
THE ANTITRUST CURSE OF BIGNESS

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ABSTRACT

In 1882, Standard Oil's General Solicitor invented the corporate trusts that inspired the birth of the antitrust discipline. The public aversion to trusts in the United States gave the field its enduring and uniquely American name. As the discipline matured, distrust of business size took root in cases and doctrines. Justices Louis Brandeis and William Douglas wrote the narrative into early case law and it remained embedded in the field even as economics became the antitrust methodology. Economics merely transformed the fear from a concern about absolute size to one of relative size (market shares). While size should be an irrelevant consideration in antitrust analysis, it still mistakenly serves as a driving force behind the law. This Article studies how the fear of bigness—of absolute or relative size—has shaped and confused analytical perceptions of antitrust, established and sustained no-fault monopolization theories, and contributed to various doctrinal oddities. The American discipline might owe its birth to the fear of size, but this fear has been a burden and a curse on the development of sound antitrust policies.

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I. INTRODUCTION

The movement was the origin of the whole system of modern economic administration . . . It has revolutionized the way of doing business all over the world. The time was ripe for it. It had to come, though all we saw at the moment was the need to save ourselves from wasteful conditions. . . . The day of combination is here to stay. Individualism has gone, never to return.

—John D. Rockefeller (1882)¹

The American public has feared big business since businesses began utilizing economies of scope and scale. Its fears are particularly roused during deep recessions and depressions. The 1890s economic depression evoked public outrage over the rapid growth of large businesses and “trusts.”² The Great Depression renewed those old fears of the Robber Barons and bigness in business.³ In 1932, Berle and Means published their celebrated analysis of the diffusion of ownership in corporate America through the separation of ownership and control.⁴ They argued that this ownership structure facilitated the growth of large businesses. The Great Recession has revived these fears of big business and began again the century-old debate over whether some businesses are “too big to fail.”⁵

Anti-bigness sentiments have been embedded in our antitrust tradition since its birth. At the turn of the nineteenth century, antitrust emerged because of the public’s fear of “trusts”—specifically, the fear that “the vast accumulation of wealth in the hands of corporations and individuals . . . oppress individuals and injure the public generally.”⁶ While most nations and international organizations refer to the field as “competition law,” the American legal field received its lasting name from

1. 1 ALLAN NEVINS, *STUDY IN POWER: JOHN D. ROCKEFELLER, INDUSTRIALIST AND PHILANTHROPIST* 402 (1953) (emphasis added).

2. See CHARLES HOFFMANN, *THE DEPRESSION OF THE NINETIES* (1970); DOUGLAS STEEPLES & DAVID O. WHITTEN, *DEMOCRACY IN DESPERATION: THE DEPRESSION OF 1893*, at 113–15 (1998) (noting that the depression elicited popular hostility toward big businesses, especially railroads, in part because “pooling” practices drove up prices); *infra* Part I.

3. See MATTHEW JOSEPHSON, *THE ROBBER BARONS* v–vi (1934) (describing how between the Civil War and the early twentieth century a handful of industrialists and financiers took control over the American economy using shady practices).

4. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

5. See, e.g., ANDREW ROSS SORKIN, *TOO BIG TO FAIL* (2009). See also GARY H. STERN & RON J. FELDMAN, *TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS* (2004).

6. *Standard Oil Co v. United States*, 221 U.S. 1, 50 (1911).

the trusts.

In 1952, thirty years before winning the Nobel Prize in economics “for his seminal studies of industrial structures, functioning of markets and causes and effects of public regulation,”⁷ George Stigler published in *Fortune Magazine* a short essay about his fears of bigness is business.⁸ In the essay, *The Case Against Big Business*, Stigler laid out his no-fault bigness vision—the rationale and need for structural remedies for big businesses:

Bigness in business has two primary meanings. First, bigness may be defined in terms of the company’s share of the industry in which it operates Second, bigness may mean absolute size—the measure of size being assets, sales, or employments as a rule.

These two meanings overlap Big business is . . . a fundamental excuse for big unions and big government. . . . I personally believe that future study will confirm the traditional belief that big businesses . . . cannot rival the infinite resource and cold scrutiny of many independent and competing companies. . . .

The Sherman Act is admirable in dealing with formal conspiracies of many firms, but . . . it cannot cope effectively with the problem posed by big business. . . . The dissolution of big businesses is . . . necessary to increase the support for a private, competitive enterprise economy, and reverse the drift toward government control.⁹

Stigler’s old concerns have always resided in the American culture and remained as a shadow in antitrust law. These sentiments, however, have never made size illegal.¹⁰ No court has ever ruled that size in itself is a violation of the Sherman Act,¹¹ but many courts have echoed the fears of bigness.¹²

7. Press Release, The Royal Swedish Acad. of Scis., This Year’s Prize in Economics Is Awarded for Research on Market Processes and the Causes and Effects of Public Regulation (Oct. 20, 1982).

8. George J. Stigler, *The Case Against Big Business*, FORTUNE, May 1952, at 123, 123, 158, 162, 164, 167.

9. *Id.* Stigler wrote his essay during a major deconcentration era of the Sherman Act. See Kovacic, *supra* note 8, at 1116–19 (discussing the deconcentration era of 1937–1956).

10. *E.g.*, United States v. Aluminum Co. of America (*Alcoa*), 148 F.2d 416, 429 (2d Cir. 1945) (Hand, J.) (“[S]ize does not determine guilt.”); George F. Canfield, *Is a Large Corporation an Illegal Combination or Monopoly Under the Sherman Anti-Trust Act?*, 9 COLUM. L. REV. 95, 95 (1909).

11. *See, e.g.*, United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) (“[T]he law does not make mere size an offence or the existence of unexercised power an offence.”); United States v. Int’l Harvester Co., 274 U.S. 693, 708–09 (1927) (“The law . . . does not make the mere size of a corporation, however impressive, or the existence of unexercised power on its part, an offence, when unaccompanied by unlawful conduct in the exercise of its power . . .”).

12. *See, e.g.*, *Alcoa*, 148 F.2d at 427 (Hand, J.) (“[The Sherman Act] did not condone ‘good

In his 1988 memoirs, Stigler acknowledged that until the 1950s he was “an aggressive critic of big business.”¹³ He “marvel[ed] at [his] confidence at that time” and noted that he “certainly would not presume today to have that knowledge about any industry, even higher education.”¹⁴ Stigler surely withdrew his critique of big business, but he did not dissipate pervasive fears of size and beliefs in trustbusting.

This Article hopes to dispel any remaining anti-bigness shadows from American competition laws by studying the size obsession and its transformations in American antitrust law. The Article presents three manifestations of the fear of bigness: (1) the fear of absolute size and its power to harm small businesses, which motivated Congress to enact the Sherman Act, (2) the fear of relative size that is still manifested in methodological analyses of market power, and (3) the fear that confuses all notions of size—both absolute and relative size—and associates bigness with a wide range of societal harms. This last fear is best summed up in a phrase coined by Justice Louis Brandeis, the “curse of bigness.”¹⁵

The Article continues as follows. Part I presents the introduction of “corporate trusts” and explains how the antitrust discipline emerged. Part II introduces what we call the “Brandeis-Douglas Effect”: the influence of two Supreme Court Justices on the anti-size legacy in American antitrust law. Justices Louis Brandeis and William Douglas believed absolute corporate size was a public evil and weaved such a narrative into their extrajudicial writings and opinions. Part III examines how economics has shaped antitrust law and transformed the bigness narrative to an analysis that relies on relative size that, while more nuanced, still perpetuates the century-old fear of bigness. Part IV turns to the “Too Big to Fail” policy, examining its origins and stressing yet again that size is not a concern of antitrust law. Part V concludes.

trusts’ and condemn ‘bad’ ones; it forbad all”). See also William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1105 (1989) (“Trustbusting is the Sherman Act’s most alluring and enduring mirage”); Horace H. Robbins, “Bigness,” *the Sherman Act and Antitrust Policy*, 39 VA. L. REV. 907 (1953); *United States v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920) (“[T]he law does not make mere size an offence or the existence of unexercised power an offence.”); *United States v. Int’l Harvester Co.*, 274 U.S. 693, 708–09 (1927) (“The law . . . does not make the mere size of a corporation, however impressive, or the existence of unexercised power on its part, an offence, when unaccompanied by unlawful conduct in the exercise of its power . . .”).

13. GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 97 (1988).

14. *Id.* at 99.

15. See Louis D. Brandeis, *A Curse of Bigness*, HARPER’S WKLY., Jan. 10, 1914, at 18, 18; *infra* Part II.A.

II. TRUST AND ANTI-TRUST

At the turn of the nineteenth century, the public and lawmakers were concerned with the size of several business entities, but most of all they were alarmed by the rapid growth of John D. Rockefeller's Standard Oil Company. William Howard Taft, who was President of the United States at the time the Supreme Court handed down the *Standard Oil* decision and would later become Chief Justice of the Court, described Standard Oil as "the greatest monopoly and combination in restraint of trade in the world[,] . . . an octopus that held the trade in its tentacles, and the few actual independent concerns that kept alive were allowed to exist by sufferance merely to maintain an appearance of competition."¹⁶ These growing trusts motivated anti-bigness legislation. Taft credited Standard Oil as "one of the chief reasons for passing the [Sherman Act]."¹⁷

A. THE BIRTH OF A DISCIPLINE

1. Samuel C.T. Dodd and Corporate Trusts

John D. Rockefeller was a pioneer of the oil industry in the United States.¹⁸ In 1862, at age 23, he had a successful business partnership in Cleveland, Ohio, benefitting from commercial opportunities of the Civil War.¹⁹ In that year, Rockefeller and his partners started investing in the development of a refinery belonging to Samuel Andrews.²⁰ In 1865, Rockefeller and Andrews bought out Rockefeller's original partners and focused the business exclusively on oil.²¹ In 1867, Rockefeller consolidated forces, uniting four family businesses, adding a third partner, Henry M. Flagler, and forming the partnership Rockefeller, Andrews & Flagler.²²

In 1870, the partners incorporated their enterprise as the Standard Oil Company of Ohio.²³ At that time, Standard Oil controlled 10 percent of the nation's oil-refining capacity.²⁴ By 1880, Standard Oil owned or effectively controlled 90 to 95 percent of the nation's petroleum and distribution

16. WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 85–86 (1914).

17. *Id.* at 85.

18. 1 IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* 39–40 (1904).

19. *Id.* at 40–42.

20. *Id.* at 42.

21. *Id.* at 42–43; U.S. DEP'T OF COMMERCE & TRADE, *REPORT OF THE COMM'R OF CORPS. ON THE PETROLEUM INDUSTRY, PART I: POSITION OF THE STANDARD OIL COMPANY IN THE PETROLEUM INDUSTRY 2* (May 20, 1907) [hereinafter *PETROLEUM INDUSTRY I*].

22. *See* *PETROLEUM INDUSTRY I*, *supra* note 21, at XVI, 2.

23. *Id.* at XVI, 2, 48.

24. *Id.* at XVI, 48.

facilities.²⁵ A government investigation concluded that, in 1904, Standard Oil and affiliated concerns:

refined over 84 per cent of the crude oil run through refineries; produced more than 86 per cent of the country's total output of illuminating oil; . . . transported through pipe lines nearly nine-tenths of the crude oil of the [Appalachian and Lima-Indiana] fields and 98 per cent of the crude oil of the Mid-Continent, or Kansas Territory field; secured over 88 per cent of the sales of illuminating oil to retail dealers throughout the country, and obtained in certain large sections as high as 99 per cent of such sales.²⁶

Its control of production and marketing of gasoline and lubricating oil was close to 90 percent nationwide.²⁷ The government investigation unequivocally concluded that Rockefeller's market position conveyed control and that his monopoly power was built "primarily on the control of transportation facilities in one form or another."²⁸

Standard Oil continued expanding uninterrupted, but state laws and organizational complexities made its size an impediment. Samuel Calvin Tait Dodd, who served as Standard Oil's general solicitor from 1881 to 1905,²⁹ devised a solution. He created a legal instrument to manage size—the "trust."³⁰ In January 1882, Dodd converted the common-law apparatus to a corporate device that would promote the accumulation of capital and managerial efficiency. Trusts, as simple legal instruments, of course, predated Dodd and Standard Oil.³¹ The "corporate trust" was an agreement

25. *Id.* at XVI, 49.

26. *Id.* at XV–XVI.

27. *Id.* The four fields under the control of Standard Oil provided the oil supply of the United States. There were several other fields that operated at low capacity. *Id.* at XVIII, 7–8, 96–120.

28. *Id.* at XVIII, 8–13, 21–38.

The [Standard Oil] monopoly . . . has never rested on ownership of the source of supply of crude oil. . . . It can not be too strongly emphasized that its growth and present power rests primarily on the control of transportation facilities in one form or another. Additional means of domination have been found in local price discrimination and other unfair competitive methods in the sale of products, as well as in the elimination of the jobber; but throughout its entire history the factor of transportation has been the keystone of its success.

Id. at XVIII. For analysis see Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1, 23–27 (1996); Benjamin Klein, *The "Hub-and-Spoke" Conspiracy that Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012). See also George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance Against Competing Cartels*, 85 S. CAL. L. REV. 499 (2012).

29. RALPH W. HIDY & MURIEL E. HIDY, *PIONEERING IN BIG BUSINESS, 1882–1911*, at 31 (1955).

30. PETROLEUM INDUSTRY I, *supra* note 21, at XVII, 66–71, 361–70.

31. See, e.g., Theodore W. Dwight, *The Legality of "Trusts,"* 3 POL. SCI. Q. 592, 592 (1888) ("A trust is . . . simply the case of one person holding the title of property, whether land or chattels, for the benefit of another, termed a beneficiary. Nothing can be more common or more useful. But the word is

amongst individual owners of businesses to transfer their stocks to the trust. The Standard Oil Trust held the entire stock of fourteen companies and a majority interest in twenty-six additional companies.³² Nine individuals, acting as the Trust's board of trustees, held trust certificates. Rockefeller held certificates representing 41 percent of the value of the issued certificates. The holding of the second largest trustee represented a share of about 12.9 percent.³³



Samuel C.T. Dodd
Standard Oil's General Solicitor, 1881–1905
The “Inventor” of the Corporate Trust

Dodd's legal instrument quickly became popular and was adopted by

now loosely applied to a certain class of commercial agreements and, by reason of a popular and unreasoning dread of their effect, the term itself has become contaminated. This is unfortunate, for it is difficult to find a substitute for it. There may, of course, be illegal trusts; but a trust in and by itself is not illegal: when resorted to for a proper purpose, it has been for centuries enforced by courts of justice, and is, in fact, the creature of a court of equity.”). At his death in 1892, Professor Dwight of Columbia Law School was one of “the ablest jurist[s] and the most widely-known authority on legal teaching” in the country. *Theodore W. Dwight Dead*, N.Y. TIMES, Jun. 30, 1892, at 8.

32. PETROLEUM INDUSTRY I, *supra* note 21, at XVII, 66–71, 361–70.

33. *Id.*

many businesses formed during the Industrial Revolution.³⁴ Dodd was a staunch advocate and defender of the trusts. In 1888, he submitted a lengthy printed testimony to the New York legislature,³⁵ in which he explained the “great mistake” of confusing the terms “combination” and “monopoly.”³⁶ In a fifty-page essay he argued that the Standard Oil Trust contributed to the public welfare through economies of scale and efficiencies. Dodd defined a monopoly as “a grant by the Government for the sole buying, working, making or using of anything.”³⁷ He declared that “[c]ombinations . . . without any grant of exclusive privileges [from the Government], are in no sense of the word, monopolies”³⁸ and warned that without combinations “the business of the world would stagnate.”³⁹ Acknowledging that the power of combinations could be used for “good” and “evil,” Dodd argued that the “power must not be destroyed; it must be regulated.”⁴⁰

In 1889, Dodd delivered a speech at the annual banquet of the Merchants’ Association of Boston on the subject of “Combinations and Competition.”⁴¹ He criticized the tendency to “denounce combinations as a public evil”⁴² and warned about the trend to turn the legal status of combinations into “a criminal conspiracy.”⁴³ Dodd argued that because of the legality of general partnerships, it would be “difficult . . . to draw the line between a combination which is and one which is not injurious to trade

34. E. Benjamin Andrews, *Trusts According to Official Investigations*, 3 Q. J. ECON. 117, 121 (1889) (“[The trust] took its life from the marked and immediate success of the Standard Oil Trust, created in 1882. The career of this Titan agency has stimulated on all hands the most earnest attempts to imitate or rival it. There is scarcely a single industry in the country which has not, either bodily or in some of its phases or departments, passed under this or that form of associate management.”). *See also* HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 249–66 (1991) (describing the three common forms of trusts: stock-transfer trust, asset-transfer combination, and holding company); John Bates Clark, *Trusts*, 15 POL. SCI. Q. 181, 181 (1900) (“This country is the especial home of trusts . . . If the carboniferous age were to return and the earth were to repeople itself with dinosaurs, the change that would be made in animal life would scarcely seem greater than that which has been made in business life by these monster-like corporations.”).

35. SAMUEL C.T. DODD, *COMBINATIONS: THEIR USES AND ABUSES, WITH A HISTORY OF THE STANDARD OIL TRUST* (1888).

36. *Id.* at 5.

37. *Id.*

38. *Id.* at 6.

39. *Id.*

40. *Id.*

41. Samuel C.T. Dodd, *Current Corporation Matters*, 5 RAILWAY CORP. L.J. 97, 97 (1889).

42. *Id.* at 97.

43. *Id.*

on account of magnitude.”⁴⁴ Business size, he argued, was not a valuable factor to measure market power.⁴⁵ Dodd also rejected the arguments that trusts decreased the quantity of products and raised prices, providing some data from the petroleum industry.⁴⁶

Until his very last days, Samuel C.T. Dodd, the inventor of the trust, remained a loyal advocate for his employer and his legal invention.⁴⁷

2. Outlawing Trusts

a. Corporate Law and Trusts

In January 1889, a New York court delivered the first decision to address the legality of trust agreements. New York had brought an action to dissolve the American Sugar Refining Company,⁴⁸ asking the court to examine the legality of its trust agreement. Although “liberty of contracting is the most important factor of commercial life,” the court recognized that externalities may justify government intervention.⁴⁹ Specifically, the court

44. *Id.*

45. *Id.* (“[I]t must be evident that a partnership between two rivals tradesmen in a country village will give them greater power over the market of that village than would be effected by a combination of hundreds of persons and millions of capital in some trade which has the world for a market.”).

46. *Id.* at 98–99.

47. *S.C.T. Dodd*, HARPER’S WKLY., Jan. 18, 1902, at 94; *Man Who Framed Oil Trust Dies*, S.F. CALL, Feb. 1, 1907, at 1; *Obituary: Samuel C.T. Dodd*, N.Y. DAILY TRIB., Feb. 1, 1907, at 7; *Father of the Modern Trust*, WASH. HERALD, Feb. 3, 1907, at 7.

48. *People v. N. River Sugar Ref. Co.*, 3 N.Y.S. 401 (Cir. Ct. 1889). In 1892, refiners who controlled 98 percent of the United States’ sugar processing capacity formed the American Sugar Refining Company, which was known as the sugar trust. *United States v. E.C. Knight Co.*, 156 U.S. 1, 1, 44 (1895). In 1895, the Supreme Court held that nothing in the record presented by the government indicated that the sugar trust had “any intention to put a restraint upon trade or commerce” and held “that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.” *Id.* at 17. For the history of the sugar trust, see generally ALFRED S. EICHNER, *THE EMERGENCE OF OLIGOPOLY: SUGAR REFINING AS A CASE STUDY* (1969); PAUL L. VOGT, *THE SUGAR REFINING INDUSTRY IN THE UNITED STATES* (1908); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979).

49. *N. River Sugar Ref. Co.*, 3 N.Y.S. at 409 (“The liberty of contracting is the most important factor of commercial life, and it should only be abridged when it is clear that the public must be injuriously affected by its unrestrained exercise in a particular case.”). We define the court’s references to one’s effects on others as “externalities.” Economists started using the term “external economies” in the early 1950s. See, e.g., J. E. Meade, *External Economies and Diseconomies in a Competitive Situation*, 62 ECON. J. 54, 56 (1952); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 389 (1954); Tibor Scitovsky, *Two Concepts of External Economies*, 62 J. POL. ECON. 143, 143–45 (1954). It is unknown who coined the term “externality,” but by 1958 it was part of the economic jargon. See, e.g., Francis M. Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351, 363–71 (1958) (analyzing three types of externalities: ownership externalities, technical externalities, and public good externalities); Paul A. Samuelson, *Aspects of Public Expenditure Theories*, 40 REV. ECON. & STAT. 332, 336 (1958) (discussing externalities in the context of public

ruled that restraints of trade warrant interference in the freedom of contracts.⁵⁰ The court held that “a combination, the tendency of which is to prevent general competition and to control prices, is detrimental to the public, and consequently unlawful.”⁵¹

On appeal, in June 1890, the Court of Appeals of New York criticized the transfer of privileges from the corporate directors to the trust,⁵² and stressed that “[t]he State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people.”⁵³ In light of the violation of the corporate charter and fiduciary duties, the court felt that it was unnecessary to “advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy.”⁵⁴ The state corporate law provided sufficient grounds to invalidate the sugar trust.

Trusts, although big and powerful, were legally vulnerable.

expenditures).

50. *N. River Sugar Ref. Co.*, 3 N.Y.S. at 409.

51. *Id.*

52. *People v. N. River Sugar Ref. Co.*, 121 N.Y. 582, 622–23 (1890).

53. *Id.* at 623.

54. *Id.* at 626. At the turn of the nineteenth century, many courts preferred to use corporate law, rather than competition law, to address anti-competitive practices. See HOVENKAMP, *supra* note 34, 247–48 (1991).



Harper's Weekly, January 21, 1888.

"Crushing the Scorpion of Anarchy, But Sparing the Octopus of Monopoly"

Depicting the public fears of the size of trusts through the octopus metaphor that symbolized the reach of the trusts to every dimension of life and the economy.

b. The End of the Standard Oil Trust

In May 1890, the Attorney General of Ohio filed a petition in the supreme court of the state, alleging that the Standard Oil Company of Ohio had violated the state law by entering into the Trust Agreement and by

transferring the control of its businesses to others.⁵⁵ The requested remedy was forfeiture of the corporate charter and dissolution of the firm.⁵⁶ In its answer, Standard Oil argued that it was not a party to the agreement because the individual stockholders transferred their shares to the trustees.⁵⁷ On March 2, 1892, the court delivered a decision against Standard Oil,⁵⁸ ruling that the Standard Oil Company of Ohio was in effect a party to an agreement intended to crush competition and serve a monopoly. It also held that the transfer of the shares was in violation of state law and instructed the company to terminate the Agreement.⁵⁹

Three weeks later, in March 1892, the board of trustees of Standard Oil held a special meeting to terminate the Trust Agreement.⁶⁰ At the meeting, Dodd shared with the shareholders his reflections on the short history of trusts and the underlying motivations for their formation.

Something over ten years ago . . . a few individuals owning stocks in a number of corporations engaged in transporting and refining oil, entered into an agreement by which their stocks were placed in the hands of trustees, and certificates were issued by said trustees showing the amount of each owner's equitable interest in the stocks so held in trust. . . . It was not done to reduce competition, because the companies whose stocks were placed in trust were not competing companies. . . . It was not done to limit production or to increase prices, but, on the contrary, was done to increase production, cheapen cost of manufacture, and to lower prices, and it has been successful in that object far beyond the anticipations of those who originated the plan. It was called a trust, because it was a trust in the sense in which the word was then understood. It vested a fiduciary obligation in a few for the benefit of many, and the trustees thus created have faithfully observed the trust confided in them.

Other persons, however, found this trust plan a convenient one, and it is alleged that it has been adopted for and adapted to purposes quite different from those which actuated the framers of this trust. Whether these allegations be true or false, it is true that a trust is now defined to be a combination to suppress competition and to reduce production, and to increase prices. Public opinion has not unwisely been aroused against combinations. . . . For this reason, if for no other, it should be seriously

55. *Ohio v. Standard Oil Co.*, 49 Ohio St. 137, 138–55, 158–67 (1892).

56. *Id.* at 155.

57. *Id.* at 155–58, 167–76.

58. *Id.* at 176–88.

59. *Id.*

60. PETROLEUM INDUSTRY I, *supra* note 21, at 77; *The Standard's New Clothes*, PITTSBURGH DISPATCH, Mar. 22, 1892, at 1.

considered whether this trust should not be terminated. So long as it exists, misconception of its purposes will exist.⁶¹

Dodd believed—or at least hoped and argued—that a change in the legal status of Standard Oil could improve the public perception of the enterprise.

The public, however, continued to refer to big businesses as trusts. In 1914, for example, the economists John Bates Clark and John Maurice Clark celebrated the breakup of Standard Oil in an updated edition of their treatise, *The Control of Trusts*: “We know to-day that we *can* dissolve the trusts—that we can break up the big corporations into smaller ones—and this is distinctly more than we once knew.”⁶² Dodd’s legal instrument was abandoned, but its name continued to be used interchangeably with large business and continued to connote a fear of size.⁶³ Standard Oil terminated the Trust Agreement but maintained its organizational form,⁶⁴ and the public continued regarding it as a “trust.”⁶⁵

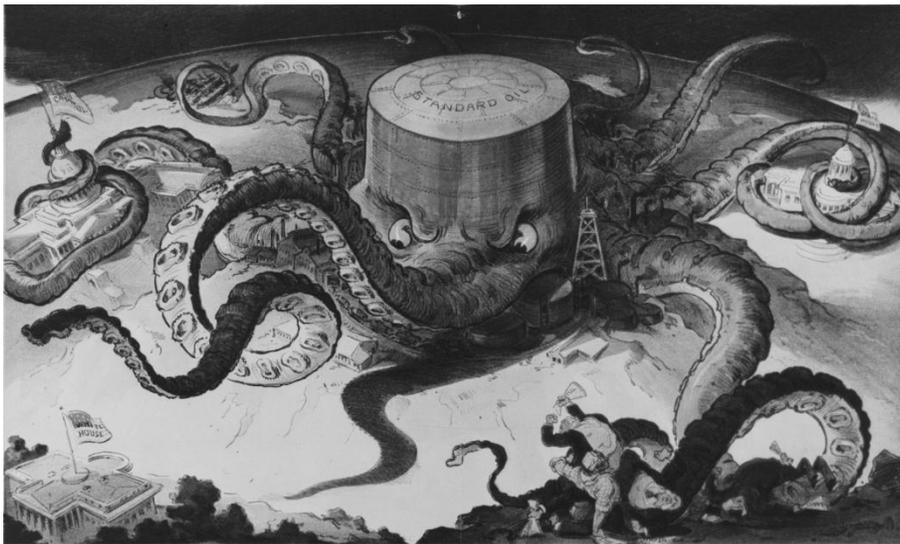
61. 2 IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* 152 (1904). For the resolution, see *The Standard’s New Clothes*, *supra* note 60, at 1.

62. JOHN BATES CLARK & JOHN MAURICE CLARK, *THE CONTROL OF TRUSTS* 3 (rev. ed. 1912).

63. In 1904, John Moody, the founder of Moody’s Investors Service, defined the term “trust” as an “agreement or combination believed to possess the intention, power or tendency to monopolize business, interfere in trade, fix prices, etc.” JOHN MOODY, *THE TRUTH ABOUT THE TRUSTS* XIV (1904). See also W.M. Coleman, *Trusts from an Economic Standpoint*, 8 J. POL. ECON. 19, 19 (1899) (referring to an “argument against trusts based upon the allegation that the managers of such immense corporations exercise a dangerous political influence”); Albert Stickney, *Trusts*, 184 N. AM. REV. 616, 616 (1907) (defining trust as “a large combination of capital in the hands of a corporation, or of a combination of corporations”).

64. PETROLEUM INDUSTRY I, *supra* note 21, at XVII, 3, 77–96.

65. See, e.g., CLARK & CLARK, *supra* note 62 (refers to Standard Oil as a “trust” throughout book); THE TRUTH’S INVESTIGATOR, *THE GREAT OIL OCTOPUS* (1911).



Puck Magazine, September 7, 1904—The Standard Oil Octopus

c. The Enactment of the Sherman Act

In July 1890, a few weeks after a New York court delivered the first legal defeat to a trust agreement,⁶⁶ President Benjamin Harrison signed into law the Sherman Act, outlawing any combination in restraint of trade,⁶⁷ monopolization and attempt to monopolize,⁶⁸ and any contract or combination in the form of a trust.⁶⁹ Congress enacted the Sherman Act, the first federal antitrust law, in response to the deep-seated public aversion toward trusts.⁷⁰ Early drafts of the Sherman Act dealt only with

66. *People v. N. Sugar Ref. Co.*, 121 N.Y. 582 (1890). See also *supra* notes 48–54 and accompanying text.

67. 15 U.S.C. § 1 (2006).

68. 15 U.S.C. § 2.

69. 15 U.S.C. § 3.

70. See, e.g., William Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 222 (1956) (“No one denies that Congress passed the Sherman Act in response to real public feeling against the trusts. . . . [B]etween 1888 and 1890, there were few who doubted that the public hated the trusts fervently.”). See also WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 54–77 (1954) (discussing American public opinion on monopolies and expert opinion on the trust problem); HANS THORELLI, *THE FEDERAL ANTITRUST POLICY* 224–32 (1955); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT’L REV. L. & ECON. 73 (1985); Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, (1993); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQ. 263 (1992); Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQ. 242, 252–58 (1992) (addressing the political battle to implement antitrust regulations in order to reduce the market power of meat packers); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988); George J. Stigler, *The Origin of the Sherman*

combinations and, in presenting the March 1890 bill, Senator John Sherman noted: “This bill . . . has for its single object to invoke the aid of the courts . . . to deal with the combinations.”⁷¹ The Sherman Act became law just eight years after John D. Rockefeller declared the end of individualism and the era of combination.

In 1893, Dodd published an essay in the *Harvard Law Review* acknowledging that the *Sugar Trust* decision and several other legal developments “ended this peculiar form of organization [of corporate trusts].”⁷² By that time, the term “trust” had acquired a particular public meaning, which Dodd defined as “every act, agreement, or combination of persons or capital believed to be done, made, or formed with the intent, effect, power, or tendency to monopolize business, to restrain or interfere with competitive trade, or to fix, influence, or increase the prices of commodities.”⁷³

In his essay, Dodd stressed that “all the effects condemned by law in the cases cited may, and sometimes do, follow as incidents of a large business.”⁷⁴ The prosecution of trusts, he warned, created the situation in which “a man engaged in a large business could have no assurance that he was not transgressing the criminal laws.”⁷⁵ The new antitrust laws, Dodd argued, demonized the monopolies although the word “‘monopoly’ . . . as ordinarily used in legal decisions, means only a large business.”⁷⁶

In the legal community, some inevitably defended corporate trusts. For example, in 1901, Albert Stickney, a prominent New York attorney,⁷⁷ published an article in the first volume of the *Columbia Law Review* that defended the “corporate trusts,” arguing that they had “no new feature,

Act, 14 J.L. STUD. 1 (1985); Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 REV. AUSTRIAN ECON. 275 (2002).

71. 21 CONG. REC. 2457 (1890). On April 8, 1890, the Judiciary Committee returned to the Senate a bill that included Section 2 with a ban on monopolization. Senator Sherman commented:

I do not intend to open any debate on the subject, but I wish to state that, after having fairly and fully considered the amendment proposed by the Committee on the Judiciary, I shall vote for it, not as being precisely what I want, but as the best under all the circumstances

21 CONG. REC. 3145 (1890). See generally Troesken, *supra* note 70 (providing background information on Senator Sherman, his connections to the oil industry, and his process of advancing the proposed Act).

72. S. C. T. Dodd, *The Present Legal Status of Trusts*, 7 HARV. L. REV. 157, 158 (1893). The *Sugar Trust* decision refers to *People v. N. River Sugar Ref. Co.*, 3 N.Y.S. 401 (1889). See *supra* note 48 and accompanying text.

73. Dodd, *supra* note 72, at 158.

74. *Id.* at 159.

75. *Id.* at 160.

76. *Id.* at 159.

77. *Albert Stickney Dead*, N.Y. TIMES, May 5, 1908, at 7.

other than that of increased magnitude.”⁷⁸ He further explained that a trust “is nothing more than an aggregation of capital in the hands of a corporation, for ordinary business purposes, in order to compete with its competitors, to make money, by producing, buying and selling at the lowest price.”⁷⁹

Even in the legal community, however, corporate trusts were largely demonized. In May 1906, the Commissioner of Corporations at the Department of Commerce and Labor submitted to President Theodore Roosevelt a report on the transportation of petroleum in the United States.⁸⁰ The report determined that Standard Oil used the railroad industry and unfair practices to control the petroleum industry. A day after receiving the report, the President released it to the public and announced that “[t]he facts set forth in th[e] report are for the most part not disputed. . . . The Standard Oil Company has, by unfair or unlawful methods, crushed out home competition.”⁸¹

In 1907, a new comprehensive report of the Commissioner of Corporations concluded that “[t]he commercial efficiency of [Standard Oil], while very great, has been consistently directed, not at reducing prices to the public, and thus maintaining its predominant position through superior service, but rather at crippling existing rivals and preventing the rise of new ones by vexatious and oppressive attacks upon them.”⁸² The operation of Standard Oil demonstrated “a substantial monopolization of the petroleum industry . . . , a deliberate destruction of competition, and a consequent control of that industry by less than a dozen men.”⁸³

The report confirmed public views: large businesses were a social harm. Standard Oil was the first and the most oppressive of all. Its monopoly power rested on its size, and its magnitude was a result of a deliberate destruction of competition.⁸⁴

78. Albert Stickney, *Corporate Trusts*, 1 COLUM. L. REV. 235, 235 (1901).

79. *Id.*

80. U.S. DEP’T OF COMMERCE & TRADE, REPORT OF THE COMM’R OF CORPS. ON THE TRANSP. OF PETROLEUM 1–31 (1906) (summarizing the discriminatory practices of the Standard Oil Company).

81. *Denounced Standard Oil as an Outlaw in Trade*, WASH. TIMES, May 4, 1906, at 1.

82. PETROLEUM INDUSTRY I, *supra* note 21, at XXI.

83. *Id.*

84. *Id.* at 22, 48–66; U.S. DEP’T OF COMMERCE & TRADE, REPORT OF THE COMM’R OF CORPS. ON THE PETROLEUM INDUSTRY, PART II: PRICES AND PROFITS 70 (1907); PETROLEUM INDUSTRY I, *supra* note 21, at 22 (“It has been claimed [that the] Standard Oil Company[’s] great power is the result of the superior ability and resources of its managers and of the consequent superiority in the efficiency of its plants and organization. Admitting that this efficiency exists, it is a result rather than a cause of the Standard’s greatness. It is possible mainly because of the great magnitude of the Standard’s



Verdict, January 22, 1900—“What a Funny Little Government”

B. FROM TRUSTS TO MONOPOLIZATION

Despite the enactment of the Sherman Act in 1890, Rockefeller’s vision of an “era of combination” seemed fulfilled. Between 1895 and 1904, the United States experienced a massive tide of mergers and consolidations that concentrated industries and formed trusts and monopolies. It was the so-called “great merger movement.”⁸⁵

The Supreme Court initially held that combinations were not illegal restraints of trade. In January 1895, in the first antitrust case reviewed by the Supreme Court,⁸⁶ the Court wrote that the Sherman Act did not “limit and restrict the rights of corporations . . . in the acquisition, control, or

operations, and that magnitude was largely attained as the result of unfair practices.”).

85. See generally NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904* (1985). Scholars provide several major accounts for the merger movement of 1895–1904. One of the popular accounts is that the initial implementation of the Sherman Act focused on cartels and diverted loose combinations toward mergers. See, e.g., Canfield, *supra* note 10; John J. Binder, *The Sherman Act and the Railroad Cartels*, 31 J.L. & ECON. 443, 444–49 (1988); George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J.L. & ECON. 77 (1985). Some argue that the Sherman Act was ineffectual. See, e.g., GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916*, at 181 (1967); Thomas K. McCraw, *Rethinking the Trust Question*, in *REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS* 1, 52–55 (Thomas K. McCraw ed. 1981). Yet, some argue that state corporate laws and their applications by courts played a significant role in this merger wave. See, e.g., HOVENKAMP, *supra* note 34, at 241–67; McCurdy, *supra* note 48, at 314–23.

86. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). See *supra* note 48.

disposition of property.”⁸⁷ Three years later, in *Joint-Traffic Ass’n*, the Court again held that a combination was not a restraint of trade, noting that “the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce . . . [and] [t]he same may be said of the contract of partnership.”⁸⁸ The Court, at least initially, did not share the public’s aversion to the trusts.

In 1904, however, the Supreme Court changed course and ended the great merger movement. In *Northern Securities*,⁸⁹ a slim majority of the Court held that the Sherman Act condemned some acquisitions of firms by a holding company.⁹⁰ Writing the dissenting opinion, Justice Holmes maintained the view that the Sherman Act said nothing about competition and that its “words hit two classes of cases, and only two,—contracts in restraint of trade and combinations or conspiracies in restraint of trade.”⁹¹ “It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared.”⁹² Justice Holmes stressed that the Sherman Act “makes no discrimination according to size.”⁹³ “Size has nothing to do with the matter.”⁹⁴ In the same year, Justice Holmes also expressed his economic view about business size:

I conceive that economically it does not matter whether you call Rockefeller or the United States owner of all the wheat in the United States, if that wheat is annually consumed by the body of the people; except that Rockefeller, under the illusion of self-seeking or in the conscious pursuit of power, will be likely to bring to bear a more poignant scrutiny of the future in order to get a greater return for the next year.⁹⁵

87. *E.C. Knight Co.*, 156 U.S. at 16.

88. *United States v. Joint-Traffic Ass’n*, 171 U.S. 505, 567 (1898).

89. *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

90. See J. L. THORNDIKE, *THE DECISION IN THE “MERGER CASE”* 1–23 (1903) (analyzing the circuit court decision). See generally Balthasar Henry Meyer, *History of the Northern Securities Case*, 1 BULL. U. WIS. 215 (1906) (summarizing the history preceding the Northern Securities case and the effects its outcome had).

91. *N. Sec. Co.*, 193 U.S. at 403 (Holmes, J., dissenting).

92. *Id.* at 405 (Holmes, J., dissenting).

93. *Id.* at 407 (Holmes, J., dissenting).

94. *Id.* (Holmes, J., dissenting).

95. Oliver Wendell Holmes, *Collected Legal Papers* 279–80 (1920). Two years later, in a private letter Holmes wrote: “[T]here are great wastes in competition, due to advertisement, superfluous reduplication of establishments, etc. But those are the very things the trusts get rid of.” Letter from Oliver Wendell Holmes to Sir Fredrick Pollock (May 25, 1906), in 1 HOLMES-POLLOCK LETTERS 123, 124 (Mark DeWolfe Howe ed., 1942).

In 1911, the Court ordered the dissolution of John D. Rockefeller's trust.⁹⁶ In the *Standard Oil* decision, the Court noted that “[i]t is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual.”⁹⁷ The Court also stressed the Sherman Act's “omission of any direct prohibition against monopoly in the concrete,”⁹⁸ but emphasized that the words of Section 2 “reach every act bringing about the prohibited results”⁹⁹—that is, monopoly.

The Court's observations were imprecise. The Sherman Act did not intend to prohibit all monopolies. The Committee on the Judiciary introduced Section 2 as an amendment to the bill of Senator Sherman.¹⁰⁰ During the debate over Section 2, members of the Committee argued that the bill did not intend to condemn a person who obtained control over trade “by virtue of his superior skill.”¹⁰¹ It was argued that “[a]nybody who knows the meaning of the word ‘monopoly,’ as the courts apply it, would not apply it to such a person at all.”¹⁰² Although some senators were unsure about this interpretation, the Senate adopted the proposed language after a very brief discussion.¹⁰³ Section 2 was enacted to prevent a person who holds a significant market share from “prevent[ing] other men from engaging in fair competition with him.”¹⁰⁴

Compelled to enact antitrust legislation because of concerns over the size and influence of trusts, Congress passed the Sherman Act. Congress,

96. In the week that marked the one-hundredth anniversary of the Supreme Court's decision in *Standard Oil*, the Senate Committee on Finance held a hearing regarding the possible elimination of tax breaks to oil and gas companies. Rex Tillerson appeared for Exxon Mobil Corporation, Standard Oil's descendant that in May 2011 held the largest market cap in the United States. Tillerson, the Chairman and CEO of Exxon Mobil, argued that the elimination of the tax breaks to the five big energy companies would be “misinformed and discriminatory.” Like Standard Oil, Exxon Mobil was the largest corporation in the world. Regardless of the (in)validity of Tillerson's argument, it conjures up the image of the octopus wrapping its tentacles around government. See *Oil and Gas Tax Incentives and Rising Energy Prices: Hearing Before the S. Comm. on Fin.*, 112th Cong. (2011) (statement of Rex W. Tillerson, Chairman & CEO, Exxon Mobil Corp.). See also End Big Oil Tax Subsidies Act of 2011, H.R. 601, 112th Cong. (2011). For further on *Standard Oil* and the petroleum industry, see Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of Standard Oil: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843 (2012).

97. *Standard Oil Co. v. United States*, 221 U.S. 1, 55 (1911).

98. *Id.* at 62.

99. *Id.* at 61.

100. See *supra* note 70 and accompanying text.

101. 21 Cong. Rec. 3151 (1890).

102. *Id.*

103. *Id.* at 3152–53.

104. *Id.* at 3152 (statement of Sen. George Frisbie Hoar of Massachusetts). In the *Whiskey Trust* case, Judge Howell Jackson relied on this legislative history. *In re Greene*, 52 F. 104, 116 (S.D. Ohio 1892). Justice Jackson was appointed to the Supreme Court in February 1893.

however, did not outlaw bigness, nor did it define the term “monopolist” or the meaning of the monopolization offense.

III. THE BRANDEIS-DOUGLAS EFFECT

Although Congress did not impose direct restrictions on business size in the Sherman Act, courts have grappled with the importance, if any, of size under antitrust laws. The anti-size narrative that can be found in case law is largely due to the work of Justices Louis Brandeis and William Douglas, whose combined careers on the Court spanned six decades. Both Justices were deeply concerned with the absolute size of corporations and the threat that such bigness posed to liberty. Despite the age of their judicial and nonjudicial writings, and the limited precedential value of most of their opinions by now, their approach to business size has left its mark on modern antitrust law.

A. LOUIS D. BRANDEIS

Louis Brandeis was born in 1856 and witnessed the rise of the big trusts in the nineteenth and early twentieth centuries. Prior to his nomination to the Supreme Court, he was the “principal champion of small business”¹⁰⁵ and advocated against the growing industrial concentration that the financial sector fueled. He was a well-known writer and speaker on the social, political, and economic dangers of bigness.

His critiques of the trusts and the financial sector focused on bigness, size, and the exploitation of the public. In 1912, Brandeis testified before Congress that “we can not maintain democratic conditions in America if we allow organizations to arise in our midst with the power of the [large trusts]. Liberty of the American citizen can not endure against such organizations.”¹⁰⁶ Concerned with the effectiveness of the Sherman Act,¹⁰⁷ he participated in the drafting of the Federal Trade Commission Act.¹⁰⁸

105. Milton Handler, *The Brandeis Conception of the Relationship of Small Business to Antitrust*, 16 A.B.A. ANTITRUST SEC. 13, 14 (1960). See also Richard P. Adelstein, “Islands of Conscious Power”: *Louis D. Brandeis and the Modern Corporation*, 63 BUS. HIST. REV. 614, 615 (1989) (describing Justice Brandeis as the “indefatigable champion of small enterprise”); Philip Cullis, *The Limits of Progressivism: Louis Brandeis, Democracy and the Corporation*, 30 J. AM. STUD. 381, 384–87 (1996) (discussing Justice Brandeis’s condemnation of the unfair practices of large firms at the expense of smaller companies).

106. *Hearings Before the H. Comm. on Investigation of United States Steel Corporation*, 62d Cong. 2862 (1912) (statement of Louis Brandeis).

107. Louis D. Brandeis, *The Regulation of Competition Versus the Regulation of Monopoly*, Address to the Economic Club of New York (Nov. 1, 1912).

108. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 389–96 (2009).

In a series of essays published in *Harper's Weekly* between November 1913 and January 1914, Brandeis criticized the trusts and the large banking industry that served them.¹⁰⁹ In one of the best-known essays in the collection, *A Curse of Bigness*, Brandeis wrote that size may not be a crime but that “size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put.”¹¹⁰ In March 1914, Brandeis published the collection as a book, *Other People's Money and How the Bankers Use It*.¹¹¹ The collection, which quickly became influential, had a clear anti-bigness message.¹¹² At the time of his nomination to the Court, Brandeis's views on bigness and antitrust enforcement were publicly well known.¹¹³

109. Louis D. Brandeis, *A Solution of the Trust Problem*, HARPER'S WKLY., Nov. 8, 1913, at 18; Louis D. Brandeis, *Breaking the Money Trust*, HARPER'S WKLY., Nov. 22, 1913, at 10; Louis D. Brandeis, *How Combiners Combine*, HARPER'S WKLY., Nov. 29, 1913, at 10; Louis D. Brandeis, *The Endless Chain*, HARPER'S WKLY., Dec. 6, 1913, at 13; Louis D. Brandeis, *Serve One Master Only!*, HARPER'S WKLY., Dec. 13, 1913, at 10; Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10; Louis D. Brandeis, *Where the Banker Is Superfluous*, Louis D. Brandeis, HARPER'S WKLY., Dec. 27, 1913, at 18; Louis D. Brandeis, *Big Men and Little Business*, HARPER'S WKLY., Jan. 3, 1914, at 11; Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18; Louis D. Brandeis, *The Inefficiency of the Oligarchs*, HARPER'S WKLY., Jan. 17, 1914, at 18.

110. Brandeis, *A Curse of Bigness*, *supra* note 109, at 18.

111. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1914).

112. *Id.* at 149–50.

113. See UROFSKY, *supra* note 108, at 277–326 (discussing Brandeis's views on “big business”).



Harper's Weekly, November 29, 1913—Cover: *How Combiners Combine*

When President Woodrow Wilson nominated Brandeis to the Supreme Court in January 1916, he was known as “The People’s Lawyer.”¹¹⁴ His vocal stance on business and social issues, however, led to a bitter fight

114. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 *YALE L.J.* 1445, 1448 (1996). Brandeis himself contributed to the image. See, e.g., Louis D. Brandeis, *The Opportunity in Law: Address before the Harvard Ethical Society* (May 4, 1905), in *LOUIS D. BRANDEIS, BUSINESS-A PROFESSION* 313, 321 (1914) (“We hear much of the ‘corporation lawyer,’ and far too little of the ‘people’s lawyer.’ The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.”); *Brandeis to Teach Roads Without Pay*, *N.Y. TIMES*, Nov. 30, 1910, at 1 (publishing a letter Brandeis wrote to Western Railroad turning down a job offer with a salary he would name: “I must decline to accept any salary or other compensation form the railroads [because the burden] will ultimately be borne in large part by the consumer . . .”).

over his confirmation.¹¹⁵ Justice Brandeis served on the Court from June 1916 to February 1939. As a Justice, he recused himself from many monopolization cases,¹¹⁶ including the *United Shoe Machinery* cases¹¹⁷ and the 1920 *U.S. Steel* case.¹¹⁸

Justice Brandeis, however, participated in collusion cases,¹¹⁹ and wrote for the Court the landmark decision in *Chicago Board of Trade*, in which he articulated the most cited expression of the rule of reason.¹²⁰ Justice Brandeis also participated in leveraging¹²¹ and resale price maintenance (“RPM”) cases.¹²² He was clearly troubled by the possibility of leveraging market power through intellectual property rights and other tying schemes.¹²³ He understood RPM to be a business strategy necessary

115. UROFSKY, *supra* note 108, at 430–59; Spillenger, *supra* note 114, at 1498–1522.

116. *See, e.g.*, *United States v. Int’l Harvester Co.*, 274 U.S. 693 (1927); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. S. Pac. Co.*, 259 U.S. 214 (1922); *Cont’l Ins. Co. v. Reading Co.*, 259 U.S. 156 (1922); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922); *United States v. Lehigh Valley R.R. Co.*, 254 U.S. 255 (1920); *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920); *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918).

117. *United Shoe Mach. Corp.*, 258 U.S. at 451; *United Shoe Mach. Co.*, 247 U.S. at 32.

118. *U.S. Steel Corp.*, 251 U.S. at 417. For more on *U.S. Steel*, see generally William H. Page, *Standard Oil and U.S. Steel: Predation and Collusion in the Law of Monopolization and Mergers*, 85 S. CAL. L. REV. 657 (2012).

119. *See, e.g.*, *Sugar Inst. v. United States*, 297 U.S. 553 (1936) (Brandeis, J., participated); *Appalachian Coals v. United States*, 288 U.S. 344 (1933) (Brandeis, J., participated); *Bedford Cut Stone Co. v. Journeyman Stone Cutters’ Ass’n of N. Am.*, 274 U.S. 37 (1927) (Brandeis, J., dissenting); *Cement Mfrs. Protective Ass’n v. United States*, 268 U.S. 588 (1925) (Brandeis, J., participated); *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922) (Brandeis, J., participated); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (Brandeis, J., dissenting); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (Brandeis, J., dissenting).

120. *Chi. Bd. of Trade v. United States*, 246 U.S. 231 (1918) (Brandeis, J., writing for the Court). In *Standard Oil*, the Supreme Court declared that courts should use the rule of reason to construe the Sherman Act. *Standard Oil Co. v. United States*, 221 U.S. 1, 61–64 (1911). *See generally* Barak Y. Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429 (2012). For the significance of *Chicago Board of Trade* see Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012); Alan J. Meese, *Standard Oil as Lochner’s Trojan Horse*, 85 S. CAL. L. REV. 783 (2012).

121. *See, e.g.*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917) (Brandeis, J., joining the majority); *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (unanimous decision of the Court delivered by Justice McReynolds); *F.T.C. v. Gratz*, 253 U.S. 421 (1920) (Brandeis, J., dissenting); *Standard Oil Co. v. United States*, 283 U.S. 163 (1931) (Brandeis, J., writing for the Court); *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 31–32 (1931) (Brandeis, J., writing for the Court); *Int’l Bus. Mach. Corp. v. United States*, 298 U.S. 131 (1936) (unanimous decision of the Court delivered by Justice Stone).

122. *See, e.g.*, *Straus v. Victor Talking Mach. Co.*, 243 U.S. 490 (1917) (Brandeis, J., joining the majority); *Boston Store of Chi. v. Am. Graphophone Co.*, 246 U.S. 8 (1918) (Brandeis, J., concurring with the majority); *Colgate & Co.*, 250 U.S. 300 (unanimous decision of the Court delivered by Justice McReynolds); *United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926) (unanimous decision of the Court delivered by Chief Justice Taft).

123. Many argue that Brandeis’s views of tying and leverage reflected his regrets of working for

to protect the public from ruinous competition.¹²⁴ Although he had harshly criticized the Supreme Court's RPM position prior to his appointment, he did not express his publicly known views of RPM in his judicial writings.¹²⁵ Three years after his appointment, however, the Court adopted the Colgate doctrine that equipped manufacturers with simple escapes from the ban on RPM.¹²⁶

While Justice Brandeis rarely participated in cases related to business size, he voiced his frustration with the Court's developing antitrust jurisprudence on at least one occasion. Dissenting in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America*,¹²⁷ Justice Brandeis criticized the Court's decisions in the 1918 *United Shoe* case¹²⁸ and in the 1920 *U.S. Steel* case¹²⁹—cases from which he had recused himself.

Justice Brandeis firmly believed that antitrust law should not encourage "ruinous competition."¹³⁰ He nonetheless distinguished between local monopolies and trusts. In 1932, a case came before the Court involving entry regulation of ice production in Oklahoma. Denying the

United Shoe Machinery. Although United Shoe symbolized the most perfect monopoly in the United States, controlling 100 percent of its market, Brandeis represented the company in several antitrust cases, was a shareholder, and served as a director in the company. See John Braeman, "The People's Lawyer" Revisited: *Louis D. Brandeis Versus the United Shoe Machinery Company*, 50 AM. J. LEGAL HIST. 284, 287 (2008–2010) ("Paradoxically, United Shoe Machinery was the one business firm with which Brandeis had been involved beyond the lawyer-client relationship—as one of its founding architects, stockholder, and director."); Spillenger, *supra* note 114, at 1519 ("United's . . . 'tying' clauses . . . were plainly anticompetitive. Anyone familiar with Brandeis's views on monopoly can imagine his discomfort at having to defend such practices In Brandeis's later account, he was personally willing to oppose regulation of these practices in 1906 and only later changed his mind as his views on competition and his perception of United's ruthless behavior evolved."); UROFSKY, *supra* note 108, at 310–17 (discussing Brandeis's extensive involvement with United Shoe).

124. For an analysis of Brandeis's RPM theory see Barak Y. Orbach, *The Image Theory: RPM and the Allure of High Prices*, 55 ANTITRUST BULL. 277, 279–80 (2010).

125. Brandeis criticized three key decisions that outlaw RPM: *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), and *Bauer & Cie. v. O'Donnell*, 229 U.S. 1 (1913). Louis D. Brandeis, *Cutthroat Prices: The Competition that Kills*, HARPER'S WKLY., Nov. 15, 1913, at 10.

126. *Colgate & Co.*, 250 U.S. at 307.

127. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America*, 274 U.S. 37, 56–65 (1927).

128. *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918).

129. *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920).

130. See, e.g., *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 415 (1921) ("The Sherman Law does not prohibit every lessening of competition; and it certainly does not command that competition shall be pursued blindly, that business rivals shall remain ignorant of trade facts, or be denied aid in weighing their significance. It is lawful to regulate competition in some degree."); Brandeis, *supra* note 125.

plaintiffs' argument that the purpose of the regulation was to protect the interests of the incumbent ice manufacturer, Oklahoma maintained that the regulation's sole goal was to limit the wasteful duplication of investments in the industry. The Court struck down the law in *New State Ice Co. v. Liebmann*.¹³¹ Justice Brandeis dissented. Despite his disdain of monopolies, the Great Depression apparently caused him some pause. He wrote, "Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for the causes of this disorder and are reexamining the bases of our industrial structure."¹³² Justice Brandeis was willing to consider the possibility that a regulated monopoly could be superior to unregulated competition when the latter would result in exuberant investments, excess production capacity, and ruinous competition.¹³³ Brandeis, however, may not have been convinced that the theory of natural monopoly worked in practice and concluded: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹³⁴

Justice Brandeis's convictions about the political and social ills of bigness remained steady over time, and in 1933 he finally expressed his views on corporate bigness in a tax case. In *Louis K. Liggett Co. v. Lee*,¹³⁵ the Court struck down a Florida chain store tax. Florida taxed chain stores with fees heavier than those imposed on independent stores.¹³⁶ While the majority of the Court found the tax provision unconstitutional, Justice Brandeis argued the provision was a proper exercise of the State's powers. His dissent condemned corporations and the "evils attendant upon the free and unrestricted use of the corporate mechanism" that his generation had accepted as the "inescapable price of civilized life."¹³⁷ States had initially denied businesses the right to incorporate because of the fears of the subjection of labor to capital, fears of monopoly, and "a sense of some insidious menace inherent in large aggregations of capital."¹³⁸ Justice Brandeis believed these fears were warranted, writing that "[t]hrough size,

131. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

132. *Id.* at 306–07.

133. Brandeis explained that "rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity." *Id.* at 307–08.

134. *Id.* at 311.

135. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933).

136. *Id.* at 528–29.

137. *Id.* at 548.

138. *Id.* at 549.

corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State.”¹³⁹ Crediting Adolf Berle and Gardiner Means for influencing his writing,¹⁴⁰ Justice Brandeis argued that the separation between ownership and control “removed many of the checks which formerly operated to curb the misuse of wealth and power” and committed society “to the rule of a plutocracy.”¹⁴¹

Justice Brandeis’s participation in select antitrust cases suggests that he made a conscious effort to avoid cases that, at least in his mind, concerned bigness in business. His economic views, nonetheless, outlived him at the Court. His successor, Justice William Douglas, was inspired by Justice Brandeis’s early nonjudicial writings against bigness. Justice Douglas, who exercised little restraint in expressing his distrust and distaste for big business, greatly influenced antitrust law until his retirement in the mid-1970s.

B. WILLIAM O. DOUGLAS

Justice Brandeis served on the Court until February 1939. His successor was William Douglas, who was appointed in April 1939 and retired in November 1975. In his thirty-six years on the Supreme Court, Justice Douglas wrote thirty-five majority antitrust decisions and nearly as many dissenting or concurring opinions in cases involving antitrust issues.

139. *Id.* at 565.

140. *Id.* at 565 n.50.

141. *Id.* at 565 (1933). The anti-chain store movement was one of the trends in the general opposition to business size. See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1014 (2005) (describing the movement as “[r]ooted in in the antimonopoly ideology of the Progressive Era”). One of the most prominent antitrust cases against chain stores is the A&P case: *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 173 F.2d 79 (7th Cir. 1949). See generally M. A. Adelman, *The A & P Case: A Study in Applied Economic Theory*, 63 Q. J. ECON. 238 (1949); Joel B. Dirlam & Alfred E. Kahn, *Antitrust Law and the Big Buyer: Another Look at the A&P Case*, 60 J. POL. ECON. 118 (1952). Wal-Mart’s size has also drawn substantial attention and writing with some references to antitrust. See, e.g., James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 370 (2007) (“The conflict surrounding Wal-Mart is thus best understood as a conflict between a focus on the consumer economic interest on the one hand, and a focus on various producer economic and social interests on the other Similar things can be said about many other areas of law as well—for example, antitrust”). In 2004, Reuven Avi-Yonah, a leading tax scholar, used Brandeis-like arguments in defense of corporate tax. See Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1231–49 (2004).

His views about size and bigness were formed before he joined the Court and were publicly known, although not nearly as widely known as Justice Brandeis's views.¹⁴² Justice Douglas's strict aversion to size remained firm over time despite changes in the economy, economic thinking, legal scholarship, and developments in law. In a legal system of precedents and citations, the mark he left on antitrust cannot be understated.

Justice Douglas came to the Court from the Securities and Exchange Commission, where he served as the third Chairman. Before joining the Court, he had developed strong views about business size and the role of antitrust laws in regulating the accumulation of wealth. Justice Brandeis's writing greatly influenced him.¹⁴³ His 1948 dissent in *United States v. Columbia Steel* is his strongest anti-size expression in the law;¹⁴⁴ and the opinion is consistent with Justice Douglas's body of work. In *Columbia Steel*, Douglas identified the "problem of bigness"—crediting Brandeis's *The Curse of Bigness* for his analysis.¹⁴⁵ Justice Douglas warned that size is an "industrial menace because it creates gross inequalities against existing or putative competitors."¹⁴⁶ Size is also a "social menace" because it allows control over prices and "is the measure of the power of a handful of men over our economy."¹⁴⁷ It is a power that "can be utilized with lightning speed" and "tends to develop into a government in itself."¹⁴⁸ Justice Douglas saw a clear solution for the threats that size poses to society: "[Industrial power] should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men."¹⁴⁹ He saw in antitrust a potential platform to execute this solution and declared that "the philosophy and the command of the Sherman Act" demanded action against business size, in order to decentralize industrial power.¹⁵⁰

In 1973, twenty-five years after *Columbia Steel*, Justice Douglas returned to *The Curse of Bigness* in a concurring opinion in *United States v.*

142. DEMOCRACY AND FINANCE: THE ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS 14–17 (James Allen ed., 1940).

143. See C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895, 905–06 (2008). In 1954, Justice Douglas published *An Almanac of Liberty*, listing his views on a wide range of issues including Brandeis and "the curse of bigness." WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 187 (1954).

144. *United States v. Columbia Steel Co.*, 334 U.S. 495, 534–40 (1948) (Douglas, J., dissenting).

145. *Id.* at 535.

146. *Id.*

147. *Id.* at 535–36.

148. *Id.* at 536.

149. *Id.*

150. *Id.*

Falstaff Brewing Corp.,¹⁵¹ resurrecting—or trying to keep alive—the fear of bigness. He reminded the Court and the public that big business is an “anathema to the American antitrust dream,”¹⁵² and warned that unhindered concentration of power “leads predictably to socialism that is antagonistic to our system.”¹⁵³ Justice Douglas clearly believed that corporate size was a public evil.

Justice Douglas’s influence on antitrust should not be underestimated. In May 1948, one month before he wrote his dissent in *Columbia Steel*, he wrote the landmark decision *United States v. Paramount Pictures, Inc.*,¹⁵⁴ reshaping the motion picture industry and, to a large extent, still governing it.¹⁵⁵ In a companion movie theater decision, *United States v. Griffith*, Justice Douglas presented a no-fault monopolization interpretation for Section 2 of the Sherman Act: “monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.”¹⁵⁶ In writing *Griffith*, Justice Douglas was convinced that the defendant illegally leveraged its monopoly power from some geographic markets into others, or, in other words, that the monopoly grew up in size. He therefore noted that “[i]f monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument.”¹⁵⁷

Justice Douglas’s fears of business size and conspiracy theories have enriched the antitrust case law. We cannot explain them, but we note that they are somewhat consistent with his record in federal tax cases in which he exhibited an unexplained strong bias in favor of the taxpayer.¹⁵⁸ All antitrust casebooks feature some of Justice Douglas’s decisions. His spirit may not represent antitrust law of recent decades, but his narrative still has some influence.

151. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

152. *Id.* at 543.

153. *Id.*

154. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

155. See Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. ON REG. 317 (2004); Barak Y. Orbach & Liran Einav, *Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry*, 27 INT’L REV. L. & ECON. 129, 130–31, 139–40 (2007). Together with *Paramount*, Justice Douglas delivered two additional decisions related to the motion picture industry: *United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948).

156. *Griffith*, 334 U.S. at 107.

157. *Id.* at 108.

158. See Bernard Wolfman, Jonathan L. F. Silver & Marjorie A. Silver, *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235, 252–64 (1973).

IV. THE RISE OF RELATIVE SIZE

Early fears of trusts and bigness were largely rooted in the perceived social and political harms of absolute size and had very little to do with economics. Economics, however, has shaped the evolution of antitrust. In particular, economics introduced the concept of relative size and transformed the antitrust narrative from one about absolute size to one of relative size—that is, from “bigness” to “market shares.”

The “law of relative size” may be better than the Brandeis-Douglas aspirational law of absolute size. However, it has its own limitations. This part begins with the economic roots of relative size, continues with a discussion of the flawed significance of relative size, and concludes with three doctrines that illustrate how the fear of relative size could transform to a fear of absolute size.

A. THE CRUDE ECONOMICS OF RELATIVE SIZE

In 1838, one year before John D. Rockefeller was born, the French mathematician Antoine Augustine Cournot published a short book about the mathematical principles of economics.¹⁵⁹ The book received little attention during his lifetime.¹⁶⁰ After the American economist Irving Fisher published its English translation in 1898, however, it became one of the most influential works in economics.¹⁶¹ In so-called “Cournot competition,” products are homogeneous and firms compete in quantity and choose quantities simultaneously.¹⁶² In this stylized model, price is inversely related to the number of firms in the market.¹⁶³ Firms, therefore, have incentives to collude to reduce quantity and raise prices. The Cournot model contributed to the development of theoretical and applied economics,¹⁶⁴ and within antitrust it has fostered the perception that market concentration is a source of anticompetitive conduct; that is, that the

159. ANTOINE AUGUSTINE COURNOT, RECHERCHES SUR LES PRINCIPES MATHÉMATIQUES DE LA THÉORIE DE RICHESSES (1838).

160. A.J. Nichol, *Tragedies in the Life of Cournot*, 6 *ECONOMETRICA* 193, 193 (1938).

161. Irving Fisher, *Cournot and Mathematical Economics*, 12 *Q. J. ECON.* 119, 120–21 (1898). Fisher’s wife’s brother-in-law translated the book. Fisher added notes to the publications. See Irving Fisher, *Cournot Forty Years Ago*, 6 *ECONOMETRICA* 198, 198 (1938). In 1927, The MacMillan Company started publishing the translations and notes as a book that became very popular. See AUGUSTIN COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (Nathaniel T. Bacon trans., 1927).

162. Carl Shapiro, *Theories of Oligopoly Behavior*, in 1 *HANDBOOK OF INDUSTRIAL ORGANIZATION* 329, 334 (Richard Schmalensee & Robert D. Willig eds., 1989).

163. *Id.* at 334–38.

164. For a comprehensive review of the Cournot model, related theories, and their implications, see *id.*

antitrust laws can legitimately target relative size.¹⁶⁵

Relative size theories fall into two related categories of potential antitrust concerns. The first category ties relative size to market power and monopoly power. This category focuses on the ability of a firm to unilaterally impose its will on the market. The second category is about the effects of rivals' relative size on the competition. This category utilizes the premise that competitors are more likely to collude or at least to be less competitive when their number decreases and their relative size grows. These general concerns have remained embedded in antitrust law, despite the economic understanding of the many limitations of the underlying premises.¹⁶⁶

1. Relative Size, Market Power, and Monopoly Power

Relative size is the standard antitrust instrument used to establish monopolization. Under Section 2 of the Sherman Act, the test for monopolization, as articulated by Justice Douglas in *United States v. Grinnell Corp.*,¹⁶⁷ is two pronged: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹⁶⁸ The possession or existence of monopoly power “may be inferred from the predominant share of the market.”¹⁶⁹ Put simply, relative size—or predominant market share—is the standard measurement of monopoly power. Even the historical accounts of the Standard Oil Company use its relative size in the petroleum markets to describe its monopoly power.¹⁷⁰

In *Alcoa*, Judge Learned Hand defined the legal thresholds of relative size for a monopolist. Judge Hand stated that a market share of ninety

165. See, e.g., *F.T.C. v. Gratz*, 253 U.S. 421, 432 (1920) (Brandeis, J., dissenting) (arguing that Congress introduced the Federal Trade Commission Act to remedy “conditions in business which a great majority of the American people regarded as menacing the general welfare . . . [because it] was believed that widespread and growing concentration in industry and commerce restrained trade”).

166. See Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 COMPETITION POL'Y INT'L 1 (2007); Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010) [hereinafter Kaplow, *Why (Ever) Define Markets?*]; Louis Kaplow, *Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments*, 7 J. COMPETITION L. & ECON. 243 (2011) [hereinafter Kaplow, *Market Share Thresholds*]; Louis Kaplow, *Market Definition and the Merger Guidelines*, 39 REV. INDUS. ORG. 107 (2011).

167. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

168. *Id.* at 570–71.

169. *Id.* at 571.

170. See, e.g., *supra* notes 21–28 and accompanying text.

percent “is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not.”¹⁷¹ These thresholds have remained the starting point for any discussion of monopoly power.¹⁷²

Monopoly power, however, is not about size—absolute or relative. In economics, the Lerner Index, $(P - MC)/P$, defines the “degree of monopoly” with the difference between the firm’s price and its marginal cost at the profit-maximizing rate of output.¹⁷³ Abba Lerner, who devised the Index, observed that “[a] man may have a considerable degree of monopolistic power although he is in control of only a very small part of the supply of a commodity.”¹⁷⁴ In devising his simple formula, Lerner sought to estimate “the divergence of the system from the social optimum that is reached in perfect competition,” and emphasized that the relevant measure was not “the amount of tribute individuals can obtain for themselves from the rest of the community, by being in an advantageous monopolistic position.”¹⁷⁵ Although economists have always recognized quite a few limitations of the Lerner Index, it still serves as the antitrust standard for measuring monopoly power.¹⁷⁶

171. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 424 (2d Cir. 1945). Because of the durability of aluminum, Alcoa’s market share could not allow it to exercise market power as much as other monopolists with a similar market share. This point stresses one of the limitations of the relationship between market share and monopoly power that Judge Hand supposedly drew. See Barak Y. Orbach, *The Durapologist Puzzle: Monopoly Power in Durable-Goods Markets*, 21 YALE J. ON REG. 67, 78–79 (2004).

172. The Supreme Court endorsed Judge Hand’s approach in *American Tobacco Co. v. United States*, 328 U.S. 781, 813–14 (1946). The circuit courts refer significance to relative size, but express a wide range of positions regarding the required thresholds for a monopoly. See, e.g., *Exxon Corp. v. Berwick Bay Real Estates Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam) (“[M]onopolization is rarely found when the defendant’s share of the relevant market is below 70%.”); *Hayden Publ’g Co., Inc. v. Cox Broad. Corp.*, 730 F.2d 64, 69 n.7 (2d Cir. 1984) (“[A] party may have monopoly power in a particular market, even though its market share is less than 50%.”); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (noting that to establish “monopoly power, lower courts generally require a minimum market share of between 70% and 80%” (citation omitted)); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) (Posner, C.J.) (“[Fifty] percent is below any accepted benchmark for inferring monopoly power from market share.”); *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002) (“A market share at or less than 50% is inadequate as a matter of law to constitute monopoly power.”); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187–88 (3d Cir. 2005) (“[A] share significantly larger than 55% has been required to establish prima facie market power [and a market share between 75% and 80% of sales is] ‘more than adequate to establish a prima facie case of power.’”).

173. See Abba P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157, 169 (1934).

174. *Id.* at 166.

175. *Id.* at 168.

176. See generally Kenneth G. Elzinga & David E. Mills, *The Lerner Index of Monopoly Power: Origins and Uses*, 101 AM. ECON. REV. 558 (2011).

The Supreme Court adopted an approach that builds on the Lerner Index. It defines “monopoly power” to mean “the power to control prices or exclude competition”¹⁷⁷ and has explicitly stated that monopoly power under § 2 of the Sherman Act requires “something greater than market power under § 1.”¹⁷⁸ In sum, monopoly power is some vague function of market power.¹⁷⁹ The methodological labyrinth, however, does not stop here.

In antitrust, relative size—or the market share of a firm—is also used to infer “market power.”¹⁸⁰ The standard definition of “market power” is “the ability to set price profitably above the competitive level.”¹⁸¹ This definition uses control over price, but price could be substituted for output, product quality, product variety, or other product dimensions.¹⁸² Market

177. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

178. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992).

179. *See, e.g.*, 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 801 (3d ed. 2008) (“[M]onopoly power . . . is conventionally understood to mean ‘substantial’ market power.”). *See also* *Deauville Corp. v. Federated Dep’t Stores, Inc.*, 756 F.2d 1183, 1192 n.6 (5th Cir. 1985) (defining monopoly power as an “extreme degree of market power”); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (defining monopoly power as “substantial” market power).

180. The 2010 Merger Guidelines relaxed the reliance on market shares, by adopting the upward pricing pressure (“UPP”) test for analyzing unilateral competitive effects of horizontal mergers on differentiated products. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N *HORIZONTAL MERGER GUIDELINES* §§ 2.1.3, 6.1 (2010) [hereinafter 2010 MERGER GUIDELINES]. *See generally* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON.: POL’YS & PERSPS. Article 9 (2010) (proposing a test based on upward pricing pressure); Robert Willig, *Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions*, 39 REV. INDUS. ORG. 19 (2011) (describing that the UPP method can be extended to increases in market power). Courts, however, may continue using market shares (relative size) to assess market power. *See generally* Keith N. Hylton, *Brown Shoe Versus the Horizontal Merger Guidelines*, 39 REV. INDUS. ORG. 95 (2011) (explaining that courts typically give judges more discretion to define market power and may continue that practice in spite of the 2010 Merger Guidelines); John E. Lopatka, *Market Definition?*, 39 REV. INDUS. ORG. 69 (2011) (arguing that market definition is still an important consideration in merger analysis).

181. *See, e.g.*, Carlton, *supra* note 166, at 5; William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981) (“The term ‘market power’ refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.”); Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 364–84 (1998). *See also* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) (defining market power as “the ability to raise prices above those that would be charged in a competitive market”).

182. *See, e.g.*, 2010 MERGER GUIDELINES, *supra* note 180, § 1 (“A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. . . . For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect

power, like monopoly power, has nothing to do with size. Therefore, inferring market power from relative size requires a large set of assumptions. At best, such a deductive process suggests that market power exists but provides no information about magnitude.¹⁸³

Thus, under present “settled law,”¹⁸⁴ the “willful acquisition or maintenance” of a substantial relative size, “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident” could be a violation of Section 2 of the Sherman Act.¹⁸⁵ This rule has nothing to do with the articulated meaning of monopoly power, or the economic understanding of the term, but reflects a continued fear of size in antitrust.

2. Relative Size and Competition Among Competitors

In addition to the way unilateral conduct is reviewed under antitrust law, relative size theories have also shaped application of the law as applied to competition among competitors. The crude Cournot model greatly contributed to the development of the Structure-Conduct-Performance (“S-C-P”) paradigm in antitrust. As the name suggests, The S-C-P paradigm tied anticompetitive conduct and poor performance to concentrated market structures.¹⁸⁶ Specifically, it provided that as the number of firms in the market declines and their relative size grows, they were more likely to collude, and less likely to compete aggressively. The S-C-P paradigm furnished a theoretical framework in which to deploy antitrust policy against corporate size, and inspired several no-fault

customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation.”).

183. See *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) (“[A] firm’s share of current sales does not [always] reflect an ability to reduce the total output in the market, and therefore it does not convey power over price.”); *United States v. Waste Mgmt. Inc.*, 743 F.2d 976, 979–82 (2d Cir. 1984); WILLIAM J. BAUMOL JOHN C. PANZAR & ROBERT D. WILLIG, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (1982); Carlton, *supra* note 166, at 5; Kaplow, *Why (Ever) Define Markets?*, *supra* note 166, at 440; Kaplow, *Market Share Thresholds*, *supra* note 166, at 244.

184. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

185. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

186. See generally JOE S. BAIN, *BARRIERS TO NEW COMPETITION* (1956); EDWARD S. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* (1964); Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104 (1979). For the history of the S-C-P paradigm see Herbert Hovenkamp, *United States Competition Policy in Crisis, 1890–1955*, 94 MINN. L. REV. 311, 350–59 (2009).

monopolization theories.¹⁸⁷

During the 1960s and 1970s, the paradigm influenced merger policy by allowing the use of market structure as a sufficient cause to challenge mergers.¹⁸⁸ Equipped with a simplistic, theoretical model, antitrust enforcers invested resources to curb the growth of relative size in American industries. This approach was embedded in the 1968 merger guidelines that outlined the general principles of merger policy in the United States that governed until 1982.¹⁸⁹ Beginning in the late 1960s, a growing economics literature has exposed weaknesses of the S-C-P paradigm, focusing on its core proposition that profitability in concentrated industries is indicative of collusive behavior. Theoretical and empirical literature demonstrated that profitability could be an outcome of efficiency of large firms, not necessarily of collusion.¹⁹⁰

The critique of the S-C-P paradigm has been effective. Antitrust policy has largely abandoned the paradigm's core presumptions.¹⁹¹

187. For no-fault monopolization theories, see, e.g., Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969); Oliver E. Williamson, *Dominant Firms and Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972).

188. See, e.g., *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963) (“[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”). See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 328–29 (1962); *United States v. Von's Grocery Co.* 384 U.S. 270, 272–74 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552–53 (1966).

189. U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES §§ 4–7 (1968), reprinted in 4 TRADE REG. REP. (CCH) ¶ 13,101. See Herbert Hovenkamp, *Harm to Competition Under the 2010 Horizontal Merger Guidelines*, 39 REV. INDUS. ORG. 3, 5 (2011) (“[T]he theory of the 1968 Guidelines was pure structuralism. . . . [A] proof of a structure that was deemed to be anticompetitive in and of itself because it led automatically to these behaviors.”); Michael A. Salinger, *The 2010 Revised Merger Guidelines and Modern Industrial Economics*, 39 REV. INDUS. ORG. 159, 160–161 (2011).

190. E.g., Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 171 (Harvey J. Goldschmid et al. eds., 1974); JOHN S. MCGEE, IN DEFENSE OF INDUSTRIAL CONCENTRATION 80–95 (1971); George J. Benston, *The Validity of Profits-Structure Studies with Particular Reference to the FTC's Line of Business Data*, 75 AM. ECON. REV. 37, 64–65 (1985); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 2–3 (1973); Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J.L. & ECON. 229, 229–31 (1977); Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 33–34 (1968). Cf. Michael E. Porter, *The Structure Within Industries and Companies' Performance*, 61 REV. ECON. & STAT. 214, 226–27 (1979); F. M. Scherer, *The Causes and Consequences of Rising Industrial Concentration*, 22 J.L. & ECON. 191, 204 (1979).

191. See Salinger, *supra* note 189, at 164. See also *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504–05 & n.13 (1974) (criticizing the incipency doctrine that implemented the S-C-P paradigm to challenge mergers); *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1081–86, 1093 (D.D.C. 1997).

However, like the old fears of size, the S-C-P paradigm left its shadows and marks in antitrust law. Market concentration keeps playing a significant role in antitrust analysis and courts often use it as an indicator of anticompetitive conduct.¹⁹² The D.C. Circuit has been using the phrase “interdependent anticompetitive conduct” to describe the consequences of increased relative size of firms within an industry.¹⁹³

The 2010 Horizontal Merger Guidelines articulate a concern that is somewhat related to “interdependent anticompetitive conduct.” The Guidelines define “coordinated effects” as anticompetitive effects arising from “coordinated, accommodating, or interdependent behavior among rivals,”¹⁹⁴ and determine that a merger could increase the risk of coordinated effects.¹⁹⁵ However, the agencies can challenge a merger for the risk of coordinated effects only with evidence that the market is vulnerable to coordinated conduct.¹⁹⁶ Industry concentration in itself does not meet this burden.¹⁹⁷

The “coordinated effects” in the 2010 Merger Guidelines are not the “interdependent anticompetitive conduct” of the D.C. Circuit—although both terms describe similar effects that could arise in concentrated industries. The Guidelines incorporate a relatively progressive analytical economic framework, while the “interdependent anticompetitive conduct” of the D.C. Circuit simply reflects the old fear of relative size.

B. DOCTRINAL SHADOWS OF SIZE

Antitrust law and its doctrines have evolved over time. Modern

192. See, e.g., *F.T.C. v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (“[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.”); *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 724 (D.C. Cir. 2001) (“The combination of a concentrated market and barriers to entry is a recipe for price coordination.”). The UPP test in the 2010 Merger Guidelines further relaxes the reliance of the Agencies on the S-C-P paradigm. See *supra* note 180. However, the S-C-P paradigm still plays a role in the guidelines. See Hovenkamp, *supra* note 189, at 5 (“The 2010 Guidelines . . . have departed from the structuralism of the 1960s further than any intervening set of Guidelines.”); Salinger, *supra* note 189, at 167 (“Structure-performance plays a bigger role [in the 2010 Guidelines] than one might have expected because attempts to develop structural models have not proved robust or convincing enough . . .”).

193. See, e.g., *PPG Indus. Co.*, 798 F.2d at 1503; *H.J. Heinz Co.*, 246 F.3d at 715–16; *F.T.C. v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 123 (D.D.C. 2004).

194. 2010 MERGER GUIDELINES, *supra* note 180, § 1.

195. *Id.*

196. *Id.* § 7. For the S-C-P paradigm in the 2010 Merger Guidelines in the context of coordinated effects, see Hovenkamp, *supra* note 189, at 13–14; Salinger, *supra* note 189, at 164.

197. See Wayne-Roy Gayle et al., *Coordinated Effects in the 2010 Horizontal Merger Guidelines*, 39 REV. INDUS. ORG. 39 (2011).

antitrust law is supposedly indifferent to absolute size, utilizing relative size, and making steps toward methodologies that relax the reliance on relative size.¹⁹⁸ Nevertheless, the public and legal institutions maintain the belief that size—absolute or relative—is to be controlled or regulated by antitrust. Misconceptions about the goals and purpose of the legal field only increase the costs of the system and reduce its efficiency, as is seen when no-fault monopolization theories and faulty doctrines are kept alive and mistakenly used to argue that, under certain conditions, the mere existence of market share or market power may amount to a violation of Section 2 of the Sherman Act.¹⁹⁹

The fear of size is somehow related to the fear of concentrated power. Antitrust's attempts to halt the increase of a firm's market power appears symmetric to the desire to control size—relative or absolute. However, as discussed above, the traditional conversion between size and market power relies on flawed assumptions.

This section illustrates through three doctrines—monopoly broth, essential facilities, and leverage theories—how the fear of size continues to cast a shadow over antitrust doctrines.

1. Monopoly Broth

The monopoly broth doctrine is one of the most abstract monopolization doctrines and it has the potential to be quite powerful.²⁰⁰

198 See *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 424 (2d Cir. 1945); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992).

199. See *Alcoa*, 148 F.2d at 427–28 (Hand J.) (noting that, under certain conditions, the mere existence of the power to charge high prices may suffice to establish liability under Section 2); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953) (Wyzanski J.) (interpreting Judge Learned Hand in *Alcoa*); *United States v. Griffith*, 334 U.S. 100, 107 (1948) (Douglas, J.) (arguing that “monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised”); *In re E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653, 751 n.42 (1980) (“If a monopoly results that proves impervious to competitive inroads and is unjustified by scale economies or other efficiencies, antitrust action in this or some other forum may be warranted, even in the absence of abusive conduct.”). See also 3 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* 63–67 (1978) (discussing the law and proposing a restrictive no fault monopoly policy); Milton Handler & Richard M. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125 (1980); HOVENKAMP, *supra* note 34, at 155–57; RICHARD A. POSNER, *ANTITRUST LAW* 103 (2d ed. 2001) (writing that “*Alcoa* thus stands for a concept of ‘no fault’ monopoly” and praising the possibilities the concept enables).

200. The Seventh Circuit gave the doctrine its name. Relying on the rule elaborated in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698–99 (1962), the circuit court wrote: “It is the mix of the various ingredients . . . in a monopoly broth that produces the unsavory flavor.” *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980). In their treatise, Areeda and Hovenkamp report that antitrust plaintiffs have cited the *Continental Ore* rule “numerous

First articulated by the Supreme Court in *Continental Ore v. Union Carbide & Carbon Corp.*,²⁰¹ the doctrine allows plaintiffs to argue that aggregation of claims may be greater than the sum of the parts and thus may entitle them to succeed in a lawsuit even though each individual claim fails.²⁰² Proponents of the doctrine reason that, in monopolization cases, “conduct must always be analyzed ‘as a whole’”²⁰³ because a monopolist could engage in a wide array of practices, the combined effect of which preserved the monopolist’s position. Thus, through aggregation of claims, plaintiffs may succeed even when every claim in itself is legal.

It is the monopolist’s relative size that may possibly turn a group of acts, each of which is insufficient to obtain antitrust relief, into an actionable antitrust claim. Because relative size, that is market share, is instrumental in the definition of the monopolist, it may also determine when aggregation of claims is possible. Size could be associated with legality of conduct.

2. Essential Facilities

The monopoly broth doctrine allows antitrust plaintiffs to argue that aggregation of claims may be greater than the sum of the parts. The essential facility doctrine possibly goes one step further and creates a no-fault monopolization liability.²⁰⁴ A monopolist that refuses to share its facility with competitors may be condemned for an exclusionary practice.²⁰⁵ The doctrine’s logic is that a monopolist could leverage its essential facility into control in other markets, driving competitors out of these markets. The essential facility doctrine reflects the fears that a

times . . . sometimes properly, sometimes improperly.” 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 310c (3d ed. 2008). See also *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) (“The proper inquiry is whether, qualitatively, there is a ‘synergistic effect.’”); *MCI v. AT&T*, 708 F.2d 1081, 1177 (7th Cir. 1983) (“If you really wanted to know what caused the unsavory flavor of the monopoly broth, you would not just audit the chef’s books of account; you would also take a look at his recipe.”); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1378 (9th Cir. 1992) (“[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect.”); *LePage’s Inc. v. 3M*, 324 F.3d 141, 171, 181–82 (3d Cir. 2003) (declining monopoly broth claim).

201. *Continental Ore*, 370 U.S. at 699 (“In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.”).

202. See AREEDA & HOVENKAMP, *supra* note 200, § 310. See also Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 *ANTITRUST L.J.* 663, 664–65 (2010).

203. AREEDA & HOVENKAMP, *supra* note 200, § 310c7, at 208.

204. AREEDA & HOVENKAMP, *supra* note 179, §§ 771–74.

205. For a discussion of the doctrine see Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 *WIS. L. REV.* 359, 361–66 (2008).

monopoly will keep growing and expanding.

The essential facility doctrine applies to vertically-integrated monopolists who hold monopoly power in the essential facility market and integrate activities in other markets. Firms in the railroad, energy, communications, and other sectors that utilize network externalities could be targets of the doctrine if they vertically integrate activities in other markets. The doctrine is not concerned with the unintegrated monopolist, like a microprocessor technology company, who controls some essential facility.²⁰⁶ The unintegrated monopolist's refusal to deal is not used to leverage its power to another market and, hence, such actions do not fall within the framework or spirit of the essential facility doctrine. The doctrine is all about expansion of a firm's size.

The doctrine originated from a case concerning a railroad trust. In the 1912 *United States v. Terminal Railroad* case,²⁰⁷ the defendants—a consortium of fourteen of the twenty-four railroads that shipped freight across the Mississippi River at St. Louis—controlled the terminal facilities on each side of the river. The Supreme Court, while assuming that the operation of these facilities as a single entity was the most efficient way to operate them, held that the Sherman Act required the consortium to provide the other ten competing railroads with access to the terminal facilities on nondiscriminatory terms.²⁰⁸

The modern essential facility doctrine was articulated in *Otter Tail Power Co. v. United States*,²⁰⁹ written by Justice Douglas. Writing for the majority, he held that a utility company that vertically integrated a power company had the duty to wheel over its lines electricity produced by other firms.²¹⁰

206. *E.g.*, *Intergraph Corp. v. Intel Corp.* 195 F.3d 1346, 1354 (Fed. Cir. 1999).

207. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). *See generally* David Reiffen & Andrew N. Kleit, *Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?*, 33 J.L. & ECON. 419 (1990). Another important decision in the history of essential facility is *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359 (1927).

208. *Terminal R.R. Ass'n*, 224 U.S. at 411.

209. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

210. *Id.* at 377–79. *See* G.E. Hale & Rosemary D. Hale, *The Otter Tail Power Case: Regulation by Commission or Antitrust Laws*, 1973 SUP. CT. REV. 99, 100. Another Supreme Court decision that is associated with the essential facility doctrine and predated *Otter Tail* is *Associated Press v. United States*, 326 U.S. 1 (1945) (holding that exclusion of competitors from an essential network of information was an illegal combination under the Sherman Act). Spencer Waller credits Alan D. Neale for coining the name of the doctrine in the 1970 edition of his treatise A.D. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION ENFORCED BY LAW* 67 (2d ed. 1970). Waller, *supra* note 205, at 361. The term first appeared in a court decision in *Hecht v. Pro-*

The essential facility doctrine is related to the fear of bigness in two ways. First, as the name indicates, the “essentiality” stands for a concern that a monopolist would control a resource needed for others’ operations. The monopolist’s refusal to share such a resource could threaten the viability of rivals, allowing a monopolist to grow unchecked by any competition. Second, the doctrine’s rationale is all about business growth—specifically, the extension of monopolistic power from one market into another. In *Otter Tail*, Justice Douglas indeed expressed these concerns, ruling that the defendant “used its monopoly power in [its geographic market] . . . to foreclose competition or gain a competitive advantage, or to destroy a competitor.”²¹¹

Many scholars have criticized the doctrine “as having nothing to do with the purposes of antitrust law,”²¹² and in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,²¹³ Justice Scalia argued that the Supreme Court has never recognized “such a doctrine.”²¹⁴ Yet federal courts “have not been so grudging in application of the doctrine.”²¹⁵

The principal criticism is that, regardless of how we define the goals of antitrust,²¹⁶ the doctrine serves no good purpose. If the facility is operated by a natural monopoly, then ordering the monopolist to share its facility would not change quantities or rates, but it would add administrative costs.²¹⁷ If the facility potentially has alternatives, the definitional aspect of the doctrine—the “essentiality” requirement—should be questioned and one could argue that application of the doctrine discourages firms from developing alternatives to the facility.

Behind the traditional essential facility doctrine stands the fear that a

Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977).

211. *Otter Tail*, 410 U.S. at 377.

212. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.). See, e.g., AREEDA & HOVENKAMP, *supra* note 179, §§ 771b–c (explaining why the doctrine “is inconsistent with antitrust’s purpose” and concluding that “the essential facility doctrine is both harmful and unnecessary and should be abandoned”); Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1989); Reiffen & Kleit, *supra* note 207, at 419–21; Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433, 474–79 (1987).

213. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

214. *Id.* at 411. Cf. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985) (referring to the “essential facilities” doctrine).

215. Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 444 (2002).

216. For the confusion in the definition of the goals of antitrust law, see Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133–34, 163–64 (2011).

217. *Blue Cross & Blue Shield United of Wis.*, 65 F.3d at 1413 (“Consumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors . . .”).

monopolist, an entity that already possesses a large relative size, will only keep growing and expanding. The duty to share the essential facilities supposedly seeks to halt or impede this pursuit. *Trinko* and persistent criticism might have ended the willingness of courts to endorse the doctrine, but its logic reflects the continued use of a size analysis in antitrust law.

3. Leverage Theories

“Leverage” is the extension of monopoly power from one market to another through the use of exclusionary practices.²¹⁸ The simplest and most intuitive form of leverage is tying, through which a firm with market power over one product conditions a transaction in that product on a transaction in another product in which it has no market power. The concern is that a firm may leverage its market power from one market to another. Dissenting in *Henry v. A.B. Dick Co.*,²¹⁹ Chief Justice White expressed his view that tying was intended “only to multiply monopolies,”²²⁰ and that it is a technique to replicate relative size from one market to another. Many subsequent courts have in fact associated tying with the evil of leverage.²²¹

Despite its apparent appeal, the leverage theory has been the subject of attack by disciples of Aaron Director and the Chicago School.²²² The

218. See AREEDA & HOVENKAMP, *supra* note 179, § 652; Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 515–16 (1985). See also Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 837 (1990).

219. 224 U.S. 1 (1912) (addressing the right of a patent holder to tie unpatented ink to his patented rotary mimeograph).

220. *Id.* at 53 (White, C.J., dissenting).

221. See, e.g., *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 32 (1931); *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 509 (1969); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953) (“[T]he essence of illegality in tying agreements is [where] . . . a seller exploits his dominant position in one market to expand his empire into the next.”); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (condemning tying arrangements, in part, “because the party imposing the tying requirements has . . . power or leverage . . . to appreciably restrain free competition in the market for the tied product”); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457–58 (1922). See also *United States v. Paramount Pictures*, 334 U.S. 131, 154 (1948) (holding that tying arrangements are “devices for stifling competition and diverting the cream of the business”); *United States v. Loew's, Inc.*, 371 U.S. 38, 44 (1962) (“[T]ying arrangements serve hardly any purpose beyond the suppression of competition . . .”).

222. See, e.g., Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 19–20 (1957) (referring to a “false notion of leverage”); Richard S. Markovits, *Tie-Ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 TEX. L. REV. 1363, 1369 (1980) (characterizing tie-ins and reciprocity as “nonleverage functions”); L. G. Telser, *A Theory of Monopoly of Complementary Goods*, 52 J. BUS. 211 (1979) (analyzing tie-in sales of complementary goods). Aaron Director published one work that includes a general sketch of his views. Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

Chicago critique perceives the demand as fixed, and hence argues that a monopolist could not extract rent by tying complementary products to his goods.²²³ Louis Kaplow labeled this line of critique “the fixed sum argument” for its proposition that a monopolist loses in one market what it earns in another.²²⁴ The critique relies on rigid assumptions, such as the ability of consumers in the primary market to fully understand their needs in the markets for complementary goods, especially when the demand for such goods is spread over time.²²⁵ Related unrealistic assumptions refer to the nature of the relationship between the demand for the tying product and the tied product, and the responsiveness of consumers to marketing schemes.²²⁶ The critique also fails to consider strategic uses of leverage to raise rivals’ costs by erecting or heightening barriers to entry.²²⁷

The debate over leverage is nuanced and subtle;²²⁸ and while not as old as the fear of size, the theory has been around for more than a century. Economists have shown that, under certain conditions, a firm with market power in one market may leverage its power into another market, thereby enhancing its relative size. However, a firm with market power does not necessarily have large relative size.

V. TBTF AND THE REEMERGENCE OF THE FEAR OF SIZE

In February 1890, a month before Senator Sherman introduced his bill, Joe Walcott—the “Barbados Demon”—a 5’1½” tall boxer won his first professional fight in a knockout.²²⁹ Walcott made himself a name by challenging foes ranging from lightweight to heavyweight with a teasing

223. POSNER, *supra* note 199, at 198–99.

224. Kaplow, *supra* note 218, at 517–19.

225. See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 473 (1992) (“For the service-market price to affect equipment demand, consumers must inform themselves of the total cost of the ‘package’—equipment, service, and parts—at the time of purchase; that is, consumers must engage in accurate lifecycle pricing.”).

226. See Einer Elhauge, *Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 399 (2009); John Simpson & Abraham L. Winkelgren, *Bundled Discounts Leverage Theory and Downstream Competition*, 9 AM. L. & ECON. REV. 370 (2007).

227. See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs To Achieve Power Over Price*, 96 YALE L.J. 209, 248–49 (1986). See also Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194, 194–97 (2002); Barry Nalebuff, *Bundling As an Entry Barrier*, 119 Q. J. ECON. 159 (2004).

228. See, e.g., United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

229. See Michael J. Schmidt, *Joe Walcott, the Barbados Demon: World Welterweight Champion*, in THE FIRST BLACK BOXING CHAMPIONS: ESSAYS ON FIGHTERS OF THE 1800S TO THE 1920S, at 109–10 (Colleen Aycock & Mark Scott eds., 2011).

personal motto: “The bigger they are, the harder they fall.”²³⁰ The Barbados Demon’s challenge call entered the American cultural pantheon as a multifaceted symbol that, among other things, pronounces the harshness of the giant’s fall.²³¹ *Too Big To Fail* (“TBTF”) is an intuitive cultural derivative that arose from the anticipated harsh consequences of a corporate giant’s fall.

In the fall of 2008, the collapse of the American financial markets captured the public attention. While the antitrust agencies were working on a new set of merger guidelines that would somewhat relax the reliance on relative size, the American public was concerned with corporate size—TBTF.²³² In January 2010, President Obama declared that “[n]ever again will the American taxpayer be held hostage by a bank that is ‘too big to fail.’”²³³ This commitment has not dissipated the fear of TBTF. Being about bigness, many suggested that the existence of TBTF firms was a failure of the antitrust laws.

Traditional fears of size are about direct exploitation of the public by big businesses—“big” in the sense of their absolute size or market share. TBTF fears are about indirect exploitation—the concern that the government will bail out failing large businesses because of the perceived social costs of their collapse. These fears are fundamentally different and thus, TBTF concerns are unrelated to antitrust.²³⁴ Moreover, as this Section discusses, antitrust law is incapable of addressing TBTF fears for several other reasons.

A. THE ORIGINS OF THE TBTF POLICY

In December 1983, Continental Illinois National Bank and Trust Company (“CINB”) was the eighth-largest bank in the United States and

230. *Id.* at 109; Hal Coffman, *Joe Walcott*, EL PASO HERALD, Dec. 3, 1913, at 9.

231. Humphrey Bogart’s classic last film, *The Harder They Fall* (1956), was loosely based on the story of the 1930s boxer Primo Camera. See KASIA BODDY, BOXING: A CULTURAL HISTORY 321–22 (2008). See also Roderick M. Kramer, *The Harder They Fall*, HARV. BUS. REV., Oct. 2003, at 58; Jesse Levin, *Growth Rates—The Bigger They Come the Harder They Fall*, FIN. ANALYSTS J., Nov.–Dec. 1972, at 71.

232. See SORKIN, *supra* note 5.

233. Barack Obama, Remarks by the President on Financial Reform (Jan. 21, 2010).

234. Lawrence J. White, *Financial Regulation and the Current Crisis: A Guide for Antitrust*, in COMPETITION AS PUBLIC POLICY 65, 100 (Charles T. Compton et al. eds., 2010) (“[I]t is important to recognize that, although size is clearly an issue with respect to TBTF, antitrust and competition issues really are not. TBTF does not represent an instance in which size involves the exercise of market power. There clearly is a market distortion: a TBTF firm, in essence, is receiving a government subsidy.”).

the largest in the Midwest.²³⁵ In May 1984, CINB became illiquid when many depositors withdrew funds due to a loss of confidence in the bank.²³⁶ The federal regulatory system estimated that a collapse of CINB would set in motion the collapse of 66 to 179 other domestic banks and other catastrophes in the financial system. Anticipating a “domino effect,”²³⁷ the FDIC designed a bailout package and infused \$4.5 billion to rescue the bank.²³⁸ Critics, however, argued that the decision to bail out CINB created “a new class of bank in the United States of America, a TBTF—too big to fail.”²³⁹ Responding to the critique at a Congressional hearing, FDIC Chairman William Isaac dismissed the TBTF theory and argued that the size of a bank was an irrelevant factor for the FDIC.²⁴⁰ At the same congressional hearing, Comptroller of the Currency C. T. Conover argued that big and small banks were treated consistently, but admitted that the federal regulatory system treated the eleven largest banks differently and would bail out any of them if they failed.²⁴¹ This statement drew substantial public attention, as it clarified to everyone the value of membership in this

235. Itzhak Swary, *Stock Market Reaction to Regulatory Action in the Continental Illinois Crisis*, 59 J. BUS. 451, 451 (1986). See also *Inquiry into Continental Illinois Corp. and Continental Illinois National Bank, Hearing Before the Subcomm. On Fin. Insts. Supervision, Regulation and Ins. Of the Comm. on Banking, Fin. and Urban Affairs*, 98th Cong. 85 (1984) (statement of Rep. Jim Leach) [hereinafter CINB Inquiry Hearing].

236. Swary, *supra* note 235, at 451–53, 471–72; Larry D. Wall & David R. Peterson, *The Effect of Continental Illinois' Failure on the Financial Performance of Other Banks*, 26 J. MONETARY ECON. 77, 77, 80 (1990). See also CINB Inquiry Hearing, *supra* note 235, at 225 (“provid[ing] a ten-year historical overview of the principal events leading up to” CINB’s 1984 illiquidity).

237. For further discussion of the domino theory, see Testimony of Chairman of the Board of Governors of the Federal Reserve System, Paul A. Volcker, Before the Joint Econ. Comm., 98th Cong. 20 (Jul. 30, 1984) (“I think the sudden failure of a large bank . . . could clearly have had influences rather directly on . . . a good many other banks around the country.”); William Isaac, Chairman of FDIC, *Statement on Federal Assistance to Continental Illinois Corporation and Continental Illinois National Bank, Before the Comm. On Banking, Finance, and Urban Affairs*, 98th Cong., at 465–66 (Oct. 4, 1984) (“If [CINB] had been handled in some other fashion, the direct cost . . . would have been very high and the cost of the domino effect, as other banks failed, would have been incalculable.”); CINB Inquiry Hearing, *supra* note 235, at 30; Swary, *supra* note 235, at 452.

238. CINB Inquiry Hearing, *supra* note 235, at 135, 271–76.

239. CINB Inquiry Hearing, *supra* note 235, at 89, 300, 576, 585–88. See also James Flanigan, *We Need More Skillful Banks, Big or Small*, L.A. TIMES, May 20, 1984, at F1 (describing CINB as “too sick to thrive, but too big to fail”).

240. CINB Inquiry Hearing, *supra* note 235, at 585–88.

241. CINB Inquiry Hearing, *supra* note 235, at 299–300 (Testimony of C.T. Conover, Comptroller of the Currency). See also George G. Kaufman, *Are Some Banks Too Large to Fail? Myth and Reality*, 8 CONTEMP. POLICY ISSUES 1, 3 (1990) (criticizing the TBTF policy and arguing that large banks should be allowed to fail); Maureen O’Hara & Wayne Shaw, *Deposit Insurance and Wealth Effects: The Value of Being “Too Big to Fail,”* 45 J. FIN. 1587, 1599 (1990) (studying the TBTF policy and concluding that “[w]hile the rationale for preventing large bank failures is understandable, the selective policy of charging all institutions the same insurance premium but providing some with greater coverage imposes unnecessary costs on the financial markets”).

top club.²⁴²

The bailout of CINB was neither the first nor the last time in which the TBTF theory was used in the context of government bailouts of large businesses,²⁴³ although it was the largest bailout of an entity in the private sector until the Great Recession.²⁴⁴ During the recession that began in 2007, TBTF theories received wide public exposure and became generally understood to mean a general risk the public absorbs for corporate size.²⁴⁵ Once again, bigness had become too costly to the public and so, in response to the financial crisis, the 111th Congress passed the Dodd-Frank Act to reform Wall Street and to address TBTF risks.²⁴⁶ Congressional committees held two hearings dedicated to the role of antitrust in financial regulation.²⁴⁷

B. SYSTEMIC RISK AND TBTF

Paul Volcker served as the Chairman of the Federal Reserve during

242. See, e.g., Tim Carrington, *U.S. Won't Let 11 Biggest Banks in Nation Fail*, WALL ST. J., Sep. 20, 1984, at A1; Robert A. Rosenblatt, *Conover Says U.S. Must Aid Ailing Banks*, L.A. TIMES, Sep. 20, 1984, at C1; *The TBTF and the TSTS*, WALL ST. J., Sep. 25, 1984, at B1.

243. See, e.g., U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-84-34, GUIDELINES FOR RESCUING LARGE FAILING FIRMS AND MUNICIPALITIES 2–3 (Mar. 29, 1984) (“[M]any believe that our current bankruptcy system is not equipped to deal with the failure of a municipal or corporate giant.”); JOAN EDLEMAN SPERO, *THE FAILURE OF THE FRANKLIN NATIONAL BANK* 109–10 (1980) (highlighting the fear of the effects of Franklin’s collapse due to its size and performance); IRVINE H. SPRAGUE, *BAILOUT: AN INSIDER’S ACCOUNT OF BANK FAILURES AND RESCUES* 242–43 (1986) (discussing favoritism in bank bailouts); STERN & FELDMAN, *supra* note 5 (explaining the use and effects of TBTF).

In the mid-1970s, some economists observed that consolidation in the financial system increased the likelihood of a failure of a large bank and proposed to adjust the regulatory system. E.g., Arthur F. Burns, *Maintaining the Soundness of Our Banking System*, FED. RESERVE BANK OF N.Y. MONTHLY REV., Nov. 1974, at 263, 267 (Burns served as the Chairman of the Federal Reserve from 1970 to 1978); Paul M. Horvitz, *Failures of Large Banks: Implications for Banking Supervision and Deposit Insurance*, 10 J. FIN. & QUANTITATIVE ANAL. 589, 598–601 (1975); Thomas Mayer, *Should Large Banks Be Allowed to Fail?*, 10 J. FIN. & QUANTITATIVE ANAL. 603, 607–09 (1975); Richard H. Pettway, *Potential Insolvency, Market Efficiency, and Bank Regulation of Large Commercial Banks*, 15 J. FIN. & QUANTITATIVE ANAL. 219, 234–35 (1980).

244. See generally SORKIN, *supra* note 5.

245. *Id.*

246. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 129 Stat. 1377 (2010) [hereinafter Dodd-Frank Act].

247. “*Too Big to Fail?*”: *The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry: Hearing Before the Subcomm. on Courts and Competition Policy of the Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter TBTF Hearing I]; *Too Big to Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform: Hearing Before the Subcomm. on Commercial and Admin. Laws of the Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter TBTF Hearing II].

the bailout of CINB and as the first Chairperson of the President's Economic Recovery Advisory for the Great Recession.²⁴⁸ In 2004, summarizing the history of the TBTF policy, he explained that one of the traditional roles of central banks is to serve as “‘lenders of last resort,’ able to provide liquidity to the banking system [at a] time of crisis.”²⁴⁹ Volcker observed that beginning in the mid-1970s, memories of the Great Depression faded in the financial industry that, faced with new competitive pressures, challenged “established practices and regulatory restraints, [and] moved more aggressively into new lending areas and international markets.”²⁵⁰ With a few exceptions, “governments around the world have, by one means or another,” rescued financial institutions that were “judged to be of ‘systemic’ importance, that is, to present a risk to the stability of the banking and financial system as a whole.”²⁵¹

In his 2004 brief overview, Volcker stressed the “sense of unfairness” that the TBTF policy established by distinguishing between small and large financial institutions.²⁵² He also acknowledged the “broader concern [of] the perceived sense of growing ‘moral hazard.’”²⁵³

The TBTF doctrine has two key features. First, any bailout decision is about the uninsured creditors of a financial institution. In the case of depositors, FDIC deposit insurance could cover all insured accounts, regardless of a bank's size.²⁵⁴ Second, the government may decide to protect the unsecured creditors of a financial institution with a bailout package only because of the perceived significance of the institution to the health of the economy.²⁵⁵ The significance of an institution to the health of the economy is determined not by its size, but by the potential effect of its collapse (or partial collapse) on the financial system—that is, the risk that its insolvency or illiquidity could jeopardize the stability of the entire system.²⁵⁶

248. John Cassidy, *The Volcker Rule*, NEW YORKER, Jul. 26, 2010, at 25; Louis Uchitelle, *Volcker, Loud and Clear*, N.Y. TIMES, Jul. 11, 2010, at BU7.

249. Paul A. Volcker, *Foreword* to STERN & FELDMAN, *supra* note 5, at vii.

250. *Id.* at viii.

251. *Id.* For Volcker's explanation of the risk that CINB created, see *supra* note 237.

252. STERN & FELDMAN, *supra* note 5, at ix.

253. *Id.*

254. Section 335 of the Dodd-Frank Act raised the maximum deposit insurance from \$100,000 per account to \$250,000. Dodd-Frank Act, Pub. L. No. 111-203 § 335, 124 Stat. at 1540.

255. See STERN & FELDMAN, *supra* note 5, at 12–17.

256. See, e.g., Franklin Allen and Douglas Gale, *Financial Contagion*, 108 J. POL. ECON. 1, 4–5 (2000) (discussing liquidity problems); Ben S. Bernanke, *Clearing and Settlement During the Crash*, 3 REV. FIN. STUD. 133, 143–45 (1990) (discussing systematic risk); Xavier Freixas, Bruno M. Parigi & Jean-Charles Rochet, *Systemic Risk, Interbank Relations, and Liquidity Provision by the Central Bank*,

Insofar as TBTF is associated with size, therefore, the term is misleading. The confusion about the role of size in TBTF policy is largely because of a general misunderstanding of systemically important financial institutions (“SIFIs”).²⁵⁷ SIFIs are those institutions that the government is likely to bail out because of their effect on the systemic risk of the financial system.

Systemic risk exists because of the interconnections among financial institutions. Absent interconnectedness, a collapse of a financial institution would be an isolated event in the economy. However, the economy and the many markets within it rely on the grid of financial networks that are facilitated by different types of intermediaries.²⁵⁸ The interconnectedness of firms reduces the cost of liquidity and facilitates greater lending capacity.²⁵⁹ One of the costs of interconnectedness, however, is an increase in systemic risk. In a grid financial economy, liquidity or solvency problems of one institution can send shock waves through the entire system.²⁶⁰

The relative and absolute size of a financial institution could make the firm a SIFI. However, because financial networks rely on intermediaries, even relatively small institutions could be SIFIs. The combination of factors—including the location of the institution on the grid, the types of connections it has with other institutions, and its size—determines its significance to the economy. It is this significance that underlies the so-called TBTF policy as far as financial regulation goes, but government bailouts are likely to be needed only for large institutions.²⁶¹ Failing small

32 J. MONEY, CREDIT & BANKING 611, 621–29 (2000) (illustrating the effects of one insolvent bank on other banks); Jean-Charles Rochet & Jean Tirole, *Controlling Risk in Payment Systems*, 28 J. MONEY, CREDIT & BANKING 832, 835–36 (1996) (describing the meanings of “systemic risk”).

257. Section 803(9) of the Dodd-Frank Act defines the terms “systemically important” and “systemic importance” as:

a situation where the failure of or a disruption to the functioning of a financial market utility or the conduct of a payment, clearing, or settlement activity could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.

Dodd-Frank Act, Pub. L. No. 111-203, § 803(9), 124 Stat. at 1807. The term SIFI as defined by the Dodd-Frank Act and subsequent regulations has a legal meaning. We refer to the economic meaning.

258. See generally Douglas M. Gale & Schachar Kariv, *Financial Networks*, 97 AM. ECON. REV. 99 (2007).

259. See Allen & Gale, *supra* note 256, at 4–5; Freixas et al., *supra* note 256, at 613 (“[A] system of interbank credit lines reduces the cost of holding liquid assets.”); Gale & Kariv, *supra* note 258, at 99–100 (discussing efficiencies created by financial networks).

260. Allen & Gale, *supra* note 256, at 4–5; Freixas, Parigi & Rochet, *supra* note 256, at 613.

261. Focusing on the question of whether a bailout may be needed, Lawrence White argued that “[t]he concept of TBTF . . . involves a financial company [that] *must be large*; its interconnections with

SIFIs could be absorbed by the market. The TBTF policy is not all about the question of whether the government would or would not bail out a SIFI, but rather about how to regulate systemic risks before SIFIs fail.

Put simply, a policy that seeks to reduce systemic risks could target bigness, but it would most likely be ineffective without addressing the nature of interconnections among financial institutions,²⁶² and by merely curbing size would impose substantial efficiency constraints on the market.

C. THE GREAT TBTF PANIC AND ANTITRUST

Antitrust law is about competition. The financial system is about the complex supply of liquidity. Antitrust analysis cannot provide any guidance as to the degree of the liquidity in the financial system, let alone changes in the systemic risk.²⁶³ Thus, TBTF has no direct antitrust implications, although it has and should have ample regulatory implications.²⁶⁴ Put simply, the antitrust methodology examines whether markets are functioning competitively, but it has no tools to explore whether a financial institution is too big or too systematically significant to fail. Nonetheless, antitrust and TBTF have been tied together.

In September 2008, while the nation was sinking into the Great Recession and the Bush Administration was finalizing the third costly comprehensive recovery measure,²⁶⁵ the Department of Justice completed a two-year study of the enforcement of Section 2 of the Sherman Act against

other financial companies must be extensive.” White, *supra* note 234, at 98 (emphasis added).

262. See Charles K. Whitehead, *Destructive Coordination*, 96 CORNELL L. REV. 323, 347–52 (2011) (discussing the paradox between coordination and regulation).

263. See White, *supra* note 234, at 100 (“[T]he mantle of antitrust should not be stretched to cover [TBTF] arguments.”).

264. The general regulatory goal is to restrict hubris in power that in the financial sector tends to lead to illiquidity for which society as a whole pays. For an overview of historical financial crisis cycles, see generally CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009). Like all liquidity crises, the Great Recession provided a good number of symbols of hubris. One of the most famous was a statement of Citigroup CEO, Chuck Prince in July 2007: “When the music stops, in terms of liquidity, things will be complicated. But as long as the music is playing, you’ve got to get up and dance. We’re still dancing.” Michiyo Nakamoto & David Wighton, *Bullish Citigroup Is ‘Still Dancing’ to the Beat of the Buy-Out Boom*, FIN. TIMES (Jul. 10, 2007, 3:00 AM), <http://www.ft.com/cms/s/0/5cefc794-2e7d-11dc-821c-0000779fd2ac.html#axzz1qLBA50GL>. In November 2007, Prince resigned as Citigroup began absorbing substantial losses. Robin Sidel, Monica Langley & Gregory Zuckerman, *Citigroup CEO Plans to Resign As Losses Grow*, WALL ST. J., Nov. 3, 2007, at A1; *Ex-Prince of the Citi*, WALL ST. J., Nov. 6, 2007, at A18.

265. See Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (Feb. 13, 2008); Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (Jul. 30, 2008); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008).

single-firm conduct.²⁶⁶ The Justice Department issued a report concluding that the enforcement of Section 2 could lead to overdeterrence and advocating for extreme caution in prosecuting potential monopolization offenses of single firms.

In May 2009, Christine A. Varney, Assistant Attorney General in charge of the Antitrust Division, announced that the Justice Department was withdrawing the report,²⁶⁷ stating: “The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected.”²⁶⁸ Varney suggested that lax antitrust enforcement contributed to the collapse of the financial system, implying that her predecessors allowed financial institutions to acquire TBTF properties.²⁶⁹

A few months later, Alan Greenspan, who as Chairman of the Federal Reserve championed deregulation and reliance on self-regulation in the financial sector,²⁷⁰ answered some questions about TBTF.²⁷¹ He also suggested that antitrust might be the cure to TBTF, saying: “In 1911, we broke up Standard Oil. So what happened? The individual parts became more valuable than the whole. Maybe that’s what we need.”²⁷²

Although TBTF is a concept related to the viability of the financial system, it has always been associated with any large institution. In the wake of the Great Recession and the great TBTF panic, the term became

266. U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008). The Federal Trade Commission did not join the report and three commissioners issued a statement expressing their reservations. *Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice* (Sept. 8, 2008).

267. Press Release, Dep’t of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/245710.pdf.

268. *Id.*

269. *Id.*

270. Many, including Greenspan himself, have counted his policies among the key causes of the Great Recession. See, e.g., NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, THE FINANCIAL CRISIS INQUIRY REPORT, at xviii (Jan. 2011); *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 17 (Oct. 23, 2008) (testimony of Alan Greenspan, Former Chairman, Fed. Reserve).

271. See Alan Greenspan, Address at C. Peter McColough Series on International Economics: The Global Financial Crisis: Causes and Consequences (Oct. 15, 2009), available at <http://www.cfr.org/united-states/c-peter-mccolough-series-international-economics-global-financial-crisis-causes-consequences/p20417>.

272. *Id.*

more widely understood to encompass any large firm whose collapse might be catastrophic—including insurance firms (e.g., AIG), and automakers.²⁷³ Directly and indirectly, abstract TBTF notions became tied to antitrust.²⁷⁴

TBTF and antitrust are unrelated. Size and bigness are not and should not be antitrust concerns. Suggestions to curb the size of firms through the antitrust laws are a rash response to the TBTF panic and one that reflects old misunderstandings and flawed assumptions of antitrust.

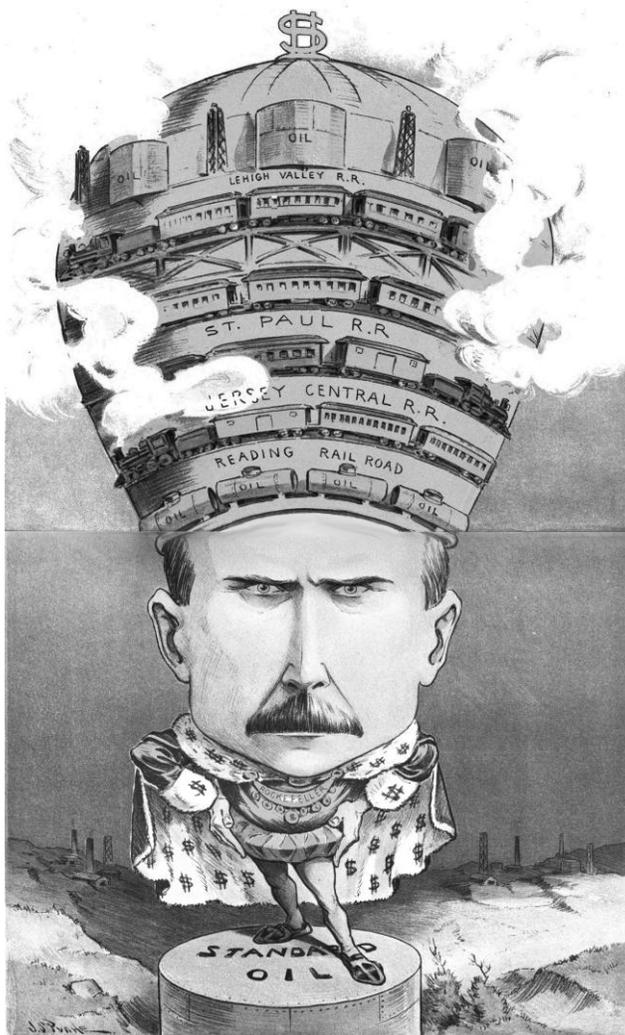
VI. CONCLUSION

Writing for the Court in *Standard Oil*, Chief Justice White argued that “the dread of enhancement of prices and of other wrongs which it was thought would flow from undue limitation[s] on competitive conditions” motivated the enactment of the Sherman Act.²⁷⁵ By suggesting the “dread of enhancement of prices” as a goal of antitrust law, Chief Justice White supposedly legitimized no-fault monopolization theories. To the extent that the mere existence of the power to charge high prices is a target of antitrust laws, no-fault monopolization theories are inevitable: all monopolies have the capacity to charge high prices. The origins of no-fault monopolization theories are therefore in the dread of bigness.

273. See, e.g., Eric Dash, *If It's Too Big to Fail, Is It Too Big to Exist?*, N.Y. TIMES, Jun. 21, 2009, at WK3.

274. See, e.g., TBTF Hearing I, *supra* note 247 (discussing the role of antitrust law in TBTF banking policies); TBTF Hearing II, *supra* note 247 (discussing the role of banking and antitrust law in TBTF financial regulation); Mark D. Whitener, *Interview with J. Thomas Rosch, Commissioner, Federal Trade Commission*, 23-SPG ANTITRUST 32, 41 (2009) (suggesting that the Great Recession could affect the way the agencies review mergers, especially if a TBTF firm is involved); Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL'Y 557, 561 (2010) (arguing that “America’s two enforcement agencies have gone so far as to speak of market concentration itself as an appropriate object of antitrust condemnation, even absent price effects.”); Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T-Mobile Transaction*, FED. COMM. L.J. (2011) (arguing that TBTF should instruct mergers among large firms); Adam J. Levitin, *In Defense of Bailouts*, 99 GEO L.J. 435, 463 (2011) (arguing that “[t]o the extent that systemic risk is a function of—or at least correlates with—firm size, it is fairly easy to identify, as well as to regulate. Bigness can be prevented by capital charges, by Pigouvian taxation, or by antitrust regulation.”); Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1391–93 (2011) (discussing the effects of TBTF on antitrust policy); Jesse W. Markham, Jr. *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the “Too-Big-to-Fail” Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 263–70 (2011) (discussing the paradox created by separating antitrust and TBTF policies).

275. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).



Puck Magazine, February 27, 1901—"The King of the Combinations"
John D. Rockefeller

In 1963, one hundred years after John D. Rockefeller entered the oil business, Robert Bork, then an able Yale professor, began writing and advocating against the antitrust protection of small businesses. Bork believed that although antitrust policy had a good purpose, it protected small competitors rather than competition.²⁷⁶ He passionately argued that

276. E. T. Grether, *The Impacts of Present Day Antitrust Policy on the Economy*, 23 ABA

antitrust policies of “preserving competitors from their more energetic and efficient rivals” created a crisis in the field and “threaten[ed] within the foreseeable future to destroy the antitrust laws as guarantors of competitive economy.”²⁷⁷ Bork’s critique of antitrust focused on size. As a firm believer in legislative intent, he reconstructed the legislative history of the Sherman Act and found that Congress enacted antitrust laws to protect “consumer welfare.”²⁷⁸ As the word “antitrust” suggests and many studies show,²⁷⁹ history does not support this finding. Nevertheless, Bork’s writing influenced an antitrust generation.²⁸⁰ In 1979, the Supreme Court adopted Bork’s unfounded statement that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”²⁸¹ Since then, “consumer welfare” has been the stated goal of American antitrust laws. Robert Bork partially succeeded in focusing antitrust on competition, rather than on size, but in the process he introduced other distortions into antitrust policy.²⁸²

Although “business size” is not and never has been a stated concern of antitrust, in many ways it has shaped the development of antitrust laws. The fear of size was the catalyst for the birth of competition laws in the United States and has always been part of antitrust laws, whether as a defined element, a narrative, or a lingering shadow of the past. American competition laws were born with the curse of bigness.

The antitrust curse of bigness is an odd one. Neither absolute nor relative size should determine antitrust outcomes. Nevertheless, size obsessions keep the curse alive. This Article seeks to remove the spell.

ANTITRUST SECTION 292, 319–23 (1963). See also D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business History*, 85 S. CAL. L. REV. 689, 707–20 (2012) (studying the effects of private antitrust actions on public enforcement).

277. Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138, 138. Versions of this article were later printed in *Columbia Law Review* and the *Antitrust Bulletin*.

278. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 47–48 (1966); Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 253 (1967); Orbach, *supra* note 216, at 134–35.

279. See, e.g., *supra* note 70.

280. Orbach, *supra* note 216, at 133–35.

281. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978)).

282. “Consumer welfare” has no defined meaning in antitrust and, whatever meaning it could have in antitrust, it would differ from the economic meaning of the term. Orbach, *supra* note 216, at 163–64. See Orbach & Sokol, *supra* note 120, at 105–07.

