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The Curse of Bigness

Antitrust in the New Gilded Age

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Introduction

We are four decades into a major political and economic experiment. What happens when the United States and other major nations weaken their laws meant to control the size of industrial giants? What is the impact of allowing unrestricted growth of concentrated private power, and abandoning most curbs on anticompetitive conduct?

The answers, I think, are plain. We have managed to recreate both the economics and politics of a century ago—the first Gilded Age—and remain in grave danger of repeating more of the signature errors of the twentieth century. As that era has taught us, extreme economic concentration yields gross inequality and material suffering, feeding an appetite for nationalistic and extremist leadership. Yet, as if blind to the greatest lessons of the last century, we are going down the same path. If we learned one thing from the Gilded Age, it should have been this: The road to fascism and dictatorship is paved with failures of economic policy to serve the needs of the general public.

Look at the global economy and witness the rule of concentrated oligopolies and monopolies, in industries like finance, media, airlines, and telecommunications, just to name the most obvious—firms whose size allows them to treat customers and competitors with impunity. Most visible in our daily lives is the great power of the tech platforms, especially Google, Facebook, and Amazon, who have gained extraordinary power over our lives. With this centralization of private power has come a renewed concentration of wealth, and a wide gap between the rich and poor.

The concentration of wealth and power has helped transform and radicalize electoral politics. As in the Gilded Age, a disaffected and declining middle class has come to support radically anti-corporate and nationalist candidates, catering to a discontent that transcends party lines. A renewed economic nationalism around the world blames immigrant workers, foreign products, or elite conspiracies for the diminishment of the middle class. There is widespread anger at big business and how they treat customers, especially in concentrated or monopolized industries like insurance, pharmaceuticals, airlines, and other insensitive behemoths. Many fear Google, Amazon, and Facebook, and their power over not just commerce, but over politics, the news, and our private information.

What we must realize is that, once again, we face what Louis Brandeis called the "Curse of Bigness," which, as he warned, represents a profound threat to democracy itself. What else can one say about a time when we simply accept that industry will have far greater influence over elections and lawmaking than mere citizens? When the American pharmaceutical industry can raise prices by thousands of percent, confident that government will do little or nothing? Where the middle class has no apparent influence on policies like health insurance, taxes, working conditions, housing, or other matters that determine how life is really lived?

We must now face questions that have been ignored for more than a generation. Are extreme levels of industrial concentration actually compatible with the premise of rough equality among citizens, industrial freedom, or democracy itself? Can we create broad-based wealth and a sense of entrepreneurial opportunity in an economy dominated by monopolists? Is there just too much concentrated private power in too few hands, with too much influence over government and our lives?

The questions, I think, answer themselves. The main goal of this short volume is to see how the classic antidote to bigness—the antitrust and other antimonopoly laws—might be recovered and updated to face the challenges of our times. For roughly a century, the antitrust law served in practice and theory as an antimonopoly code that sought to limit excessive industrial concentration and to police monopoly conduct. By the midpoint of the last century, antitrust became widely understood in the Western world as a necessary part of a functioning democracy, as an ultimate check on private power.

Yet over the span of a generation, the law has shrunk to a shadow of itself, and somehow ceased to have a decisive opinion on the core concern of monopoly. The law that the Supreme Court once called a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition" no longer condemns monopoly, but has grown ambivalent, and

sometimes even celebrates the monopolist—as if the "anti" in "antitrust" has been discarded.

Most of what follows can be understood to center on the recovery of one principle: that in enacting and repeatedly fortifying the antitrust laws the United States made a critical, indeed Constitutional choice in industrial and national policy. After a period of intense national debate, including a presidential election in 1912 where economic policy was a central issue, the nation rejected a monopolized economy and chose repeatedly over the decades to preserve its tradition of an open and competitive market. The goal of antitrust law must be understood as respecting that choice. Or as Louis Brandeis, the great prophet of a decentralized economy, put it, the antitrust laws answered a question: "Shall the industrial policy of America be that of competition or that of monopoly?"

What happened? The law is currently suffering from an overindulgence in the ideas first popularized by Robert Bork and others at the University of Chicago over the 1970s. Bork contended, implausibly, that the Congress of 1890 exclusively intended the antitrust law to deal with one very narrow type of harm: higher prices to consumers. That theory, the "consumer welfare" approach, has enfeebled the law. Promising greater certainty and scientific rigor, it has delivered neither, and more importantly discarded far too much of the role that law was intended to play in a democracy, namely, constraining the accumulation of unchecked private power and preserving economic liberty. Forty years ago, the famed Robert Pitofsky warned that it is "bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws." He was right.

Antitrust has fallen into hibernation before as ideologies have shifted, only to come roaring back to meet the needs of the age. To deliver on its mandate, American antitrust needs both to return to its broader goals and upgrade its capacities. It needs better tools to assess new forms of market power, to assess macroeconomic arguments, and to take seriously the link between industrial concentration and political influence. It needs to take advantage of all that economics and other social sciences have to offer. It needs stronger remedies, including a return to breakups, that are designed with the broader goals of antitrust in mind. Finally, it needs to put courts back in the business of policing what Brandeis termed as conduct meant to "suppress or even destroy competition.

The alternative is not appealing. Over the twentieth century, nations that failed to control private power and attend to the economic needs of their citizens faced the rise of strongmen who promised their citizens a more immediate deliverance from economic woes. The rise of a paramount leader of government who partners with monopolized industry has an indelible association with fascism and authoritarianism. It is true that antitrust alone will not cure the curse of bigness or eliminate the excesses of private power. But it strikes at the root, and getting the engines of the law restarted is an important part of dealing with a problem that has reached Constitutional dimensions.

As such, this book is far less radical than it might be. It is actually a call for a middle path, to control economic structure before it controls us. It does not see antitrust as degraded beyond redemption, nor label its practitioners as unprofessional

or untalented. It claims, rather, that the law has lost sight of its goals and has subsequently failed in its core mission. The initiatives I propose may combine to go far toward reinvigorating antitrust in our era, restoring it as a check on private power as necessary in a functioning democracy.

Our Gilded Age and Where It May Lead

Once upon a time, the major industrialized nations might have been thought to have learned their lesson. After suffering communist and fascist revolutions, a depression and two catastrophic World Wars, they had collectively changed their approach to the economy and its role in a democracy. Rejecting *laissez faire*'s rule by the wealthy, communism's dictatorship of the proletariat, and fascism's state-directed economy, the West took a different path—the re-democratization of economic policy and a politics of wealth redistribution. That path yielded decades of economic growth that built middle classes, and saw a level of prosperity previously unknown to human history, reducing what had become a massive gap between rich and poor. As such, the economic achievements of Western democracies stole the thunder of both communism and fascism, whose calls for revolution were always driven by the unfairness and cruelty of unfettered capitalism.

No one economic policy overcame the inequalities produced by the Industrial Revolution and the consolidations of late twentieth century. But antitrust laws formed part of the story, meant to break the economic and political power of self-enriching trusts, and to resist the accumulation of wealth in monopoly and concentrated cartels. That was a mission reinforced by the horrible lessons of fascist Germany and Japan, and their close partnerships between government and its main monopolies. One way or another, concentration and inequality had its effects. By the late 1960s, the share of national income going to the top 1 percent of earners had fallen to 8 percent, a far cry from the extreme inequality of the 1910s and 1920s. Seemingly, the capitalist nations had found a way to square the circle, and by promising a wealthy middle class, presented an alluring alternative to the self-enriching dictatorships in other parts of the world.

That was then, and yet here we are again, as if trapped in a bad movie sequel. Today, as in the 1910s, two essential economic facts characterize the industrialized world. The first is the reemergence of an outrageous divide between the rich and the poor. This trend is most stark in the United States, where the top 1 percent today earn 23.8 percent of the national income and control an astonishing 38.6 percent of national wealth.

The second is a return to concentrated economies—that is, industries dominated by fewer and larger companies.* As the World Economic Forum attests, a smaller number of firms and industries control a far greater share of global wealth. In the

*There is a technical difference between "bigness" and "industry concentration"—the former refers just the size of firms, while the latter refers to the number of firms competing in each properly defined market. However, in practice, the two tend to overlap: When firms are larger in an industry, especially as a result of mergers, there tend to be fewer competing firms in the industry.

United States, between 1997 and 2012, 75 percent of American industries became more concentrated. Similarly, since the year 2000, across U.S. industries, the Herfindahl-Hirschman index, which measures market concentration, has increased in over 75 percent of industries. The stock markets have actually shrunk, as the U.S. public markets have lost almost 50 percent of their publicly traded firms.*

The most visible manifestations of the consolidation trend sit right in front of our faces: the centralization of the once open and competitive tech industries into just a handful of giants: Facebook, Amazon, Google, and Apple. The power that these companies wield seems to capture the sense of concern we have that the problems we face transcend the narrowly economic. Big tech is ubiquitous, seems to know too much about us, and seems to have too much power over what we see, hear, do, and even feel. It has reignited debates over who really rules, when the decisions of just a few people have great influence over everyone. Their power feels like "a kingly prerogative,

*If industry concentration and income inequality are key features of our economic times, are they linked? Many economists think so. See Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. Online 1 (2015). But the proposition is not uncontested. See Daniel Crane, *Antitrust and Wealth Inequality*, 101 Cornell Law Review 1171 (2016). A concentrated industry can tacitly collude to prevent wage growth, yielding less for workers and more for shareholders and management, and be less competitive and more profitable, thanks to the ability to cooperate to keep prices high or jointly exclude entrants. The profits are kept by professionals, senior executives, management, or shareholders, who are wealthier. Concentrated industries can also cooperate politically to prevent redistribution or use government to protect profits.

inconsistent with our form of government" in the words of Senator John Sherman, for whom the Sherman Act is named.

With an economy that looks like a knock-off of the Guilded Age, is it any surprise that our politics have come to match it? The late nineteenth and early twentieth centuries were marked by the brutal treatment of workers, the destruction of small- and medium-sized businesses, and broad economic suffering. That led to widespread popular anger and demands for something new and different. Strong leaders promised a return to greatness, bread for the workers, and a new order.

Today, economic grievance is yielding a similar turn to angry, populist answers around the world. Some blame their fortunes on immigrants, Jews, Muslims, Christians, or perhaps the Chinese or the Americans, yielding a new generation of xenophobic, nationalist, and racist politics. Others blame bankers, the tech industry, or corporations in general. We have witnessed a return to the politics of outrage and of violence, one stoked by the humiliations of becoming poorer than one's parents, of workers who are treated as disposable, and the prospect of falling through the cracks.

The better lesson from the twentieth century is that less angry alternatives work: programs to aid the unemployed and the aged, to protect workers and labor, and other efforts to blunt the harshness and disparity inherent to unrestrained capitalism. And in the United States, there was born a different movement and a different approach to tackling the structural origins of accumulated private power, named after its target, the trusts—hence the "antitrust" laws.

It would be an exaggeration to suggest that antitrust provides a full answer to either inequality or other economic

woes. But it does strike at the root cause of private political power—the economic concentration that facilitates political action. Advocating antitrust revival is not meant to compete with other economic proposals to address inequality. But laws that would redistribute wealth are themselves blocked by the enhanced political power of concentrated industries. In this way, the structure of the economy has an underlying influence on everything in the realm of economic policy. If antitrust is not the solution, it, historically, has been part of the solution, meriting a new look at what it can do.

To understand where we are and where we may be going, we must return to a moment in the past when we first began addressing the questions we still face today.

The Monopolization Movement

From the late nineteenth through the early twentieth century, the United States came under the grip of a powerful political and economic movement whose influence spread across the world and persists today. Known in its time as the Trust Movement, it called for the reorganization of the American and world economy into a new form: the giant, monopoly corporation. It achieved that goal with leviathans like Standard Oil and AT&T in America, I.G. Farben in Germany, and with the domination of the Japanese imperial economy by the *zaibatsu* system. In its American form, the Trust Movement envisioned an economy with every sector run by a single, almighty monopoly, fashioned out of hundreds of smaller firms, unfettered by competitors or government restraint. In short: pure economic autocracy.

This monopolization movement proceeded with blinding speed in the United States. During just one decade, from 1895 to 1904, at least 2,274 manufacturing firms merged, leaving

behind 157 corporations, most of which dominated their industries.* By the early 1900s, nearly every major industry in the United States was either already controlled by, or coming under the control of, a single monopolist. John D. Rockefeller's Standard Oil remains the best-known monopoly of the era, but the greater economic impact came from the consolidation campaigns waged by men like banker John Pierpont Morgan, history's greatest monopolizer. Morgan merged hundreds of steel firms into U.S. Steel, built railroad monopolies in the West and the Northeast, created an Atlantic shipping giant called the International Mercantile Marine Co., and served as the real force behind AT&T's conquest of the telecommunications industry. His model also inspired other copycat financiers who created a tobacco trust, a cotton trust, a sugar trust, a rubber trust, a filmmakers trust, a trust that made matches, a nail trust, and so on.

To mention Morgan is to summon to mind the top hat, bulbous nose, giant yacht, and access to nearly unlimited capital. His was called the Gilded Age for a reason, for the creation of industry-spanning monopolies was the source of a new kind of wealth that left bankers like Morgan or magnates like Rockefeller with personal fortunes and economic influence previously unknown to the world. To take just one example: To create the U.S. Steel monopoly, and eliminate Andrew Carnegie as a competitor, Morgan agreed to pay him a sum that

*Economic historian Naomi Lamoreaux traced the market shares of ninety-three of the major consolidations during that era, and recognized that seventy-two of them were able to gain at least a 40 percent market share in their industry, and forty-two of them gained over 70 percent. *The Great Merger Movement in American Business*, 1895–1904 (1985).

immediately made Carnegie the richest man in the world, and one of the richest in history. (Carnegie would soon thereafter be worth about $310 billion in current dollars measured by his share of the economy.) But even if the cash payouts of the Trust Movement provided much of the gusto, there was more to it than that. The new monopolists of the Gilded Age preferred to believe that they were not merely profiteering, but building a new and better society. They were bravely constructing a new order that discarded old ways and replaced them with an enlightened future characterized by rule by the strong, by a new kind of industrial Übermensch who transcended humanity's limitations. The new monopolies were the natural successor to competition, just as man had evolved from the ape.

The Trust Movement's arguments were, in part, economic: Men like Rockefeller and Morgan simply took the monopoly as a superior form of business organization that was saving the economy from ruin. The U.S. and world economy had undergone terrible shocks in the 1890s, and hundreds of firms were thrown into bankruptcy. Many blamed "ruinous competition" for driving prices too low. In the same way that Silicon Valley's Peter Thiel today argues that monopoly "drives progress" and that "competition is for losers," adherents to the Trust Movement thought Adam Smith's fierce competition had no place in a modern, industrialized economy.

Monopolists liked to portray themselves as part of a progressive movement, striving toward a better age, and justified their work using the then-fashionable ideology of "Social Darwinism" and the writings of its English exponent, Herbert Spencer. Not well known in our times, except, perhaps, as

crudely reflected in the writings of novelist Ayn Rand or the monopoly worship of Thiel and other Silicon Valley thinkers, Spencer provided a philosophy for the conquering tycoon, and, for some, even a personal religion.

Here was the faith. Led by the strongest and greatest of men, society was in the midst of an evolutionary transformation, whose goal was nothing less than the forging of a new world order. The weak, the small, and the old-fashioned were all being swept away, to be replaced by the new, the scientific, and above all, the strong. For some, this purge displaced not just old ways and inefficient businesses, but Christianity as well, with its regard for the disadvantaged and insistence on humility before God. Many Social Darwinists believed less in humanity's sinful nature than man's perfectibility, personified in the image of a man "looking to the sun," aspiring to Godlike qualities. The meek were not going to inherit the earth but be eliminated, through the process of a survival of the fittest.

In politics, Social Darwinists embraced *laissez-faire*, opposing any interventions that might be thought to stop the strong from displacing the weak. Spencer opposed "poor laws" in Britain, believing the impoverished should be left to live or die on their own, so as "to clear the world of them, and make room for better." To be fair, he and other Social Darwinists did lend support in one form of state intervention: eugenics campaigns meant to cull the physically and mentally disabled, and thereby help speed up the coming of the new age. John D. Rockefeller, Jr., would personally fund an initiative to sterilize some 15 million Americans, for, as Spencer put it, "The forces which are working out the great scheme of perfect happiness. . . exterminate such sections of mankind as stand in their way, with the same sternness that they exterminate beasts of prey and herds of useless ruminants."

As between men, so would it be for business. Nothing—certainly not government—should try to stop the great monopolists in their conquest of the economy. For what was underway was a kind of industrial eugenics campaign that exterminated the weak and the unfit to make room for firms great and powerful. John D. Rockefeller, Jr. put it this way: "The American Beauty Rose can be produced in its splendor and fragrance only by sacrificing the early buds which grow up around it."

Resistance, such as would be waged by Louis Brandeis and his like, was futile, for Morgan's and Rockefeller's campaigns were thought to be natural, unstoppable, and perhaps even ordained by God. "To stop co-operation of individuals and aggregation of capital would be to arrest the wheels of progress—to stay the march of civilization—to decree immobility of intellect and degradation of humanity," explained Standard Oil's counsel Samuel Dodd, inventor of the Trust form. "You might as well endeavor to stay the formation of the clouds, the falling of the rains, or the flowing of the streams." Or, as Rockefeller himself put it, "Growth of a large business is merely a survival of the fittest . . . the working out of a law of nature, and a law of God."

This was the Trust Movement's underlying philosophy and vision of what an economy should be: centralized, run by great men, free from any government interference, and to promote survival of the fittest, largely indifferent to the plight or demise of the weak, the poor, and the unfit. It cannot be

denied that some of the firms built during this era were impressive creations, and that the American economy, as a whole, experienced impressive if not wholly unprecedented growth. But the monopolization movement also marked a radical break from values once seen as foundational to the Republic, if not the more humanist traditions of Western civilization. As historian Richard Hofstadter put it, "Nothing less was at stake that the entire organization of American business and American politics, the very question of who was to control the country."

For the American tradition had, to that point, been defined by resistance to centralized power and monopoly. The American Revolution itself was in large part sparked by the abuses of Crown monopolies. The original Boston Tea Party was, after all, really an anti-monopoly protest. As Hofstadter writes: "From its colonial beginnings through most of the nineteenth century, [America] was overwhelmingly a nation of farmers and small-town entrepreneurs—ambitious, mobile, optimistic, speculative, anti-authoritarian, egalitarian, and competitive. As time went on, Americans came to take it for granted that property would be widely diffused, that economic and political power would be decentralized."

With the assertion that much of economic decision-making was beyond the government's control, the question of who really ruled the country was suddenly unclear. Fortifying matters was the tendencies of great monopolists, like Standard Oil or the New Haven Railroad, to use bribes and other forms of influence to control political outcomes. As such, the movement posed a new challenge for a Constitution that was committed to limited and separate powers, and never contemplated the rise of private power as great as any of the branches of government, and able to corrupt governmental operations to suit its ends.

Perhaps most profound was the break with the ideal that the United States was a nation characterized by a relative sense of equality among its citizens. As Alexis De Tocqueville observed, "Among the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of condition among the people." But that was no longer true for small businesses, farmers, and especially workers. There was a new divide between the giant corporation and its workers, leading to strikes, violence, and a constant threat of class warfare. Looking back, the difference in incomes was so stark it makes today's America look like Scandinavia; the wealthy might earn millions a year, while the average worker earned between one and two dollars a day.

In short, while the Trust Movement was powerful, lucrative, and had its true believers, it also engendered great popular resistance that threatened a new revolution. Overseas, socialist, communist, and anarchist forces were gaining strength and would in time overthrow many of Europe's governments. In the United States, outrage was channeled into organized labor, the farmers' "Granger movement," the founding of an Anti-Monopoly Party, and the emergence of populist candidates like William Jennings Bryan, three-time Democratic nominee for President.

And it also led to the passage of the first antitrust law, the Sherman Act, enacted in 1890, during the first furious wave

of reactions to the rise of the trusts. The law was named after its original sponsor, Senator John Sherman, an Ohio Republican who was the younger brother of the Civil War general William Tecumseh Sherman. While it was clear that the law was meant to address the "Trust Problem," like many laws, the reasons stated for its passage were many and varied, reflecting a then-recent debate over tariff policy, as well as the interests of small producers, farmers, and others, as modified by the usual dealmaking and compromises. The language of the law is extremely broad. In section one it bans "every contract, combination in the form of trust or otherwise . . . in restraint of trade." In section two it declares that "every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

The language is so strong—its literal text bans so much—that the scholarly debate over the Sherman Act's meaning and history may never end. But two things can be stated. It was clearly understood as a reaction to the rising power of the monopoly trusts, such as the Standard Oil company. And it was evident that the members of Congress had concerns that were diverse and disparate in nature. Consider, for example, the words of Senator Sherman on the floor of the Senate, who discussed the evils of monopoly pricing, but also proclaimed that no problem "is more threatening than the inequality of condition, of wealth, and opportunity" and also added that "if the concerted powers of this combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government."

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Let us not spend any more time on the impossible task of trying to find the true original meaning of the Sherman Act. Instead, we turn to the work of Louis Brandeis, whose philosophy of resistance to the Trust Movement and whose vision of the economy has had an enduring influence, and whose voice is needed for what we confront today.

The Right to Live, and Not Merely to Exist

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

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

on economic analysis was a mark of good character had became something of a controlling meme. Those demanding a return to the law's traditions of trustbusting and breakups were cast as wild-eyed radicals in an administration that favored moderation and composure.

And of all of the blind spots during the last decade, the greatest was surely that which allowed the almost entirely uninhibited consolidation of the tech industry into a new class of monopolists.

The Rise of the Tech Trusts

Once upon a time, in the 1990s and 2000s, the web and the internet were new and everything was going to be different forever. The web formed its own special exception, not just to the laws of business but to just about everything humanity had faced before. For personal relationships, private identity, and communication styles were all different "in cyberspace." Logically, this also suggested the demise of the usual principles of business and economics.

What else could one conclude when, in the 2000s, a tiny blog could outdo an established media outlet? When startups seemed to come from nowhere, gain millions of users overnight, and make their founders and employees wealthier than the old school tycoons? The man who described the mood was author John Perry Barlow, who in the 1990s implored those interested in cyberspace to "imagine a place where trespassers leave no footprints, where goods can be stolen an infinite number of times and yet remain in the possession of their original owners, where businesses you never heard of can own the history of your personal affairs, where only children feel completely at home, where the physics is that of thought rather than things, and where everyone is as virtual as the shadows in Plato's cave."

Everything was fast and chaotic; no position was lasting. One day, AOL was dominant and all-powerful; the next, it was the subject of business books laughing at its many failures. Netscape rose and fell like a rocket that failed to achieve orbit (though Microsoft had something to do with that). MySpace, the social media pioneer, was everywhere and then nowhere. Search engines and social media sites seemed to come and go: Altavista, Bigfoot, and Friendster were household names one moment and gone the next.

The chaos made it easy to think that bigness—the economics of scale—no longer really mattered in the new economy. If anything, it seemed that being big, like being old, was just a disadvantage. Being big meant being hierarchical, industrial, dinosaurlike in an age of fleet-footed mammals. Better maybe to stay small and stay young, to move fast and break things.

All this suggested that in cyberspace, there could be no such thing as a lasting monopoly. The internet would never stand for it. Business was now moving at internet speed: A three-year-old firm was middle-aged; a five-year-old firm almost certainly near death. "Barriers to entry" was a twentieth century concept. Now, competition was always just "one click away."

Even if a firm did manage to gain temporary dominance, there was nothing to be afraid of. We were not speaking of the evil monopolists of old. The new firms were instead devoted to spreading sweetness and light, goodwill toward all men—whether access to information (Google), good books for cheap (Amazon), or the building of a global community (Facebook).

Not only did they not charge high prices, sometimes they didn't even charge at all. Google would give you free email, free map apps, free cloud storage. Hence businesses like Facebook or Google needed to be seen as more akin to a charity. Who would sue the Red Cross for its "monopoly" on disaster relief?

In these heady times, only a malcontent would dare suggest that just maybe, business and economics had not quite been reinvented forever. Or that what was taken to be a new order might, in fact, just be a phase that was destined to come to an end as firms better understood the market and its new technologies. The good times were on.

After a decade of open chaos and easy market entry, something surprising did happen. A few firms—Google, Ebay, Facebook, and Amazon—did not disappear. They hit that five-year mark of obsolescence with no signs of impending collapse or retirement. Instead, the major firms seemed to be sticking, and even growing in their dominance. Suddenly, there weren't a dozen search engines, each with a different idea, but one search engine. There were no longer hundreds of stores that everyone went to, but one "everything store." And to avoid Facebook was to make yourself a digital hermit. There stopped being a next new thing, or at least, a new thing that was a serious challenge to the old thing.

Unfortunately, antitrust law failed to notice that the 1990s were over. Instead, for a decade and counting, it gave the major tech players a pass—even when confronting fairly obvious dangers and anticompetitive mergers. That is best exemplified by the Facebook story.

Launched in 2004, Facebook quickly dispatched its rival MySpace, which had been a rare Los Angeles tech success story, but had become a mess of intrusive advertising, fake users, and trolls. In just a few years, Facebook achieved an early dominance over general purpose social networking.

But by the 2010s, Facebook faced one of its most serious challengers, a startup named Instagram. Instagram combined a camera app with a social network on which it was easy and fast to share photos on mobile. It was popular with younger people, and it was not long before some of its advantages over Facebook were noticed. As business writer Nicholas Carlson said at the time, Instagram "allows people to do what they like to do on Facebook easier and faster."

Having already gained 30 million users in just eighteen months of existence, Instagram was poised to become a leading challenger to Facebook based on its strength on mobile platforms, where Facebook was weak. By the doctrine of internet time, Facebook, then eight years old, was supposed to be heading into retirement.

But the disruption narrative was rudely interrupted. Instead of surrendering to the inevitable, Facebook realized it could just buy out the new. For just $1 billion, Facebook eliminated its existential problem and reassured its investors. As *TIME* would put it, "Buying Instagram conveyed to investors that the company was serious about dominating the mobile ecosystem while also neutralizing a nascent competitor."

When a dominant firm buys its a nascent challenger, alarm bells are supposed to ring. Yet both American and European regulators found themselves unable to find anything wrong with the takeover. The American analysis remains secret, but we have the United Kingdom's report. Its analysis, such as it was, went as follows. Facebook did not have an important photo-taking

app, meaning that Facebook was not competing with Instagram for consumers. Instagram did not have advertising revenue, so it did not compete with Facebook either. Hence, the report was able to reach the extraordinary conclusion that Facebook and Instagram were not competitors.

It takes many years of training to reach conclusions this absurd. A teenager could have told you that Facebook and Instagram were competitors—after all, teenagers were the ones who were switching platforms. With this level of insight, the world's governments in the 2010s did nothing to stop the largest firms from buying everyone and anyone who might be a potential threat, in a buying spree worthy of John D. Rockefeller himself. Nothing was learned from the Instagram failure: Facebook was able to buy its next greatest challenger, WhatsApp, which offered a more privacy-protective and messaging-centered competitive threat. The $19 billion buyout—as suspicious as J.P. Morgan's bribe of Andrew Carnegie—somehow failed to raise any alarm. At the time, many were shocked at the price. But when one is actually agreeing to split a monopoly as lucrative as generalized social media, with over $50 billion in annual revenue, the price suddenly makes sense.

In total, Facebook managed to string together 67 unchallenged acquisitions, which seems impressive, unless you consider that Amazon undertook 91 and Google got away with 214 (a few of which were conditioned). In this way, the tech industry became essentially composed of just a few giant trusts: Google for search and related industries, Facebook for social media, Amazon for online commerce. While competitors remained in the wings, their positions became marginalized with every passing day.

If many of these acquisition were small, or mere "acqui-hires" (i.e., acquisitions to hire employees), others, like Facebook's takeover of Instagram and Whatsapp, eliminated serious competitive threats. In the 2000s, Google had launched "Google Video" and done pretty well, but not compared to its greatest competitor, YouTube. Google bought YouTube without a peep from the competition agencies. Waze, an upstart online mapping company, was poised to be an on-ramp for Google's vertical challengers, until Google, the owner of its own dominant online mapping program, bought the firm in a fairly blatant merger to monopoly. Google also acquired AdMob, its most serious competitor for online advertising, which the government let happen on the premise that Apple might also enter the market in a serious way (they didn't). Amazon acquired would-be competitors like Zappos, Diapers.com, and Soap.com.

These were hardly coercive takeovers, as practiced by Standard Oil. Most of these firms were happy to have a big fat buyout. But if the takeovers were friendlier, their net effect was little different than John D. Rockefeller's campaign: the continued domination by the trusts. This was obvious to the business press. As *Techcrunch* opined of the 2014 WhatsApp acquisition, "Facebook [now] possesses the most popular messaging app, and has neutralized the biggest threat to its global domination of social networking." Or as another business analyst wrote at the time: "Without this acquisition, 'uncool' Facebook would have been in a very difficult competitive position against its cooler messaging apps rivals [which] would have posed an existential threat for Facebook. By acquiring the leader in messaging apps, Facebook has removed this threat."

Where buyouts were not practical, the tech firms tried a different approach: "cloning," the favorite tactic of Microsoft back in the day. Faced with potential competitive challenge from Yelp's popular reviews of local businesses in the early 2010s, Google created its own "local" sites attached to Google maps. The value in any such site would rest in the quality of its user reviews, and as a newcomer, Google didn't have any of those. It solved the problem by simply purloining Yelp's reviews and putting them on its site, making Yelp essentially redundant, and also harvesting the proceeds of its many years of work.*

Meanwhile, Facebook cloned so many of its rival Snapchat's features that it began to seem like a running joke. Amazon has a track record of cloning products that succeed so it can help itself to the margins. To be sure, there is nothing wrong with firms copying to learn from each other; that's how innovation can happen. But there is a line where copying and exclusion becomes anti-competitive, where the goal becomes the maintenance of monopoly as opposed to real improvement. When Facebook spies on competitors, or summons a firm to a meeting just to figure out how to copy it more accurately, or discourages funding of competitors, a line is crossed.

Over the years, as with the original Trust Movement, a strong current of self-justification began to creep into the consolidation. This could be a somewhat awkward undertaking for some of the firms who, as startups, had been committed to the

*The FTC, in the course of an investigation, told Google to knock it off, and Google grudgingly stopped taking Yelp's reviews, though it insisted it was doing Yelp a favor. It nonetheless maintained its Yelp clones, and, in the style of Microsoft, did everything it could to make its own local results show up, even though they were inferior by Google's own metrics.

old internet ideals of openness and chaos. But now it was all for the best: a law of nature, a chance for the monopolists to do good for the universe. The cheerer-in-chief for the monopoly form is Peter Thiel, author of *Competition Is for Losers*. Labeling the competitive economy a "relic of history" and a "trap," he proclaimed that "only one thing can allow a business to transcend the daily brute struggle for survival: monopoly profits."

The big tech firms are a little more circumspect than Thiel. For Facebook, it is not trying to build a global empire of influence so much as "bringing the world closer together." It is supposedly a "different kind of company that connects billions of people." To do that right, however, requires a global monopoly. Meanwhile, Google wants to organize the world's information, but to do so they need to get their hands on all the information in the world. Amazon, meanwhile, wants nothing more than to serve the consumer, which is great, and you can check out any time you like, but you can never leave.

If there is a sector more ripe for the reinvigoration of the big case tradition, I do not know it.

A Neo-Brandeisian Agenda

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

1. Merger Review

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

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

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

To abandon economic analysis entirely would be implausible. But what's needed are broader and tougher merger standards, especially when it comes to the largest, most important mergers. This is an area where legislative action is warranted

to make clear, at a minimum, that the Anti-Merger Act of 1950 meant what it said. Here is not the right place for a full discussion of reforms, but they might at a minimum include setting a higher bar for giant mergers (over $6 billion in value). The problem of overlapping ownership of horizontal rivals highlighted by Professor Einer Elhauge should be addressed, and we might also consider a return to structural presumptions, such as a simple but *per se* ban on mergers that reduce the number of major firms to less than four.* Whatever the proposals may be, an overhaul of merger review is a priority.

2. Democratization of the Merger Process

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

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

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

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

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

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

3. Big Cases

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

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

4. Breakups

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

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

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

Consider a breakup of Facebook that undid the mergers with Instagram and WhatsApp. While Facebook might not like being dissolved, and might find the new competition unwelcome, it

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

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

5. Market Investigations and Competition Rules

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

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

6. Antitrust's Goals

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

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

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

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

As a legal matter, the "protection of competition" standard has the advantage of much greater support from congressional intent and earlier precedent. It is a challenging, even absurd exercise, to pick a modern economic standard out of the language of the Sherman, Clayton, or Anti-Merger Acts or their legislative histories. The idea that Congress was concerned with "allocative efficiency" in 1890 or even 1914 or 1950 is an economic version of anthropomorphism. In contrast, it is no great stretch to say that Congress was interested in the preservation of competition. The Congressional record does not contain the words "allocative efficiency," "consumer welfare,"

or "wealth transfer," but it does repeatedly discuss the choice between competition and monopoly. Here, as just one typical example, is Representative Dick Thompson Morgan in 1914: "the one thing we wish to maintain, and retain and sustain, is competition. We want to destroy monopoly and restore and maintain competition."

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

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

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

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

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

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

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

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