

TOO BIG TO EXIST

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*The Great Recession focused attention on the regulation of business size as it became clear that some entities were too big to fail. Over a century ago, antitrust law emerged from similar fears of big businesses. In many respects, these sentiments influenced the direction American antitrust law during its early decades and, at the margin, still exist today. In *Standard Oil of New Jersey v. United States* (1911), the United States Supreme Court broke up the then-world’s largest business entity into thirty-four companies, condemning business norms of large organizations and endorsing the fear of size. One hundred years later, the old size hostility transformed itself into more nuanced concerns about systemic risks. This Essay examines several aspects of the fear of business size in antitrust law as it is reflected in concerns regarding big businesses and worries that monopolists exclude competitors and leverage market power.*

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The movement was the origin of the whole system of 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*

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combination is here to stay. Individualism has gone, never to return.

—John D. Rockefeller (1882)¹

INTRODUCTION

Deep recessions and Depressions apparently have the tendency to fill the public with increased concerns regarding size. The 1890s economic depression corresponded to the increased public outrage against the trusts.² The Great Depression resurfaced the fears of the Robber Barons and large businesses.³ Adolf Berle and Gardiner Means published their influential book, *The Modern Corporation and Private Property*, which explores the rise of big businesses and centralized management and the diffusion of ownership in the United States.⁴ The Great Recession popularized the phrase: “Too Big to Fail.”⁵ This Essay explores several reflections of fear in antitrust law.

Antitrust law, financial regulation, and other regulatory areas appear to be obsessed with size.⁶ Modern antitrust law does not target size if antitrust ever did; it is focused on the acquisition and maintenance of market power, or a more ambiguous term—monopoly power. “Business size” and “monopoly power” are *not* synonymous, but perhaps because antitrust originated in struggles against big businesses the public often perceives monopolists as big businesses.

In May 1911, the Supreme Court broke up Standard Oil, but unequivocally reaffirmed that business size in itself is not an antitrust violation: “size, aggregated capital, power and volume of business are not monopolizing in a legal sense.”⁷ This rule has remained unshaken over the past century. In the famous *Alcoa* case, Judge Learned Hand stressed that mere “size does not determine guilt” under Section 2 of the Sherman Act.⁸

Although holding in the *Standard Oil* decision that business size alone does not violate the Sherman Act, the Court, believed that the statute was enacted with the intent to target bigness: “The debates [over the Sherman Act] conclusively show . . . that the

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

² See CHARLES HOFFMANN, *THE DEPRESSION OF THE NINETIES* (1956); DOUGLAS STEEPLES & DAVID O. WHITTEN, *DEMOCRACY IN DESPERATION: THE DEPRESSION OF 1893* (1998); *infra* Part I.

³ See MATTHEW JOSEPHSON, *THE ROBBER BARONS* (1934).

⁴ ADOLF BERLE & GARDINER 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 See, e.g., TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* (2010).

⁷ 221 U.S. 1, 10 (1911).

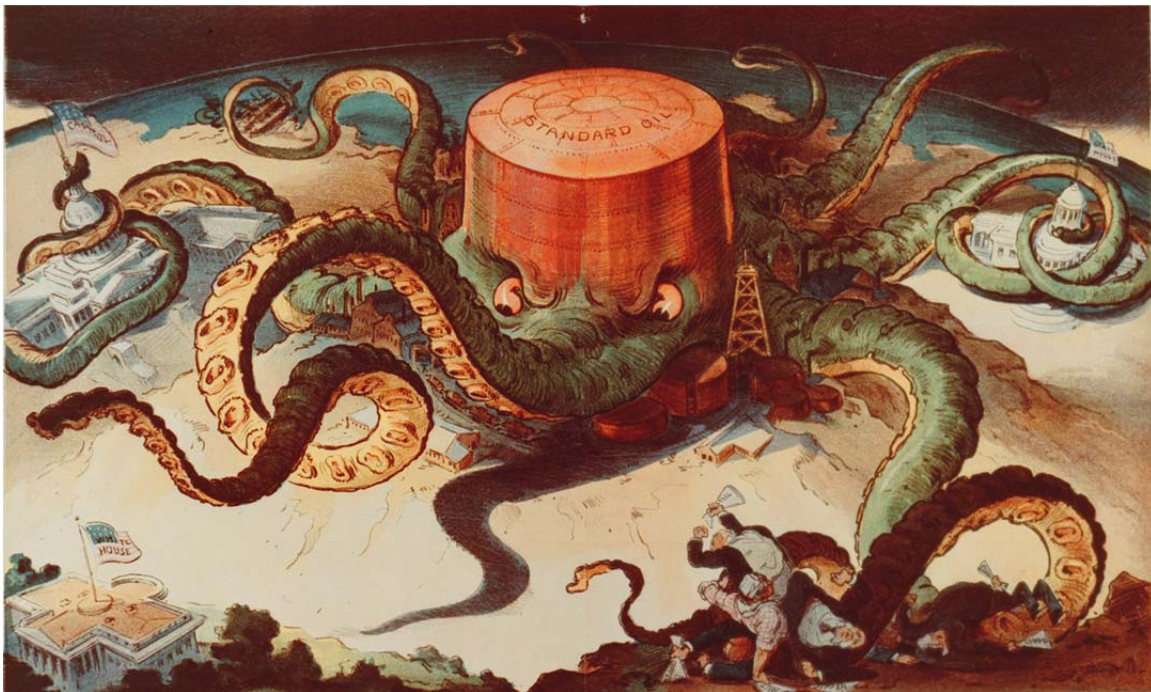
⁸ *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945) (Hand, J.). See also *U.S. v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) (“the law does not make mere size an offense, or the existence of unexercised power an offense.”); *U.S. v. International Harvester Co.* 274 U.S. 693, 708 (1927).

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main cause which led to the legislation was the thought . . . the vast accumulation of wealth in the hands of corporations and individuals . . . oppress individuals and injure the public generally.”⁹ Similarly, in *Alcoa*, Judge Hand noted that Congress “did not condone ‘good trusts’ and condemn ‘bad’ ones; it forbad all.”¹⁰

Modern antitrust law has nothing to do with business size. Yet, historical remnants—old cases and outdated doctrines—may suggest that business size, as oppose to relative market share, is a relevant factor under present law. This Essay examines how antitrust law emerged as a legal field built upon an aversion to big businesses and reflects on four doctrinal manifestations of the fear of bigness in the present law. The first reflection, the so-called Brandeis-Douglas Effect refers to deep convictions of two Supreme Court Justices who associated mere size with evil. One of these Justices, Louis Brandeis, intentionally avoided using such a narrative in antitrust decisions, but the other, William Douglas, often incorporated his beliefs into his language that remained in the antitrust case law. The three other reflections are antitrust doctrines that represent fear of monopolists—monopoly broth, essential facility, and leverage.

While modern antitrust scholars and practitioners do not attribute any significance to business size per se, the shadow of the fear of business size appears to exist in antitrust. This Essay seeks to eliminate this shadow.



Puck Magazine, September 7, 1904
The Standard Oil Octopus: Public perceptions of business size

⁹ *Standard Oil*, 221 U.S. at 50.

¹⁰ *Id.* at 427.

I. TRUST AND ANTI-TRUST

In 1863, John D. Rockefeller, then twenty-six years old, formed Standard Oil to further his trading of oil commodities.¹¹ By 1870, Standard Oil controlled 10% of the nation's oil-refining capacity.¹² By 1880, Standard Oil owned or effectively controlled 90–95% of the nation's petroleum and distribution facilities.¹³ As Rockefeller and his associates took over the industry, Standard Oil became “a community of interest among stockholders in various companies.”¹⁴ The absence of competition laws allowed Rockefeller to draw partners through the advantages of business combinations. In 1875, he formed the Central Refiners' Association, whose members delegated to Rockefeller vast authorities for buying oil, allocating sales, negotiating transportation sales, and many others.¹⁵ Standard Oil rapidly expanded, but state laws and organizational complexities made the alliance size an impediment to its endeavors.¹⁶

Samuel C.T. Dodd, who served as Standard Oil's general counsel from 1881 to 1905,¹⁷ devised a solution—he created a legal instrument for managerial efficiency of size: the “trust.”¹⁸ In an 1893 essay for the *Harvard Law Review*, he wrote:

The term “trust” . . . embraces only a peculiar form of business association effected by stockholders of different corporations transferring their stocks to trustees. The Standard Oil Trust was formed in this way, and originated the name “trust” as applied to industrial associations. The trustees had no powers except such as the law confers upon every holder in trust of corporate stocks.¹⁹

Trusts, as simple legal instruments, of course predated Dodd and Standard Oil. In 1882, Dodd converted the common-law apparatus to a corporate device that serves accumulation of capital and managerial efficiency. Only six years later, commenting about the proliferation of trusts, Professor Theodore Dwight of Columbia Law School wrote:

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.

¹¹ See RALPH W. HIDY & MURIEL E. HIDY, *PIONEERING IN BIG BUSINESS, 1882-1911* 13 (1955).

¹² BRUCE BRINGHURST, *ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890-1911* 10 (1979).

¹³ BRINGHURST, *id.*, at 11. Elizabeth Granitz and Benjamin Klein showed that the Standard Oil's source of market power was control over distribution and that it did not possess independent market power in petroleum refining. See Elizabeth Granitz & Benjamin Klein, *Monopolization by “Raising Rivals' Costs”*: *The Standard Oil Case*, 39 J. L. & ECON. 1 (1996).

¹⁴ HIDY & HIDY, *supra* note 11, at 14.

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 23–44.

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 44–49.

¹⁹ See S. C. T. Dodd, *The Present Legal Status of Trusts*, 7 HARV. L. REV. 157, 157 (1893).

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Nothing can be more common or more useful. But the word is 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.²⁰

Dodd's legal instrument appealed to many businesses that formed during that industrial revolution in the late nineteenth century.²¹ In January 1889, Dodd delivered a speech at the annual banquet of the Merchants' Association of Boston on the subject of "Combinations and Competition."²² He criticized the tendency to "denounce combinations as a public evil"²³ and warned about the legal trend to turn the legal status of combinations into "a criminal conspiracy."²⁴

In his speech, Dodd argued that because of the legality of general partnerships, it would be "difficult . . . to draw the line between a combination which is one which is not injurious to trade on account of magnitude."²⁵ Business size, he noted, was not a valuable factor to measure market power.²⁶ He also rejected the arguments that trusts decreased quantity of product and raised prices, providing some data from the petroleum industry.²⁷

In January 1889, the same month in which Dodd delivered his speech defending the legality of trusts and their economic value, a New York court delivered the first decision to address the legality of trusts. New York brought an action to dissolve the American Sugar Refining Company.²⁸ To rule in this lawsuit, the court examined the

²⁰ Theodore W. Dwight, *The Legality of "Trusts,"* 3 POL. SCI. Q. 592, 592 (1888). At his death in 1892, Professor Dwight was one of "the ablest jurist and the most widely-known authority on legal teaching" in the country. See *Theodore W. Dwight Dead*, N.Y. TIMES, Jun. 30, 1892, at 8.

²¹ See E. Benjamin Andrews, *Trusts According to Official Investigations*, 3 Q. J. ECON. 117 (1889). See also HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, 249-66 (1991) (describing the three common forms of trusts: stock-transfer trust, asset-transfer combination, and holding company).

²² Samuel C.T. Dodd, *Current Corporation Matters*, 5 RAILWAY CORP. L.J. 97 (1889)

²³ *Id.* at 97.

²⁴ *Id.*

²⁵ *Id.*

²⁶ "It must be evident that a partnership between two rivals tradesmen in a country village will give them greater power over the market of the 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." *Id.*

²⁷ *Id.* at 98-99.

²⁸ *People v. North River Sugar Refining Co.*, 3 N.Y.S. 401 (1889). In 1892, refiners who controlled 98% of the United States' sugar processing capacity formed the American Sugar Refining Company, which was known as the sugar trust. *U.S. v. E.C. Knight Co.*, 156 U.S. 1 (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 [or] that trade or commerce might be indirectly affected." *Id.* at 19. For the history of the sugar trust, see 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).

legality of the trust agreement of the American Sugar Refining Company. Although “liberty of contracting is the most important factor of commercial life,” the court acknowledged that externalities justify regulation²⁹ and that restraints of trade are one such form of externality that warrant intervention in the freedom of contracts.³⁰ 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.”³¹ On appeal, in June 1890, the Court of Appeals of New York criticized the transfer of privileges from the corporate directors to the trust,³² and stressed that “[t]he state permits in many ways an aggregation of capital, but, mindful of the possible dangers to the people.”³³ In light of the violation of the corporate charter and fiduciary duties, the court felt that it was not necessary to “advance into the wider discussion over monopolies and competition and restraint of trade, and the problems of political economy.”³⁴ The state corporate law provided sufficient grounds to invalidate the sugar trust.

A few weeks later, President Benjamin Harrison signed into law the Sherman Act, outlawing any combination in restraint of trade,³⁵ monopolization and attempt to monopolize,³⁶ and any contract or combination in form of trust.³⁷ Congress enacted the Sherman Act, the first federal anti-trust law, in response to the deep-seated public aversion toward trusts.³⁸ Early drafts of the Sherman Act dealt only with combinations

²⁹ 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 (1952); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STAT.* 387 (1954); Tibor Scitovsky, *Two Concepts of External Economies*, 62 *J. POL. ECON.* 143 (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 (1958); Paul A. Samuelson, *Aspects of Public Expenditure Theories*, 40 *REV. ECON. & STAT.* 332 (1958).

³⁰ 3 N.Y.S. at 409

³¹ 3 N.Y.S. at 409

³² *Id.* at 622–23.

³³ *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 622–23 (1890).

³⁴ *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 21, 247–48 (1991).

³⁵ § 1, codified as 15 U.S.C. § 1.

³⁶ § 2, codified as 15 U.S.C. § 2.

³⁷ § 3, codified as 15 U.S.C. § 3.

³⁸ *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 trust. . . . [B]etween 1888 and 1890, there were few who doubted that the public hated the trusts fervently.”) *See also* 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); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN*

and, in presenting the March 1890 bill, Senator Sherman noted: “This bill . . . has a single object to invoke the aid of the courts . . . to deal with the combinations.”³⁹ The Sherman Act became law just eight years after John D. Rockefeller declared the end of individualism and the era of combination.

In his 1893 essay, Samuel C.T. Dodd observed that the Sugar Trust decision and several other legal developments “ended this peculiar form of organization [of corporate trusts].”⁴⁰ By that time, however, 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.”⁴¹

Nevertheless, and despite the enactment of the 1890 Sherman Act—or perhaps because of it—a few years after the United States adopted anti-trust laws, Rockefeller’s vision of an “era of combination” appeared to be 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.⁴²

At the outset of the great merger movement, the Supreme Court adopted the position that combinations were not necessarily an illegal restraint of trade. In January

ANTITRUST ACT 53-99 (1954); Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 *ECON. INQ.* 242 (1992); 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 Act*, 14 *J. L. STUD.* 1 (1985); HANS THORELLI, *THE FEDERAL ANTITRUST POLICY* 224-32 (1955); Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 *REV. AUSTRIAN ECON.* 275 (2002).

³⁹ 21 Cong. Rec. 2457 (Mar. 21, 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 (Apr. 8, 1890).

⁴⁰ Dodd, *supra* note 19, at 158.

⁴¹ *Id.*

⁴² 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 Sherman Act focused on cartels and diverted loose combinations toward mergers. See, e.g., George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 *J. L. & ECON.* 77 (1985); John J. Binder, *The Sherman Act and the Railroad Cartels*, 31 *J. L. & ECON.* 443 (1988); George F. Canfield, *Is a Large Corporation an Illegal Combination or Monopoly Under the Sherman Anti-Trust Act?*, 9 *COLUM. L. REV.* 95 (1909). Some argue that the Sherman Act was ineffectual. See, e.g., GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1967); Thomas K. McCraw, *Rethinking the Trust Question*, in *REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 1* (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 21, at 241–67; Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 *BUS. HIST. REV.* 304 (1979).

1895, in the first anti-trust case reviewed by the Supreme Court, the *E. C. Knight* case,⁴³ Chief Justice Fuller took the position that, in enacting the Sherman Act, “Congress did not attempt . . . to limit and restrict the rights of corporations . . . in the acquisition, control, or disposition of property.”⁴⁴ Three years later, writing for the Court in *Joint-Traffic Association*, Justice Peckham expressed the skepticism that a combination could be a restraint of trade: “[T]he 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. The same may be said of the contract of partnership.”⁴⁵

In the 1904 five-to-four decision in *Northern Securities*,⁴⁶ the Supreme Court ended the great merger movement holding that the Sherman Act could condemn acquisitions of firms by a holding company.⁴⁷ Writing for the dissent, Justice Holmes maintained the view that “[the Sherman Act] says nothing about competition. . . . [Its] words hit two classes of cases, and only two,—contracts in restraint of trade and combinations or conspiracies in restraint of trade. . . . It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared.”⁴⁸ Justice Holmes, however, stressed that the Sherman Act “makes no discrimination according to size.”⁴⁹ “Size has nothing to do with the matter,” he wrote.⁵⁰

Thus, during the great merger movement, despite public aversion toward trusts, the Supreme Court was largely skeptical of the potential harmful nature of big businesses. The trusts swallowed and crushed competitors but also introduced efficiencies through scope and scale, and revolutionized organizational and managerial techniques.⁵¹ They transformed the economy, brought new products to the market, and expanded distribution networks.⁵² Transitions often involve noisy struggles that do not necessarily focus on the key issues.⁵³ The framing of the battle against trusts appears to be one of them. The critics of trusts feared big businesses and condemned size as evil, disregarding the many potential social benefits of business size.

⁴³ 156 U.S. 1 (1895). See *supra* note 28. For an analysis of this case see McCurdy, *supra* note **Error! Bookmark not defined.**

⁴⁴ *E.C. Knight Co.*, 156 U.S. at 16.

⁴⁵ *U.S. v. Joint-Traffic Ass’n*, 171 U.S. 505, 567 (1898).

⁴⁶ *Northern Securities Co. v. U.S.*, 193 U.S. 197 (1904).

⁴⁷ See generally Balthasar Henry Meyer, *History of the Northern Securities Case*, 1 BULL. U. WIS. 217 (1906). See also JOHN LARKIN THORNDIKE, *THE DECISION IN THE “MERGER CASE”* (1903) (analyzing the circuit court decision).

⁴⁸ *Northern Securities*, 193 U.S. at 403-5.

⁴⁹ *Id.* at 407.

⁵⁰ *Id.*

⁵¹ See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

⁵² *Id.*

⁵³ See generally Barak Y. Orbach & Frances R. Sjoberg, *The Clucking Theorem: Legal Transitions, Civility Norms, and Social Costs*, 44 CONN. L. REV. • (2011).

In his 1893 essay, Samuel Dodd clearly spelled out this point: “all the effects condemned by law in the cases cited may, and sometimes do, follow as incidents of a large business.”⁵⁴ 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.”⁵⁵ The new anti-trust laws, Dodd argued demonized the monopolies although the word “monopoly” . . . as ordinarily used in legal decisions, means only a large business.”⁵⁶

Dodd’s affiliation with Standard Oil most likely influenced his views of business size. Others, however, expressed similar perspectives, even during the era when the press regularly condemned trusts. For example, in 1901, Albert Stickney, a prominent New York attorney,⁵⁷ published in the first volume of the *Columbia Law Review* an article about “corporate trusts,” arguing that trusts had “no new feature other than . . . increased magnitude.”⁵⁸ He further explained that a trust “is nothing more than an aggregation of capital in the hands of a corporation, of ordinary purposes, in order to compete with its competitors, to make money, but producing, buying and selling at lowest price.”⁵⁹

In 1900, John Bates Clark published a short essay, titled “*Trusts*,” stressing the dominance of trusts in the American economy and raising questions regarding their roles in society:

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. Their size is, however, one of the few things about them of which we can be absolutely sure. Whether in the long run they will prove to be benevolent or malevolent we cannot know more positively than we can know whether the extinct saurians were gentle or fierce.⁶⁰

Despite the appeared uncertainty about the nature of trusts, Clark’s criticism was unequivocal, writing that trusts “do not kill men in a literal way, but to a large extent they do kill competition.”⁶¹ Writing in 1900, Clark believed that the “measures that it is possible to take are not many.”⁶² He considered the advantages and limitations of structural remedies, tax, price regulation, and state ownership of monopolized

⁵⁴ *Id.* at 159.

⁵⁵ *Id.* at 160.

⁵⁶ *Id.* at 158.

⁵⁷ *Albert Stickney Dead*, N.Y TIMES, May 5, 1908, at 7.

⁵⁸ Albert Stickney, *Corporate Trusts*, 1 COLUM. L. REV. 235, 235 (1901).

⁵⁹ *Id.*

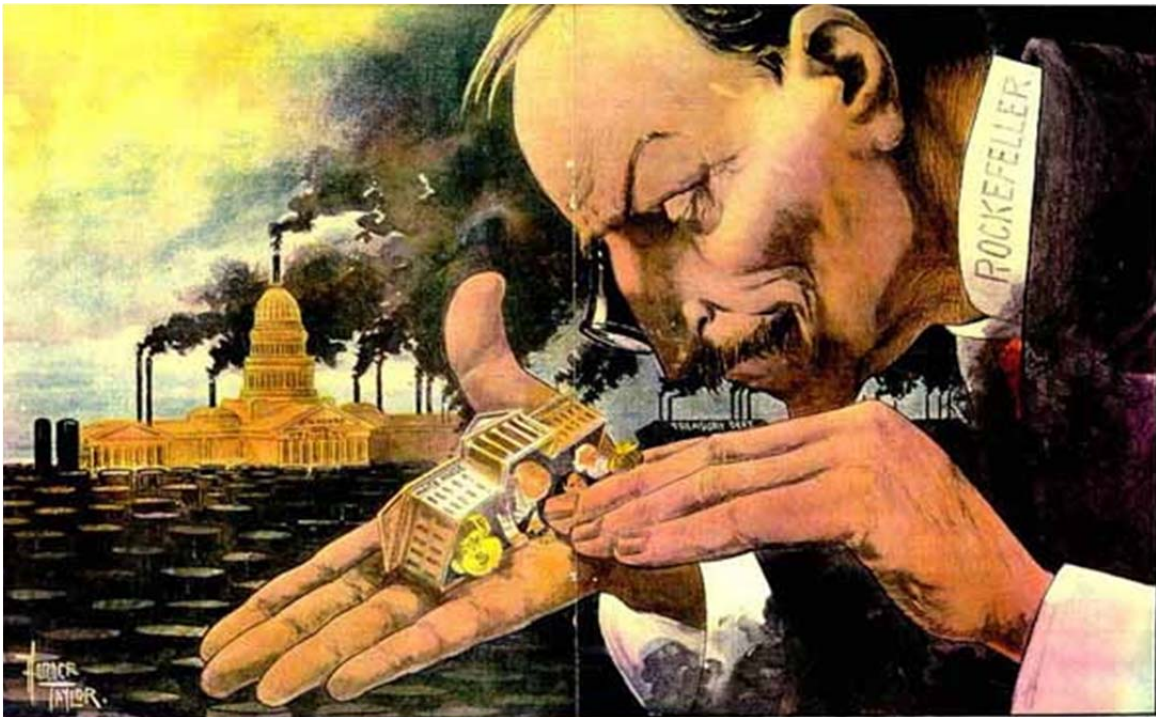
⁶⁰ John Bates Clark, *Trusts*, 15 POL. SCI. Q. 181, 181 (1900).

⁶¹ *Id.* at 182.

⁶² *Id.* at 187.

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industries.⁶³ His preferred recourse, however, was to live “in harmony with the spirit of our people, with the principles of common law and also with the economic tendencies that have made our present state a tolerable one.”⁶⁴ He believed that potential competition could restrain trusts and that society should not be concerned from the loss of ineffective small businesses.⁶⁵ Clark argued that “fair competition” protected by the state could guarantee social prosperity.⁶⁶ Specifically, he identified three major unfair practices: price discrimination,⁶⁷ predatory pricing,⁶⁸ and exclusive dealing.⁶⁹ Society therefore should allow trusts to “have the fullest benefit from all real economies” and restrain their use of market power through laws that protect fair competition.⁷⁰



Verdict, January 22, 1900

“The Trust Giants Point of View: ‘What a Funny Little Government’”

⁶³ *Id.* at 187-90.

⁶⁴ *Id.* at 190.

⁶⁵ *Id.*

⁶⁶ *Id.* at 190-95.

⁶⁷ *Id.* at 191.

⁶⁸ *Id.* at 191-92.

⁶⁹ *Id.* at 192.

⁷⁰ *Id.* at 195.

II. DISTRUST IN SIZE

The fear of business size has evolved since Samuel C.T. Dodd devised the trust for John D. Rockefeller.⁷¹ Over the past century, the field of antitrust has grappled with the question of size. The original concerns regarding big businesses have become more nuanced and focused on the relevant market, where firms that hold monopoly power may not be “big” in absolute terms. In *Standard Oil*, Chief Justice White mentioned the Sherman Act’s “omission of any direct prohibition against monopoly in the concrete,”⁷² but emphasized that the words of Section 2 “reach every act bringing about the prohibited results”⁷³—that is, monopoly.

This side note of Chief Justice White was imprecise. The Committee on Judiciary introduced Section 2 as an amendment to the bill of Senator John Sherman.⁷⁴ 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.”⁷⁵ They further 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.”⁷⁶ Some Senators were unsure about this interpretation, but after a very brief discussion the Senate adopted the proposed language.⁷⁷ Thus, Section 2 was enacted to prevent a person who holds a significant market share to “prevent other men from engaging other men from engaging in fair competition with him.”⁷⁸

Congress has never determined who is a monopolist. Today, monopoly power is generally associated with control over a high share in the relevant market. Discussions of the requisite market share commonly begin with Judge Learned Hand’s statement in *Alcoa* that a market share of ninety percent “is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.”⁷⁹

Whatever the relative requirement is—monopoly power is associated with some relative size perceptions. This Part explores the modern fear of size in antitrust law in two dimensions. The first dimension, Section II.A, traces the peculiar marks of Justices

⁷¹ See, e.g., WALTER ADAMS & JAMES BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* (2d ed. 1986).

⁷² *Standard Oil*, 221 U.S. at 62.

⁷³ *Id.* at 61.

⁷⁴ See *supra* note 39 and accompanying text.

⁷⁵ 21 Cong. Rec. 3151 (Apr. 8, 1890).

⁷⁶ *Id.*

⁷⁷ *Id.*, at 3152.

⁷⁸ *Id.* (Senator George Frisbie Hoar of Massachusetts). In the Whiskey Trust Case, Judge Howell Jackson relied on this legislative history. In *Re Greene*, 52 F. 104 (S.D. Ohio (1892)). Jackson was appointed to the Supreme Court in February 1893.

⁷⁹ *Aluminum Co. of America*, 148 F.2d at 424. The Supreme Court endorsed Judge Hand’s approach in *American Tobacco Co. v. U.S.*, 328 U.S. 781, 813–14 (1946).

Brandeis and Douglas on the antitrust case law and the anti-size narrative they left behind them. The second dimension, Sections II.B-D, examine three antitrust doctrines that are particularly focused on the volatility of business size.

A. The Brandeis-Douglas Effect

Many judges and scholars have contributed to the national record of distrust in size, but more than others, two Supreme Court Justices deserve credit for incorporating the fear of bigness to the antitrust case law: Louis Brandeis and William Douglas. This Section examined how the advocacy work of Brandeis during the days before his appointment to the Supreme Court found its way to antitrust decisions.

1. Louis D. Brandeis

Brandeis served on the Court from June 1916 and February 1939. Prior to his nomination, Brandeis took a strong position against big corporations and the financial sector that served them. His views of the desirable direction for antitrust law were publicly known.⁸⁰

Brandeis published numerous essays in the press attacking the trusts and the banking industry that served them. Most notably, between November 1913 and January 1914, he published a series of essays in the *Harper's Weekly*, criticizing the trusts and large financial institutions. One of the most famous essays in this collection is *A Curse of Bigness* in which Brandeis summarized his views: "Size, we are told, is not a crime. But size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put."⁸¹ In March 1914, Brandeis published the collection as a book, entitled: *Other People's Money and How the Bankers Use It*.⁸² The collection, which quickly became influential, had a clear message: "The great banking houses . . . have definitely arrested development because to them the creation of the trusts is largely due."⁸³

Brandeis' vocal stance on business and social issues, as well as being the first Jew nominated to the Supreme Court, made his nomination controversial.⁸⁴ As a Justice, he recused himself from several significant antitrust cases.⁸⁵ Nonetheless, he did participate in many decisions, occasionally writing for the Court—as in *Chicago Board of Trade v. United States*⁸⁶—and sporadically penning a dissenting opinion.⁸⁷ In the antitrust cases,

⁸⁰ See MELVIN UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 277–326 (2009).

⁸¹ Louis D. Brandeis, *A Curse of Bigness*, *HARPER'S WEEKLY*, Jan. 14, 1914, at 18.

⁸² LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1914).

⁸³ *Id.* at 149–50.

⁸⁴ *Id.* at 430–59.

⁸⁵ See *United States v. United Show Machinery Co. of New Jersey*, 247 U.S. 32 (1918); *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920); *Continental Ins. Co. v. Reading Co.*, 259 U.S. 156 (1922); *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

⁸⁶ 246 U.S. 231 (1918).

Brandeis refrained from articulating his position about business size. In 1933, however, when the Supreme Court struck down a Florida chain store tax in *Louis K. Liggett Co. v. Lee*,⁸⁸ Brandeis expressed his concerns about size in the dissenting opinion: “Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business[,] . . . are sometimes able to dominate the state.”⁸⁹ Brandeis credited Berle and Means for influencing his writing,⁹⁰ and argued that the separation between ownership and control made business size “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.”⁹¹

2. *William O. Douglas*

Brandeis served on the Court until February 1939. His successor was William Douglas that 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. His views about size and bigness were formed before he joined the Court,⁹² and 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 case law has been significant.

Douglas came to the court from the Securities and Exchange Commission, where he served as the third Chairman. Despite this background, he did not trust big businesses. Douglas had strongly held views about business size and the role of antitrust laws in regulating such accumulation of wealth. Brandeis’s writing greatly influenced him.⁹³ In 1948, writing for the dissent in *Columbia Steel*, Douglas identified a “problem of bigness” in the steel industry, adopting *The Curse of Bigness* in his analysis.⁹⁴ He was concerned about the potential political influence of concentrated capital:

⁸⁷ See, e.g., *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Swift Co. v. U.S.*, 276 U.S. 311 (1928); *Standard Oil v. U.S.*, 283 U.S. 163 (1931).

⁸⁸ 288 U.S. 517 (1933).

⁸⁹ *Id.* at 565.

⁹⁰ *Id.* at 564.

⁹¹ *Id.* at 565. 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 (2005). In 2004, Reuven Avi-Yonah, a leading tax scholar, used similar arguments in defense of corporate tax. See Reuven S. Avi-Yonah, *Corporations, Society, and the State*, 90 VA L. REV. 1193, 1231-49 (2004).

⁹² See, JAMES ALLEN ED., *DEMOCRACY AND FINANCE: THE ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS* (1940).

⁹³ See generally C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEVELAND ST. L. REV. 895 (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).

⁹⁴ *U.S. v. Columbia Steel Co.*, 334 U.S. 495, 534-36 (1948) (Douglas, J., dissent).

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Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It 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. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.⁹⁵

Twenty-five years later, in a concurring opinion in *Falstaff Brewing*,⁹⁶ Douglas returned to Brandeis's *The Curse of Bigness*, and articulated his concern of bigness: "A nation of clerks is anathema to the American antitrust dream. So is the spawning of federal regulatory agencies to police the mounting economic power. For the path of those who want the concentration of power to develop unhindered leads predictably to socialism that is antagonistic to our system."⁹⁷ In his opinion in *Falstaff Brewing*, Douglas addressed efficiencies related to size and determined that businesses had acquired size for non-profit purposes:

It is, of course, true that a business unit may be too small to be efficient, but it is equally true that a unit may be too large to be efficient. And the circumstances attending business today are such that the temptation is toward the creation of too large units of efficiency rather than too small. The tendency to create large units is great, not because larger units tend to greater efficiency, but because the owner of a business may make a great deal more money if he increases the volume of his business ten-fold, even if the unit profit is in the process reduced one-half.⁹⁸

Justice Douglas' influence in antitrust should not be underestimated. In May 1948, a month before he wrote his dissent opinion in *Columbia Steel*, he wrote for the Court the landmark decision in *United States v. Paramount Pictures, Inc.*⁹⁹ that reshaped the motion picture industry and, to a large extent still governs it.¹⁰⁰ Most notably, inspired by *Alcoa*, in *Grinnell*,¹⁰¹ Justice Douglas articulated the test for monopolization under Section 2 of the Sherman Act: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from

⁹⁵ *Id.* at 536.

⁹⁶ *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

⁹⁷ *Id.* at 543.

⁹⁸ *Id.* at 540-41 (Douglas, J., concurring).

⁹⁹ 334 U.S. 110 (1948).

¹⁰⁰ For the significance of this decision see Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 *YALE J. REG.* 317 (2004). Together with *Paramount*, Justice Douglas delivered two additional decisions related to the motion picture industry: *U.S. v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres v. U.S.*, 334 U.S. 110 (1948).

¹⁰¹ *U.S. v. Grinnell*, 384 U.S. 563 (1966).

growth or development as a consequence of a superior product, business acumen, or historic accident.”¹⁰²

B. Monopoly Broth

Many antitrust doctrines condemn the acquisition and maintenance of monopoly power, the crux of which is often simply the size of the firm in relation to the relevant market. The most peculiar one is the “monopoly broth” doctrine. First articulated by the Supreme Court in *Continental Ore*,¹⁰³ 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.¹⁰⁴ The Seventh Circuit gave the doctrine its name by relying on the *Continental Ore* rule and writing: “It is the mix of various ingredients . . . in a monopoly broth that produces the unsavory flavor.”¹⁰⁵ In their treatise, Areeda and Hovenkamp report that antitrust plaintiffs have been cited the *Continental Ore* rule “numerous times . . . sometimes properly, sometimes improperly.”¹⁰⁶

The monopoly broth doctrine could be powerful. The aggregation of claims allows antitrust plaintiffs to focus on the impact of the defendant’s conduct, rather than the legality of each claim. The monopolist’s market position may possibly turn a group of acts, each of which is insufficient to obtain an antitrust relief, into an actionable antitrust claim. The logic behind the monopoly broth doctrine is that in monopolization cases “conduct must always be analyzed ‘as a whole’”¹⁰⁷ because a monopolist could engage in a wide array of practices, the combined effect of which preserved the monopolist’s position.

Monopoly broth, therefore, is a modern doctrinal reflection of the old anti-trust fears. It may be a useful legal device when a monopolist utilizes an array of practices to acquire more or preserve market power, but its inherent vagueness casts doubts over its practical operational uses.

¹⁰² *Id.* at 570-71.

¹⁰³ *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (“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”).

¹⁰⁴ See generally 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 310 (3d ed. 2007). See also Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 *ANTITRUST L. J.* 663 (2010).

¹⁰⁵ *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980).

¹⁰⁶ 2 AREEDA & HOVENKAMP, *supra* note 104, § 310c, at 201. See also *City of Groton v. Connecticut 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. Southern California Edison Co.*, 955 F.2d 1373, 1378 (9th Cir. 1992) (“it 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 (3rd Cir. 2003) (declining monopoly broth claim).

¹⁰⁷ 2 AREEDA & HOVENKAMP, *supra* note 104, § 310c, at 208.

C. Essential Facilities

The monopoly broth doctrine potentially 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. A monopolist that refuses to share its facility with competitors may be condemned for an exclusionary practice.¹⁰⁸

The doctrine typically applies to vertically integrated monopolists whose monopoly power is held in the “essential facility” and they integrate activities in other markets. Utility companies in the railroad, energy, communications and other sectors inevitably utilize network externalities and once they are vertically integrated they could become a target of the doctrine. The doctrine’s logic is that monopolist could leverage the “essential facility” it controls to control in other markets and driving competitors out of these markets. Claims against an unintegrated monopolist that controls an “essential facility” are inconsistent with the spirit of the doctrine.¹⁰⁹

The doctrine originated from a case concerning a railroad trust. In the 1912 *Terminal Railroad* case,¹¹⁰ 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.

In the 1973 *Otter Tail* decision,¹¹¹ Justice Douglas’s opinion laid out the foundations for the modern essential facility doctrine. Writing for the majority, he ruled that a utility a utility company that vertically integrated a power company had the duty to wheel over its lines electricity produced by other firms.¹¹²

¹⁰⁸ For a discussion of the doctrine see Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359 (2008).

¹⁰⁹ Under some circumstances, an antitrust plaintiff may have valid claims against an unintegrated monopolist that controls an “essential facility.” For example claims under Section 3 of the Clayton Act

¹¹⁰ *U.S. v. Terminal Railroad 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. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

¹¹¹ *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

¹¹² See generally G.E. Hale & Rosemary D. Hale, *The Otter Tail Power Case: Regulation by Commission or Antitrust Laws*, 1973 SUP. CT. REV. 99 (1973). Another Supreme Court decision that is associated with the essential facility doctrine and predated *Otter Tail* is *Associated Press v. U.S.*, 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 108 at 361. The term first appeared in a court decision in *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977).

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Many scholars have criticized the doctrine “as having nothing to do with the purposes of antitrust law,”¹¹³ yet federal courts “have not been so grudging in application of the doctrine.”¹¹⁴ In *Trinko*,¹¹⁵ however, Justice Scalia argued that the Supreme Court has never recognized “such a doctrine.”¹¹⁶

The principal criticism against the essential facility doctrine is that, regardless of how we define the goals of antitrust laws,¹¹⁷ it does not serve any good purpose.

If the facility in question is operated by a natural monopoly, then it is unclear how ordering the monopolist to share its facility could change anything. Sharing a monopoly does not change quantities or rates, but it very possibly adds administrative costs.¹¹⁸ Otherwise, if the facility in question may have alternatives, one could dispute the definitional aspect of the doctrine or argue that its application discourages firms from developing alternatives.

The essential facility doctrine therefore stands for a duty imposed on a monopolist for its dominant position on the market—its size, if you wish—a duty to share its facility with rivals. *Trinko* and persistent criticism might have ended the willingness of courts to endorse the doctrine, but its shadow and marks still exist.

D. Leverage

“Leverage” in antitrust is the extension of monopoly power from one market to another through the use of exclusionary practices.¹¹⁹ The implicit rationale of the essential facility doctrine is that a monopolist that does not share its infrastructure (or another facility) with rivals may leverage its monopoly power to another market.

The simplest and most intuitive form of leverage is tying, where a firm with market power over one product conditions a transaction in this product on a transaction in another product in which it has no market power. The concern is that the firm would leverage its market power in the market for the first product to the market for the other

¹¹³ *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) (Posner, J.). See, e.g., Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989); Reiffen & Kleit, *supra* note 110; Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987).

¹¹⁴ Robert Pitofsky et al., *The Essential Facility Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 444 (2002).

¹¹⁵ *Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹¹⁶ *Id.* at 411. Cf. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

¹¹⁷ 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 (2011).

¹¹⁸ *Blue Cross & Blue Shield United of Wisconsin* 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.”)

¹¹⁹ See generally 3 AREEDA & HOVENKAMP, *supra* note 104, § 652; Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM L. REV. 515 (1985). See also Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990).

product. In *Henry v. A.B. Dick*,¹²⁰ a case about the right of a patent holder to tie unpatented ink to his patented rotary mimeograph, Chief Justice White expressed in the dissent his view that tying intended “only to multiply monopolies.”¹²¹ Many subsequent courts indeed associated tying with the evil of leverage.¹²²

Despite its apparent appeal, the leverage theory has been subject to attack by disciples of Aaron Director and the Chicago School.¹²³ Richard Posner formulated the core of this criticism:

A . . . fatal . . . weakness of the leverage theory is its inability to explain why a firm with a monopoly of one product would want to monopolize a complementary product as well. It may seem obvious that two monopolies are better than one, but since the products are used in conjunction with one another to produce the final product or service in which the consumer is interested[,] it is far from obvious. If the price of the tied product is higher than the purchaser would have had to pay on the open market, the difference will represent an increase in the price of the final product or service to him and so he will demand less of it and therefore buy less of the tying product.¹²⁴

Louis Kaplow labeled this line of critique “the fixed sum argument” for its proposition that the monopolist loses in one market what it earns in another.¹²⁵ In practice, the critique itself relies on many 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 complementary will spread in the long run.¹²⁶ 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

¹²⁰ 224 U.S. 1 (1912).

¹²¹ *Id.*, at 53.

¹²² See, e.g., *Carbice Corp. of Am. v. American Patents Dev. Corp.*, 283 U.S. 27, 32 (1931); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 509 (1969); *Times-Picayune Publishing 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. U.S.*, 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. U.S.*, 258 U.S. 451, 457-58 (1922). See also *U.S. v. Paramount Pictures*, 334 U.S. 131, 154-55 (1948) (holding that tying arrangements are “devices for stifling competition and diverting the cream of the business”); *U.S. v. Loew’s, Inc.*, 371 U.S. 38, 47-48 (1962) (“tying arrangements serve hardly any purpose beyond the suppression of competition.”).

¹²³ See, e.g., Ward S. Bowman, Jr., *Tying Arrangement and the Leverage Problem*, 67 YALE L.J. 19 (1957); Richard S. Markovits, *Tie-Ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 TEX. L.REV. 1363 (1980); Lester G. Telser, *A Theory of Monopoly of Complementary Goods*, 52 J. Bus. 211 (1979). Aaron Director published one work that includes a general sketch of his views. See Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW U. L. REV. 281 (1956).

¹²⁴ RICHARD A. POSNER, *ANTITRUST LAW* 198-99 (2d ed. 2001).

¹²⁵ Kaplow, *supra* note 119, at 517-19.

¹²⁶ See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

consumers to marketing schemes.¹²⁷ The critique also fails to consider strategic uses of leverage to raise rivals' costs by erecting or heightening barriers to entry.¹²⁸

The debate over leverage is not nearly as old as the fear of bigness but it has been around for more than a century. It is nuanced and subtle.¹²⁹ Economists show that, under certain conditions, a firm with market power in one market may leverage its power into another market. Size may grow.

Aside from academic debates over the plausibility of the practice, its illegality is questionable. Section 2 of the Sherman Act does not prohibit abuse of dominant position. When applied literally Section 2 prohibits leverage only when the monopolist monopolizes or attempts to monopolize the secondary market.¹³⁰

Thus, the leverage theory illustrates once again the fear of business size. Its limited application under antitrust laws cannot explain the extensive attention it has drawn over the years. The theory suggests that a monopoly—that is, a big business—can extend power into another market. Under Section 2 of the Sherman Act, this practice *may* be illegal only when the monopolist monopolizes or at least attempt to monopolize the other market.¹³¹

CONCLUSION—TBTE: THE SIZE OBSESSION

Congress enacted the Sherman Act in response to the public aversion of big businesses and the conduct of the trusts in the 1880s. The 1890 adoption of anti-trust legislation had effect on businesses but at least until 1904 did not slow down the emergence of big businesses in the United States. During the past century, antitrust law

¹²⁷ See generally Einer Elhauge, *Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009); John Simpson & Abraham Winkelgren, *Bundled Discounts Leverage Theory and Downstream Competition*, 9 AM. L. & ECON. REV. 370 (2007).

¹²⁸ See generally 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 Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002); Barry Nalebuff, *Bundling As an Entry Barrier*, 119 Q. J. ECON. 159 (2004).

¹²⁹ See, e.g., *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

¹³⁰ See, e.g., *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“§ 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. . . . The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in ‘unfair’ . . . tactics.”); *Cost Management Service v. Washington Natural Gas*, 99 F.3d 937, 951 (9th Cir. 1996) (“to the extent that ‘monopoly leveraging’ is defined as an attempt to use monopoly power in one market to monopolize another market, this theory remains a viable theory under Section 2”). Cf. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (“[T]he use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability.”)

¹³¹ Since leveraging is essentially a vertical arrangement, often deployed through tying, antitrust plaintiffs could try causes of action other than Section 2.

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has dramatically evolved and become a field in economics. Business size is no longer an antitrust concern.

Although modern antitrust does not target big businesses, the tracks of the old fears still exist in several questionable doctrines and the narrative of some old cases. It is time to lay them to rest.