplished through a union of monopolies and the state. Some thought of monopolies as a threat to economic freedom by themselves; others feared that private monopolies provided an excuse for nationalization or at least extensive regulation. Here is conservative economist George Stigler, writing in 1952: "The dissolution of big businesses is . . . a part of the program necessary to increase the support for a private, competitive enterprise economy, and reverse the drift toward government control."

A far more obscure man named Aaron Director would lead the economic attack that would later become known as the Chicago School of Antitrust. Director, who taught at the University of Chicago law school, but was neither a lawyer, nor an economist with a PhD, was a mysterious Socrates-like figure who left behind few written works, but whose students were many and whose intellectual influence over late-twentieth-century legal thought is matched by few. Born in the Russian empire, Director

*One prominent exception was the iconoclastic economist Joseph Schumpeter, who had championed the entrepreneur in his earlier years, but in his later years grew to admire the large monopolistic corporation and begun to see the lure of monopoly as a principal driver of innovation and "creative destruction." Schumpeter, however, did not take seriously the problem of investment in barriers to entry, and particularly the power of government to insulate monopolies from creative destruction. See Tim Wu, *The Master Switch* (2010).

grew up in Portland, Oregon, and was a onetime leftist-socialist. At Yale, he published a socialist newspaper with his friend, artist Mark Rothko. Over the 1930s, he moved to the right, and by the 1950s, he was co-teaching antitrust law at the University of Chicago.

Director's big idea was brilliant in its simplicity. Working with classic price theories (that, at the time, had been discarded as unrealistic by most of the economic profession), he attacked Supreme Court case law as insensitive or counterproductive in terms of "consumer welfare." By this he meant the measure of whether the economic prospects of the consumer were enhanced in a measurable way, which usually meant evidence of lower prices. The goal of preserving competition might simply protect weaker, less efficient companies from more efficient firms that might lower prices for consumers.

Director may have started alone, more or less, but he soon gained an impressive band of followers and associates. He was an exceptionally inspirational teacher and colleague, who prompted great loyalty and admiration. He influenced students and colleagues like John McGee (who attacked the Standard Oil decision), Ward Bowman ("Tying Arrangements and the Leverage Problem"), and future federal judges Robert Bork, Richard Posner, and Frank Easterbrook. To various degrees they tended to share Director's method and assumptions. As McGee once put it, one must begin with "the strongest presumption that the existing structure is the efficient structure." In other words, they began with a presumption that antitrust was unnecessary, based on the *laissez-faire* idea that problems work themselves out, and most of the time we live in the best of all possible worlds.

The Chicago School struck some important and worthy blows. Director encouraged McGee, then a graduate student, to study "predatory" pricing in the Standard Oil case, and if McGee's historical work has been questioned since, it was worth asking when government should be challenging the strategy of lowering prices to defeat competitors, given that lower prices are also a means of competing on price. Perhaps Chicago's most successful shots, however, were taken at the Supreme Court's categorical, or *per se*, condemnation of "vertical agreements"—that is, agreements between producers and retailers. Total bans on such arrangements were hard to justify, and even Louis Brandeis was among the critics of them. Vertical-agreement rules would prove the easiest targets for the Chicago School's attack.

Nonetheless, even by the mid-1960s, Director and his adherents remained in what Richard Posner would later call "the lunatic fringe," and their views were not considered important enough to merit inclusion in mainstream legal or academic summaries of antitrust laws. Moreover, Director's critiques were external; he faulted the law based on what he thought the law's goals should be ("consumer welfare"), not what they were, like the scientist who faults *Star Wars* for failing to explain hyperspace. To become influential, what Director actually needed was a lawyer—someone who could weaponize his ideas, put them in a form usable by attorneys and judges. Fortunately for him, he would find his advocate in the greatest and most loyal of his students.

Robert Bork was born in Pittsburgh and grew up in the suburb of Ben Avon. His father was in the steel industry, and his mother was a teacher. Sometime in his youth, he surprised his parents and classmates by declaring himself a socialist, and remained loyal to that cause throughout college. Bork had originally thought he'd be a journalist and writer, in the model of Ernest Hemingway; like Hemingway, he liked to box, and he also made an effort to join the Marines at the end of the Second World War.

During law school, Bork began to soften politically, becoming what he called a "New Deal" liberal. And so things were, and might have stayed, until Bork took an antitrust class co-taught by Aaron Director. During that semester, he underwent what he later called a "religious conversion." As Bork later said, "Aaron gradually destroyed my dreams of socialism with price theory." He would become a self-described "janissary," or loyal soldier, for Director.

As the switch from socialism to free-market libertarianism suggests, Bork dwelt in the extremes, preferring strong positions, which he stated with eloquence and confidence. And unlike Director or other Chicago School economists, he was a first-rate legal talent as well. In this respect he was equaled only by Richard Posner, but the latter never had the same singlemindedness and bombast that Bork did, nor anything like Bork's inflexibility. While Posner would prove influential over a range of fields, and widely respected for his thoughtful and far-ranging mind, Bork was far more of a soldier: He advanced his position and marched forward without concession or regret, like the tank commander, leaving behind many critics, but also changing minds.

Bork's signal contribution was this. He took Director's "consumer welfare" idea—that antitrust was intended only to lower prices for consumers—and argued that it was not merely what an economist like Director thought the law *should* do, but that it had been, all along, the *actual intent* of the laws. Working with his Chicago allies, he then created a fully formed alternative account of what the antitrust laws should do and not do, in a book entitled *The Antitrust Paradox*. In 1964, when he first presented the thesis, it was considered absurd and even insane. But within twenty years he'd manage to convince a majority of the Supreme Court to adopt his position.

How did Bork do it? The key was a 1966 paper, "Legislative Intent and the Policy of the Sherman Act," arguably the most influential single antitrust paper in history. There he conducted his own investigation of the debates surrounding the Sherman Act and arrived at an extraordinary conclusion. "Congress intended the courts to implement . . . only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer . . . satisfaction." In case that wasn't clear, he put it again this way: "The legislative history . . . contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare." Instead, Bork insisted, "courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies."

What did Bork mean by this exactly? He meant that in any antitrust case, the government or plaintiff had to prove to a certainty that the complained-of behavior actually raised *prices* for consumers. Consider Standard Oil, which, as we've seen, used a number of strategies and techniques to both destroy old competitors and keep out new ones. Not a problem, according to Bork, unless it could be proven that Standard Oil maintained higher prices or that those competitors would have actually lowered the price of heating oil. That approach to antitrust—the one, suspiciously enough, just invented by Aaron Director and his followers—had magically been in the minds of members of Congress in 1890 when they wrote the Sherman Act.

Absolute certainty in the face of much contradictory evidence is classic Bork. No other scholar ever managed to find what Bork did in the Congressional record. Bork relied heavily on the views of Senator Sherman, who did think the interests of buyers were important. However, Sherman had much broader concerns as well. He wanted antitrust law to fight "inequality of condition, of wealth, and opportunity" and feared that the trusts created "a kingly prerogative, inconsistent with our form of government." As Herbert Hovenkamp, today's reigning dean of antitrust doctrine, puts it: "Bork's analysis of the legislative history was strained, heavily governed by his own ideological agenda . . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."

Among other things, Bork's radically narrow reading of the Sherman Act threw out the broader concerns that had long animated the Act and its enforcement. Most important was the idea that grounds much of this book: that antitrust represented a democratic choice of economic structure and a check on the political and economic power of the monopolies. So was any regard for small producers. As Learned Hand had written, "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.

 These considerations . . . prove to have been in fact [the law's] purposes."

Even within a strictly economic framework, Chicago was leaving much behind. The focus on "allocative efficiency" yielded almost no consideration of the "dynamic" costs of monopoly, like stagnation or stalled innovation. Virtues of competition stressed by Hayek, like the virtues of decentralizing information and the avoidance of central planning, were lost. Perhaps most surprising for a view inspired by economics was an approach to antitrust that was shockingly tolerant of monopoly, supposedly the economist's bête noire.

Given that Bork's singleminded interpretation was at odds with seventy years of precedent, as a legal matter his argument was dead on arrival. But over the years, Bork managed to skillfully tie Chicago School consumer welfare theories to another, very powerful legal locomotive that was just beginning its run by the late 1960s. By that point, concerns of "judicial activism" were no longer a liberal fear (as in the 1930s), but had become an important conservative trope. Bork repackaged his approach to antitrust as a tool of judicial restraint (not unlike "originalism," another of Bork's favorites). He insisted that the multiplicity of values served by antitrust was too vague, and served judicial irresponsibility, by allowing the judge to choose whatever value happened to match the judge's preordained result.* In Bork's critique, it seemed an antitrust law driven by anything

*In Bork's words: "A value will be announced as pertinent with a confidence that is matched only by the mystery that shrouds its derivation. A very specific decision is then whelped from the value premise without benefit of midwifery by any visible minor premise."

but consumer welfare was the law of the libertine, degenerate and debauched. Economic analysis was now righteous and self-restrained. As such, Bork managed to embed the culture war into one's method of interpreting the Sherman Act.

A final characteristic of Bork's approach was not merely to tap the culture war, but to offer judges a relatively easy way to deal with hard cases: They could eradicate messiness and complications in exchange for a simpler, disciplined, and single-pointed theory that yielded straightforward answers. This revealed an acute understanding of the judicial mind; despite the robes and bench, judges are still lawyers, and can become anxious when asked to decide complex and challenging cases. Bork offered a calming remedy, with an appealing simplicity and apparent rigor. For Bork's antitrust economics are *easy*—not easy enough for a schoolchild, but easy enough for a lawyer who does not specialize in antitrust and is looking for a dignified and respectable manner in which to decide, or get rid of, a hard case. The simple question that Bork posed for every doctrine was this: Does it clearly prevent harm to consumers? Have you proven it? Or might there, plausibly, be an economic explanation that doesn't imply harm, and if so, what is it? Hence Christopher Leslie's critique that "Bork's legacy is an oversimplified economics that often rests on unfounded or disproven assumptions."

In truth, clad in the costume of economic rigor, Robert Bork's attack on antitrust was really *laissez-faire* reincarnated, without the Social Darwinist baggage, and with a slightly less overt worship of monopoly—but with much the same results. With narrow exceptions, mainly related to price-fixing, the government was once again barred from trying to influence economic structure, regardless of what Congress said or did. The belief that really mattered was that the market enjoyed its own sovereignty and was therefore necessarily immune from mere democratic politics. That meant that the antitrust law, which dared dictate what the economy should look like, needed be put into hibernation—perhaps forever.

A Neo-Brandeisian Agenda

Some effort to revive the antitrust laws may be an inevitability in a nation founded on principles of anti-monopoly, equality, and decentralized power. What should be done? It's not enough to demand change without providing an agenda that enjoys legal legitimacy, can make use of the best economic tools, and is usable by enforcers, judges, and industry itself. That is the aspiration of this last section.

1. Merger Review

The priority for Neo-Brandeisian antitrust is the reform of merger review. Rereading the legislative history of the Anti-Merger Act of 1950, one is struck by how far current practice has drifted from what Congress intended. As the Supreme Court put it, the law sought to erect "a barrier to what Congress saw was the rising tide of economic concentration" and therefore provided "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." For "Congress saw the process of concentration in American business as a dynamic force" and it wanted to give the government and courts "the power to brake this force at its outset and before it gathered momentum."

Merger control has wandered so far from Congress's expressed intent in 1950 as to make a mockery of the democratic process. Congress instructed the courts to block a merger when its effect "may be substantially to lessen competition." Yet somehow, as in other areas, the agencies have read into this language something that is obviously not in the text of the law: a general requirement that clear proof of higher prices after the merger be provided. This has made every merger battle into a highly technical battle of experts having little to do with the original concerns of the law. Consider, for example, the 2018 merger between AT&T and TimeWarner—the kind of merger the law clearly intended to block—which in practice came to turn on a technical wrangling over whether cable customers might end up paying an extra 45 cents per month for their TV service.

Even within a purely economic framework, merger review is flawed. The fact that a merger may be designed to eliminate a future or "potential" competitor is often ignored as too speculative. That's why American and European agencies allowed Facebook and Google to buy many of their major potential competitors. Innovation and dynamic effects, being harder to measure, do not get due consideration.

To abandon economic analysis entirely would be implausible. But what's needed are broader and tougher merger standards, especially when it comes to the largest, most important mergers. This is an area where legislative action is warranted to make clear, at a minimum, that the Anti-Merger Act of 1950 meant what it said. Here is not the right place for a full discussion of reforms, but they might at a minimum include setting a higher bar for giant mergers (over $6 billion in value). The problem of overlapping ownership of horizontal rivals highlighted by Professor Einer Elhauge should be addressed, and we might also consider a return to structural presumptions, such as a simple but *per se* ban on mergers that reduce the number of major firms to less than four.* Whatever the proposals may be, an overhaul of merger review is a priority.

2. Democratization of the Merger Process

Since the Trust era, giant mergers have been of great concern to the public, implicating consolidation, inequality, and the very state of capitalism itself. Nonetheless, with rare exceptions, there is today limited public debate over actual mergers. One explanation is that economic policy is complex, and that Americans are interested in other, more entertaining parts of politics. But another reason is the incredibly secretive and technical nature of the process, which particularly contributes to the decision not to challenge a merger. Even the Supreme Court and the Federal Reserve have greater openness in their proceedings. It is hard for the public or the press to care without any opportunity to know what is going on.

*In today's economy, many natural competitors, like the major U.S. airlines, have the same institutional owners, which may facilitate cooperation instead of competition. See Azar, José and Schmalz, Martin C. and Tecu, Isabel, "Anticompetitive Effects of Common Ownership," *Journal of Finance* 73(4), May 10, 2018.

The problem is path dependent, for mergers have fallen between agency and judicial process, and live in their own realm. Judicial process, while in some tension with democratic principles, is part of the Constitutional system, and has numerous traditional safeguards. Judges are appointed and confirmed, the proceedings are public, and the decisions are explained.

In contemporary practice, however, the prior agency review has become the de facto process of importance in nearly all cases. And, drawing on prosecutorial, as opposed to judicial or administrative norms, it is a secret process with extensive rules designed to protect all involved, as in criminal investigation. But everyone knows the merger is being reviewed, and one can usually guess who is involved and what is being said. It is unclear whether the values being served by the secrecy are worth the cost.

One remedy is to recognize that merger review is a quasi-judicial, administrative process, and one that the public deserves to know more about. Industry comments on a major merger should be filed publicly, not in secret, and any interested member of the public should be encouraged to file comments. Finally, in major mergers, the agency, if it plans on a consent agreement, should put out its proposed remedy for meaningful public comment.

For merger reviews are too important to the public to be so secret. Some might suggest the result would be politicization of merger review—but big mergers *are* political, and the idea that the public or its representatives be kept in the dark is hard to support. The suggested reforms would reopen the tradition of spirited public debate over major mergers, as opposed to the stealthy consolidation of industries that is today's reality.

3. Big Cases

The phrase "trustbuster" dates to the turn of the twentieth century, and as we've said, it is here that antitrust law owes its debt to President Theodore Roosevelt. Tradition and norms of enforcement can matter as much, if not more, than what the law says. Through the 1970s and even into the 1990s, attacks on persistent monopoly remained a mainstay of antitrust enforcement practice, particularly at the Justice Department. That tradition, one that's at the core of the Sherman Act, has been lost. The last major Section 2 case seeking dissolution of an industrywide firm was the Microsoft trial; the last major breakup was the AT&T litigation.

Attacks on the trusts will always encounter resistance, not least from the target itself. But little could be closer to obeying Congressional intent than to use the Sherman Act against the trusts, or monopolies, of the era. It is here, among other places, that America can borrow from Europe, which has never given up on the big cases, and continues to enforce a law it borrowed from the United States in a manner more like America once did. Europe now leads in the scrutiny of "big tech," including the case against Google's practices, and in smaller, less public matters, like policing how Apple deals with competitors who also depend on the iPhone platform. European antitrust is far from perfect, but its leadership and willingness to bring big cases when competition is clearly under threat should serve as a model for American enforcers and for the rest of the world.

4. Breakups

Breakups and the blocking of mergers (also known as "structural relief") are at the historic core of the antitrust program, and should not be shied away from unduly. Breakups, done right, have clear effects. They can completely realign an industry's incentives, and can, at their best, transform a stagnant industry into a dynamic one.

There is an unfortunate tendency within enforcement agencies to portray breakups and dissolutions as off the table or only for extremely rare cases. There is no legal reason for that presumption: Indeed, the original practice favored dissolution as the default remedy—implied in the very word "antitrust."

Too much of the resistance to dissolution comes from taking too seriously the legal fiction of corporate personhood. In reality, a large corporation is made up of sub-units, whether functional or regional, or independent operations that have been previously acquired. It is not "impossible" to administer a breakup as is sometimes claimed. Many breakups are akin to the spinoffs or dissolutions that are not uncommon in business practice as it stands, such as AOL-Time-Warner's decision to break itself up into multiple units in the early 2000s. While the purpose is and should be public benefit, in some cases, like Standard Oil, the breakup may actually be healthy for the firm itself, but thanks to ego, otherwise known as agency problems, something it would not do itself.

Consider a breakup of Facebook that undid the mergers with Instagram and WhatsApp. While Facebook might not like being dissolved, and might find the new competition unwelcome, it is hard to see what the great social cost, if any, would be. It is not clear that there are important social efficiencies gained by the combination of these firms. But reintroducing competition into the social media space, perhaps even quality competition, measured by matters like greater protection of privacy, could mean a lot to the public. And we have not even touched upon the non-economic concerns, such as the concentration of so much power over speech into a single platform, and the clear dangers to democracy that stem from manipulation of the Facebook conglomerate. The simplest way to break the power of Facebook is breaking up Facebook.

This suggestion dovetails with a more technical but important concern over the use of consent decrees as the main antitrust remedy. As American and European enforcers have relied heavily on consent decrees and settlements, their management can be overwhelming. The agencies are resource-constrained, and their best expertise lies in investigation and enforcement, not compliance and monitoring. By the mid-2010s, for example, the sheer number of Justice Department consent decrees covering the beer industry was vexing. And the level of dedicated government oversight necessary to monitor every consent decree effectively would give even believers in government some qualms. Breakups or structural remedies are, effectively, self-executing, and thereby a much cleaner way of dealing with competition problems.

5. Market Investigations and Competition Rules

In 2007, the United Kingdom, using a device known as the "market investigation," studied the conditions of competition among airports in the London and Edinburgh regions, and concluded that the joint ownership of Heathrow, Gatwick, Stansted, and four other airports was neither necessary nor serving the public. It proposed a divestiture that left the major airports competing for business: especially Heathrow, Gatwick, and Stansted. While strenuously resisted and fought in the British courts, the results have been widely lauded, yielding higher service quality and greater efficiency by various measures.

The United States can and should adopt a market investigations law like that of the UK, and give it to the Federal Trade Commission to enforce. The prerequisite would be persistent dominance of at least ten years or longer, suggesting that a market remedy is not forthcoming, and proof that the existing industry structure lacked convincing competitive or public justifications, and that market forces would be unlikely to remedy the situation by themselves. In practice, the agency would put overly consolidated industry under investigation, recommend remedies through the administration process, and adopt them, subject to judicial review. The market investigation would serve as a particularly effective tool for stagnant and longstanding but not particularly abusive or aggressive monopolies or duopolies. The United States and Europe can both make headway employing pro-competitive rules instead of bringing cases, an approach championed both by the Obama White House and FCC Commissioner Rohit Chopra. The basic approach, which has already been used to great effect in some industries, calls for rules designed explicitly to weaken obvious barriers to market entry or otherwise promote a healthy competitive process.

6. Antitrust's Goals

There is good reason to think that antitrust's intended economic and political roles cannot be fully recovered without jettisoning the absurd and exaggerated premise that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" While the tools of economics will always be essential to antitrust work, it is a disservice to the laws and their intent to retain such a laserlike focus on price effects as the measure of all that antitrust was meant to do.

But would abandoning "consumer welfare" as the lodestone of the antitrust law make the antitrust law too indeterminate? Consider the views of Judge Doug Ginsburg, who doubts that Congress really intended maximization of "consumer welfare" to be the Sherman Act's goal, but argues that the alternatives used for most of the twentieth century created too much leeway and unpredictability. As he complains, "[c]ourts were freely choosing among multiple, incommensurable, and often conflicting values."

These fears are exaggerated, for there will be a post-consumer welfare antitrust that is practicable and arguably as predictable as the consumer welfare standard. I say that in part because, in practice, the consumer welfare standard has not set a high bar. Decades of practice have shown that the promised scientific certainty of the Chicago method has not materialized, for economics does not yield answers but arguments. In practice, the consumer welfare standard asks judges and lawyers to do something nearly impossible: to measure the welfare effects of highly complex transactions or conduct. Instead, we should be asking judges to do something far more suited to a legal entity. Courts should assess whether the targeted conduct is that which "promotes competition or whether it is such as may suppress or even destroy competition"—the standard prescribed by Brandeis in his *Chicago Board of Trade* opinion issued in 1918.

The "protection of competition" test is focused on protection of a *process,* as opposed to the maximization of a *value*. It is based on the premise that the legal system often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth. The former asks the legal system to eliminate subversions and abuses; the latter, in contrast, inevitably demands some exercise in social planning, and ascertaining values that can be exceedingly difficult, if not impossible, to measure. Because "welfare" is so hard to ascertain, courts and enforcers rely too heavily on price effects, since they are the easiest to measure—yielding underenforcement of the law.

As a legal matter, the "protection of competition" standard has the advantage of much greater support from congressional intent and earlier precedent. It is a challenging, even absurd exercise, to pick a modern economic standard out of the language of the Sherman, Clayton, or Anti-Merger Acts or their legislative histories. The idea that Congress was concerned with "allocative efficiency" in 1890 or even 1914 or 1950 is an economic version of anthropomorphism. In contrast, it is no great stretch to say that Congress was interested in the preservation of competition. The Congressional record does not contain the words "allocative efficiency," "consumer welfare," or "wealth transfer," but it does repeatedly discuss the choice between competition and monopoly. Here, as just one typical example, is Representative Dick Thompson Morgan in 1914: "the one thing we wish to maintain, and retain and sustain, is competition. We want to destroy monopoly and restore and maintain competition."

These considerations suggest a return to "protection of competition" as the recognized goal of American antitrust law. As scholar Barak Orbach makes clear, protection of competition was the accepted and restated goal of the antitrust laws from the 1890s through the 1970s. The point was repeated over the decades: In 1904 the Supreme Court said that the Sherman Act "has prescribed the rule of free competition among those engaged in . . . commerce." Or as it said in the 1950s, "The heart of our national economic policy long has been faith in the value of competition. . . . 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" And in 1978, the Court observed that "Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country." In short, to use the "protection of competition" standard is not to break new ground but to return to what the democratic majority asked for.

Its better legal pedigree may be why some members of the judiciary have begun to use a protection of competition standard again. Without much fanfare, Justice Stephen Breyer, in condemning so-called "pay for delay" settlements in the pharmaceutical industry, did so based on the "potential for genuine adverse effects on competition." Richard Posner writes that "the purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency."

This kind of analysis attempts to capture far more of the dynamics of the competitive process than do existing analyses, and also implicates political considerations as well. As a legal matter, it marks a return to Brandeis's original "rule of reason" which was far more concerned with the competitive process. As Brandeis wrote, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. . . ."

The Neo-Brandesian antitrust agenda is not an agenda for solving every economic challenge produced by the new Gilded Age. But structure matters, and these suggestions would help us return to an economic vision that prizes dynamism and possibility, and ultimately attunes economic structure to a democratic society.

The English Magna Carta, the Constitution of the United States, and other foundational laws of democracies around the world were all created with the idea that power should be limited—that it should be distributed, decentralized, checked, and balanced, so that no person or institution could enjoy unaccountable influence.

Yet this vision has always had a major loophole. Written as a reaction to government tyranny, it did not contemplate the possibility of a concentrated private power that might come to rival the public's, of businesspeople with more influence than government officials, and of an artificial creature of law, the corporation, that would grow to have political protection exceeding that of actual humans.

That's why the struggle for democracy now and in the progressive era must be one centered on private power—in both its influence over, and union with, government. Brandeis viewed a true democracy as one composed of liberties and securities, so as to enable human flourishing in a nation of rough economic equals. It is a challenging balance to get right. But if we know one thing, it is that we are very far from a defensible division of the spoils of progress or the kind of economic security that yields human flourishing.

By providing checks on monopoly and limiting private concentration of economic power, the antitrust law can maintain and support a different economic structure than the one we have now. It can give humans a fighting chance against corporations, and free the political process from invisible government. But to turn the ship, as the leaders of the Progressive era did, will require an acute sensitivity to the dangers of the current path, the growing threats to the Constitutional order, and the potential of rebuilding a nation that actually lives up to its greatest ideals.