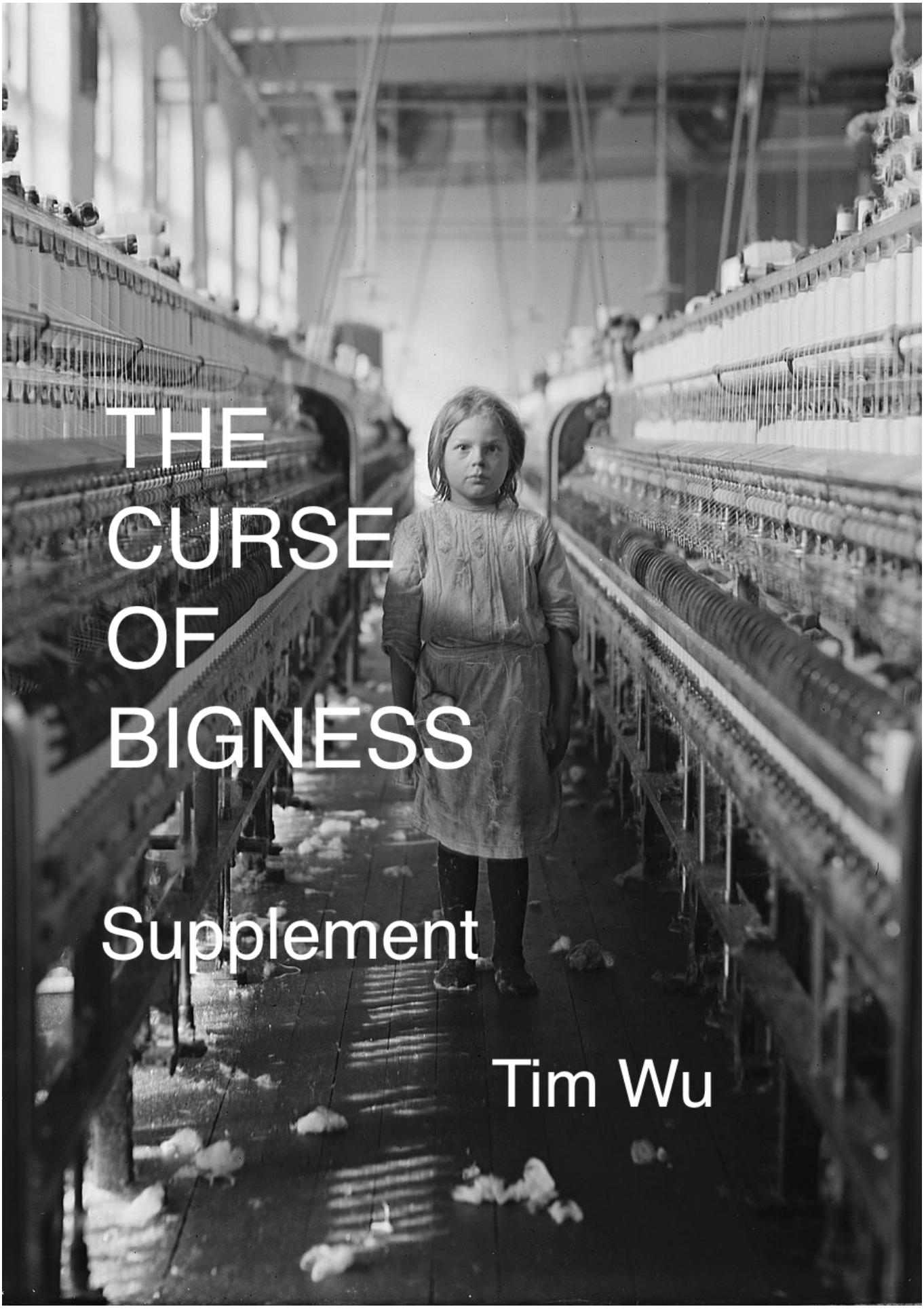

THE CURSE OF BIGNESS

Supplement

Tim Wu

SUPPLEMENT

THE CURSE OF BIGNESS
Antitrust in the New Gilded Age

Tim Wu†
Columbia University

Note from the author:
This supplement is to be read between chapters 3 and 4.

An American Experiment in Central Planning

The cyclical theory of American history holds that the country moves through periods of greater and lesser regard for government and private interests, which then translate into periods of liberalism and conservatism. There is more than one such theory: the best known belongs to the father-son team of Arthur Schlesinger Sr. and Jr. who suggested a predictable swing between periods of a "public purpose" and "private interest."[1]

Without embarking on a full defense of cycle theories, it is hard to deny that the public's opinion of American big business seems to go through recognizable peaks and valleys. It swings between a vision of corporate leaders as admirable captains whose conduct serves the national interest (as in the 1880s, 1920s, and 1980s) to the contrary proposition, that large corporations tend toward evil and are run by self-serving barons (as in the 1900s, 1910s, 1930s, 1960s, and 1970s).

The 1900s and through the 1930s witnessed just such dramatic swings. During the progressive era, corporate leaders were decried as robber barons and saw their reputations besmirched and destroyed, particularly during the Roosevelt and Wilson administrations. Yet by the 1920s, under Coolidge and Hoover, business's reputation was rehabilitated and became the beloved and glamorous engine of all things American. That lasted, of course, until the Great Depression, which damaged the reputation of both the

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† For assistance with the preparation of this supplement, I thank Ella Solovtsova Epstein and Maya Barr Katalan.

[1] Arthur M. Schlesinger, Jr., *The Cycles of American History* 27 (1986) (explaining the cycle theory as "a continuing shift in national involvement, between public purpose and private interest."). The elder Schlesinger successfully predicted, in 1924, that the American affection for business would end in about 1932. *Id.* at 24.

financial industry and big business in a way that many, at the time, thought irreparable.

It may not be surprising to hear that antitrust law and its enforcement has been influenced by these cycles, for enforcement of the law amounts to an assertion of public resistance to private power and is aided by having the force of public opinion behind it. That is why, to understand the story of antitrust during the New Deal, we need to begin with the period that preceded it.

We can return to 1914, when antitrust law reached its hour of greatest triumph in the election of Wilson, as advised by Brandeis, and the passage of two laws (the Clayton Act and the FTC Act) meant to strengthen and complement the Sherman Act. Yet not too long after those laws were passed, the United States entered into the War, after which came the rehabilitation of big business under Coolidge and Hoover. By consequence, antitrust law had fallen into nearly as deep a hibernation by the 1920s as it had in the 1890s under President McKinley.

The reasons for this were numerous. One was the defeat of the movement that had inspired the antitrust laws in the first place. Three presidential administrations -- Roosevelt, Taft and Wilson -- had collectively taken a run at just about every major trust in existence and many of the minor ones as well, from tobacco to canning to filmmaking, and had achieved either breakups or settlements. J.P. Morgan, the great monopolizer, was dead, his fortune and control diminished. The Rockefellers had mellowed and turned to philanthropy, founding, among other institutions, the University of Chicago, a school whose influence over antitrust was still decades away. With the greatest trusts broken, there was less of an appetite for the breakup of "gentleman" monopolists -- that is, those without a clear record of villainy and abuse.

An indicator of how the mood had shifted by the early 1920s was the treatment of the U.S. Steel company, the behemoth which Morgan had created in 1901 by buying out Andrew Carnegie. At one point, U.S. Steel was actually a larger trust than Standard Oil, and had been a frequent target of Brandeis' ire and Congressional threats. Yet the firm, for some unclear reason, did not attract an early lawsuit from Roosevelt or Taft. When suit was finally filed in 1911, near the end of the Taft administration, U.S. Steel had weakened considerably and was no longer clearly a monopoly. It had also either mellowed with age or cleaned up its act. At least, that's what the Supreme Court thought when it announced that the firm had "resorted to none of the brutalities or tyrannies that the cases illustrate of other combinations [like Standard Oil.]"[2]

[2] United States v. United States Steel Corp., 251 U.S. 417, 440-41 (1920) (summarizing the district court opinion).

The Supreme Court pardoned U.S. Steel on the grounds, roughly, that it was a good trust, run by gentlemen, not hooligans. Along the way, the Court weakened the law considerably by announcing a principle that was a tough pill to swallow for those, like Justice Harlan, who believed that monopoly was an evil unto itself. For the first time, the Supreme Court suggested that being a monopolistic giant wasn't by itself enough to merit dissolution. The Court put it this way: "[T]he law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible."[3]

That was the 1920s. By the early 1930s, after the crash of Wall Street and the onset of a ruinous depression, the affection for big business had melted away. But among many progressive thinkers, the discussion had shifted. It was no longer about reinvigorating antitrust, but centered on an idea considered even more forward-thinking: migrating to a centrally planned, state-managed economy.

Known variously as "state capitalism," "planning," or "corporatism," the idea was to migrate to a state-directed economy which would accept industry cartels, and even monopolies, but demand that they serve the national interest. This was an idea first promoted in the United States by Theodore Roosevelt in the 1910s (his "New Nationalism) but the thinkers of the 1930s were more focused on expertise and planning than he had been. To prevent the mistakes that had led to the Depression, the idea went, expert government planners would direct production and pricing. By this theory, the small producers and process of competition so prized by antitrust aficionados would be rendered unnecessary, for everyone would now be working together.

With the global economy in wreckage, it is not surprising that bold solutions were in fashion. Capitalism's failings made central planning and corporatism seem to many a logical and perhaps unavoidable solution to economic distress. That sense was amplified by glowing accounts of the success of Joseph Stalin's first "Five Year Plan," which was credited with a massive increase in the industrial output of the Soviet Union from 1928-1933, a time in which capitalism's main economies were shrinking. A sympathetic and influential correspondent for the *New York Times*, Walter Duranty, lauded Stalin's approach and wrote that "[t]he whole purpose of the plan is to get the Russians going—that is, to make a nation of eager, conscious workers out of a nation that was a lump of sodden, driven

[3] *Id.* at 451.

slaves."[4] Duranty, unfortunately, did the world a disservice by neglecting to also report on the mass famines created by the plan, which may have killed as many as 7 million.

If following Stalin's economic vision might have seemed a bit much for the average American, the economic policies of Mussolini in Italy were, to some at least, an attractive and more moderate alternative. Unlike Stalin, Mussolini had not banned private ownership, but instead promoted "economic dirigisme," or an economy directed by the state. The Mussolini government explicitly licensed industry cartels and created state banks to provide credit to failing companies. These were attractive ideas to many in the United States, where many economists and businessmen took "ruinous competition" and "low prices" (deflation) to be the primary causes of the economy's collapse. The cure was a marriage of stronger government and stronger industry, which, with the agreement of organized labor, would do a better job of running the economy for the collective good. What could possibly go wrong?

The state capitalism craze of the early 1930s caught the ear of the new President, Franklin Delano Roosevelt, who had been elected based on a mandate that he'd "do something" about the Depression. To do something, Roosevelt needed ideas, for which he turned to his "brain trust" — a group of thinkers at first mainly comprised of professors from Columbia University, including figures like Raymond Moley, Alford Berle and, most important to our story, an economist named Rexford Tugwell. Tugwell, whom one critic called "the ideological philosopher of the Planners,"[5] was a leading advocate for the planned economy, one that would replace what he called "the anarchy of the competitive system."[6]

Let us consider the case for a planned economy as it was made in the early 1930s. Pure *laissez-faire* capitalism had clearly failed; everyone but Herbert Hoover could agree on that. As the planners saw it, a critical problem with market economies was the chaotic mismatch of supply and demand. Producers overestimated the demand for their products, in part because advertising — then a new art — had temporarily enhanced it. That had led to overproduction, falling prices (deflation), and failing industries. The better approach would be to seek to match supply and demand not by a chaotic market process, but through the exercise of centralized expertise.

Tugwell proposed that the U.S. economy be overseen by a 21-member National Economic Council which would take on the role of

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[4] Walter Duranty, *Red Russia of Today Ruled by Stalinism, Not by Communism*, N.Y. Times, June 14, 1931, at 1.
[5] Herbert Hoover, *The Memoirs of Herbert Hoover: The Great Depression 1929-1941*, at 388 (1952).
[6] Rexford G. Tugwell, *Design for Government*, 48 Pol. Sci. Q. 321, 326 (1933).

balancing supply, demand, and prices across industries. The Council would estimate consumer demand for all goods and coordinate production to meet demand. Only that way, Tugwell said, could one be "certain that the amount of goods flowing into the markets is proportional to the purchasing power of consumers."[7] Using the best available data, the Council would also set prices and prevent overproduction. Such planning, Tugwell suggested, was necessary "if we are not periodically to suffer from inflation, wrongly directed productive efforts, waste of capital resources, and consequent periods of stagnation…."[8]

The planners had another point, this one more tied to the process of competition itself: that competition was not only inefficient but also wasteful and, in some cases, failed to take advantage of economies of scale. Why should there be 10 hotels along a beach instead of one giant, more efficient hotel? Or why, for example, have two gas stations on one corner when one might do the job?

These examples might make obvious to the reader that a major challenge for economic planners is informational. It might be true that, given perfect information about everything (and perfect execution) a single centralized planner would outperform a decentralized economy. The problem lies with the assumption that it might be practical, or even possible, for any single, centralized entity to accumulate all of the necessary information and actually make accurate predictions.[9] To outperform the market, Tugwell's National Economic Council would have needed to estimate the right levels of supply and demand for thousands of goods for hundreds of millions of buyers in a complex and dynamic economy.

As anyone who has planned a large dinner party knows, planning is difficult even at that scale, let alone at the scale of an entire economy. And a mistake in party planning is one thing; when mistakes are made at the level of a whole nation, the consequences can be severe indeed. In retrospect, the experiments with planned economies in the Soviet Union, China, and Eastern European nations demonstrated just the power of this informational problem,

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[7] Rexford G. Tugwell, *The Brains Trust* app. at 526 (1968).
[8] *Id.* app at 525.
[9] Fredrick Hayek expressed the problem this way:

If we possess all the relevant information, *if* we can start out from a given system of preferences and *if* we command complete knowledge of available means, the problem which remains is purely one of logic. . . . This, however, is emphatically *not* the economic problem which society faces. . . . [T]he "data" from which the economic calculus starts are never for the whole society "given" to a single mind which could work out the implications, and can never be so given. F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519, 519 (1945).

compounded by other problems, like deliberate falsification of information for propaganda purposes. Occasionally, planners got things right (a matter made much of at the time). But they also made mistakes, and when they did, the unbuffered consequences were catastrophic. If one were to choose just one example of how badly central planning can fail, consider the Great Chinese famine of 1959-61, where a confluence of natural disasters, terrible mistakes in the execution of collective farming, and widespread efforts to hide those mistakes led an estimated 30 million to death by starvation.

In 1933, unaware of this grim future, the Roosevelt administration began to implement a planning model for the U.S. economy with the passage of a new law, the National Industrial Recovery Act of 1933, and the creation of a new agency, the National Recovery Administration (NRA). Less extreme than, but similar to, the cartelization program in Mussolini's Italy, this law all but replaced antitrust as the system governing competition in the United States. Here is how the first head of the NRA, General Hugh Johnson, explained its goals: "[T]he very heart of the New Deal is the principle of concerted action in industry and agriculture under government supervision looking to a balanced economy as opposed to the murderous doctrine of savage and wolfish competition and rugged individualism, looking to dog-eat-dog and devil take the hindmost."[10]

The Act asked industries to do something new and quite radical: to write their own codes of competition, promising an exemption from the antitrust laws in exchange. They were happy to oblige, for the law, in practice, allowed businesses to do what antitrust law forbade: namely, to agree not to compete.

To be sure, the law was not as strong or coercive as similar efforts in Italy or Germany. It wasn't the Soviet seizure of private industry to serve the ends of the state. Nor was it even the nationalization that yielded Crown Corporations in Britain and other countries. Instead, it included paradoxical and conflicting provisions designed to create a new economic order while still serving traditional American ideals, like the aid of small business, thus somehow trying to promote both competition and cartelization at the same time. But the ideology of the Act remained fundamentally corporatist — and as such was in tension, if not in direct conflict, with the very premises of the antitrust laws and Brandeisian ideals of a decentralized economy. For here was a program that promoted cartels or monopolies across the entire economy, aided and supervised by the government, introducing the terrifying possibility of the state contributing to what Brandeis saw as the "curse of bigness."

[10] Hugh Samuel Johnson, *The Blue Eagle from Egg to Earth* 169 (1968).

Over its two years of operation, the NRA gave businesses broad license to set their own prices and practices. More than 1,000 codes were submitted, exempting most of American industry from antitrust laws. In theory, the NRA discouraged explicit price-fixing, but allowed things like agreements on minimum pricing, supply, and product standardization -- price-fixing in all but name.

Having reset the basic rules of competition, Johnson and Tugwell sat back, like farmers who had planted seeds, waiting for the results. Unfortunately, to their surprise and disappointment, nothing happened. The hoped-for economic growth did not arrive. It needs some time, its advocates said, but they waited -- and still nothing happened. While there is great disagreement as to why, perhaps the simplest explanation was that the economic theory was wrong.

As we've said, the diagnosis was that prices were too low and businesses thus had no incentive to produce anything. But merely allowing *de facto* cartels to raise prices did not, in fact, stimulate economic growth. Instead, it made things more expensive, which, given slumping wages and wide unemployment, made people buy less instead of more. What the economy needed was stimulus — the kindling of demand, a point made famous by Maynard Keynes. Unfortunately, the artificially high prices allowed by the NRA were the opposite of stimulus. That is why today, economists are nearly unanimous in their condemnation of the experiment: the harshest critics estimate that it may have prolonged the depression by years and reduced GDP by some six to 11 percent.

The true believer in central economic planning might argue that the NRA wasn't given enough time or wasn't forceful enough. Perhaps industry should have been ordered to produce at controlled levels of supply dictated by the government, and also ordered to price at low levels, thereby spurring consumption. Some of Tugwell's defenders argue that Roosevelt was just too conservative, still too attached to "competition, small economic units, and fee simple property."[11] But the NRA had other, possibly fatal administrative problems. In practice, the NRA's code-drafting process was dominated by large firms which used the codes to set terms favorable to their ways of doing business. That prompted smaller firms to ignore the codes — the cheating that is typical of cartels. Enforcing the codes was costly. By the end of 1933, just six months after the bill's passage, the NRA had a backlog of more than 10,000 code violations.

The NRA also envisioned a new era of peaceful labor relations, hoping to facilitate higher labor standards and a new tolerance of unions, but big businesses resisted those dictates as well, as many

[11] Paul K. Conkin, *The New Deal* 39 (Abraham S. Eisenstadt & John Hope Franklin eds., Harlan Davidson, 3d ed. 1992).

refused to recognize unions at all. Labor unions retaliated with strikes. By the end of 1934, the idea of cooperation between labor, government, and industry collapsed into industrial warfare and actual violence. Ultimately, this failure may have reflected the intransigence of industry, or perhaps the fact that the NRA was just not as brutal as the Italian or German regimes and hence was ineffective as an attempt at corporatism. In any event, in a few years, it was just a bureaucratic mess.

Despite this failure, along with far worse ones in communist nations, the truth is that the concept of centralized planning has never fully lost its allure. It seems to have a special appeal to a certain kind of mind, the man determined to make his mark, like Robert Moses, New York City's planner extraordinaire, who proposed bulldozing many of Manhattan's historic neighborhoods to make way for freeways, so as to connect New Jersey to Brooklyn. Resistance to those plans came from a different breed of progressive in the 1960s and 1970s, like the urban planning expert Jane Jacobs, or E. F. Schumacher, who in 1973 wrote *Small Is Beautiful: Economics As If People Mattered*.

From this, it should be apparent that there is no permanent political valence associated with centralized or decentralized approaches to the economy. While in theory, the First New Deal was "liberal" and the early Trust movement "conservative," we can see that, in fact, they had much in common. Both were reactions to large economic shocks — the depressions of the 1890s and 1930s. Both took the view that a centralized and planned economy was superior to the chaos and unpredictability of competitive markets. And both saw progress in the shape of beneficent giants that hoped to leave behind a more primitive, selfish time and enter a new era marked by a ruling class whose motives transcended individuals' concerns. The real difference between the approaches lay in whom that ruling class would consist of. The Trust movement saw them as private planners of the sort represented by Rockefeller – industry tycoons – and Morgan – major bankers. The First New Deal put its trust in enlightened government planners. But both movements, at some level, believed in centralized authority – at an extreme, one that approached economic dictatorship.

By 1935, the American experiment in planning and corporatism was not going very well when the Supreme Court abruptly struck down the Act itself as unconstitutional.[12] The unanimous majority included Justice Brandeis and other liberal members of the Court. On the day of the decision, Brandeis gave the White House a warning of what was coming. "This is the end of this business of centralization," he told a White House aide, "and I want you to go back and tell the President that we're not going to let this government centralize

[12] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

everything."[13] When the decision came down, President Roosevelt, shaken, asked his advisors, "[W]hat about old Isaiah?" (meaning Brandeis). "With the majority," came the answer.[14]

With the NRA gone, there was, all at once, a vacuum left in that rather key matter of economic policy during depression. The Roosevelt administration was suddenly looking for new ideas and new staff. As is sometimes the way in American policy, having tried one approach for a while, the administration was happy to swing over to its opposite.

The Neo-Brandesians and the Second New Deal

In the mid-1930s, Felix Frankfurter was, officially at least, an academic, a professor at Harvard Law School, with no position in government. His status was a matter of choice: offered the role of Solicitor General in the new Roosevelt administration, he had declined. Yet he was nonetheless among the most influential figures in American policymaking, especially economic policy, as a leading architect of Roosevelt's second (and lasting) New Deal. Living full-time in Washington D.C. and acting both independently and through his network of disciples, allies and mentees (sometimes described as "Felix's happy hot dogs"), he did more than anyone to bring the ideas of Brandeisian policy back into the mainstream. For it was they who resurrected antitrust and its enforcement traditions in what was, at the time, described as a neo-Brandeisian movement.

Frankfurter's connection to Brandeis and his ideas was more concrete than was fully realized at the time. For Frankfurter was, in fact, an unofficial agent of Justice Brandeis, who was sequestered at the Court; Frankfurter even accepted Brandeis's financial support as he carried out political activities. It was thus that Brandeis, through Frankfurter and his mentees, was actively involved in the unexpected rebirth of antitrust in the late 1930s, despite the rise of an important rival: the "central planning" movement that was then at the height of its popularity.

Unlike the backers of the First New Deal, the Brandeis-Frankfurter school considered cartels an impediment to growth, and believed that in most industries, it was monopolization, excessive firm size and the misfeasance of bankers, not competition, that had helped create the Depression. While sympathetic to a role for government in helping the needy, the unemployed, and retirees, Frankfurter's followers were, in most cases, more hostile to the idea of a large federal government undertaking the centralized planning of the economy. As historian Ellis Wayne Hawley puts it,

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[13] Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Politics of Upheaval* 280 (1960).
[14] Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* 99 (1958).

> If the philosophy of the Brandeis-Frankfurter adherents and their allies could be summed up in one word, that word would probably be "decentralization." … Large, monopolistic organizations, they held, were not the result of technological imperatives. They grew instead from the desire to avoid competition, the desire for promoters' profits, and the fact that "finance" simply went out and forcibly merged "a flock of little business concerns for milking purposes." … Competition, in other words, could and should be restored and maintained.[15]

The neo-Brandeisians thought that the government's job was "to recreate a system of economic democracy as the basis for political democracy…."[16] Echoing the criticisms we've already made, they felt that "detailed economic planning in a country as vast as the United States was simply incompatible with a democratic society."[17]

The Frankfurter-Brandeisians also took a view later associated with conservatives like Fredrick Hayek: that excessive concentration and monopoly might lead to a government of dangerous size and power. Created to counterbalance industrial giants, governments might instead form a union with them, combining private and public power. For the neo-Brandesians, the First New Deal represented a dangerous flirtation with fascism. In this, they parted ways with Tugwell, who believed that the Soviet economic model was "worthy of serious consideration."[18]

The increasing acceptance of such views would take the nation in a direction different from that of the First New Deal, which is why historians refer to the period from 1935 onward as the "Second" New Deal. The full influence of the neo-Brandeisians on economic policy is too extensive to chronicle here, but it included the establishment of the Security and Exchange Commission in 1934, the passage of the Banking Act of 1935, and, most importantly for our story, the resurrection of the lost antitrust enforcement tradition. That came through Roosevelt's appointment of two men to head the Justice Department's antitrust division, two men who may set an example for our times: Robert Jackson and Thurman Arnold.

Robert Jackson is the better known of the two, for he would later serve as a Supreme Court Justice and as the head prosecutor for the Nuremberg war crime trials. Jackson had, by the time of his

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[15] Ellis W. Hawley, *The New Deal and the Problem of Monopoly* 286-87 (Princeton Univ. Press 2015) (1966).
[16] *Id.* at 288.
[17] *Id.*
[18] Rexford Tugwell & Howard Hill, *Our Economic Society and its Problems* (1934) 521-525.

appointment, already gained a measure of national fame by prosecuting Andrew Mellon, the Pittsburgh magnate who had served as Treasury Secretary for more than a decade under Harding, Coolidge and Hoover, for tax evasion. (Jackson's prosecution led, among other things, to Mellon agreeing to build the National Gallery in Washington D.C. as a settlement).

Jackson was Roosevelt's "legal ace," and in 1937, under the influence of the neo-Brandeisians, FDR appointed him to rehabilitate the Justice Department's antitrust division.[19] In that role, Jackson personally rebooted a moribund office that had all but abandoned law enforcement in the age of government-licensed cartels. As Jackson later recounted, "It was not until I came into the Department that the [planning] philosophy was definitely abandoned and we reverted to the Woodrow Wilson doctrine that free competition is the wisest and most liberal measure of business regulation."[20]

Jackson fired up the engines of prosecution with two major cases. The first was a broad indictment of price-fixing in the oil industry: he charged 24 major oil companies and 46 officers in a criminal action.[21] The second was a 130-count indictment of Alcoa, the aluminum monopolist and one of the last of the old trusts (and also a firm closely associated with Andrew Mellon, his bête noir). With suits against the oil industry and the Aluminum trust, Jackson was asserting what he called "a sovereignty of public over private interest in business."[22]

If these two big cases suggested a new vigor, they were merely a hint of what was to come next. For after promoting Jackson to Attorney General in 1938, Roosevelt selected a little-known professor and Washington outsider to take over antitrust enforcement. His name was Thurman Arnold, and the mark he would leave on the trust-busting tradition would, in time, be comparable only to that of Theodore Roosevelt's.

Arnold himself may have seemed an unlikely figure to wear the trustbuster's mantle. Born in small-town Wyoming, he had, by the 1930s, developed a reputation for being an eccentrical loose cannon.

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[19] Matthew Stoller, *Goliath* 130 (2019).
[20] R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787, 789-90 (2005) (quoting Robert H. Jackson, *Draft Autobiography* 86-87 (Box 190, June-July 1944) (on file in the Robert H. Jackson Papers, Library of Congress, Manuscript Division)).
[21] The price-fixing in question was the system of controlling the supply of oil that had been explicitly blessed by the National Recovery Act, which led the industry to complain that they were simply doing what the government had suggested. Jackson's prosecution, in that sense, established the return to antitrust policy.
[22] Robert H. Jackson, *Should the Antitrust Laws Be Revised?,* 71 U.S. L. Rev. 575, 576 (1937).

He had the academic's manner of disheveled dress, carried a pipe at all times, and liked to make inappropriate jokes. He had written a book, *The Folklore of Capitalism*, that compared the antitrust laws to laws banning prostitution — in other words, laws merely honored in the breach. One contemporary called him just "another Marx brother who had strayed into the government by mistake."[23] But all this was not inconsistent with a fierce, courageous, crusading character that could be almost foolhardy in its extremes.

Arnold's approach to antitrust enforcement borrowed from criminal prosecution. He favored what he called "shock treatment" — suing not just one monopolist, but all the members of an oligopoly at once, along with any vertical co-conspirators. He would later compare himself to a traffic officer: he thought it was important to spell out, frequently and clearly, the rules of the road, and thought that only through arrests and punishments might a true deterrent effect be achieved. As law professor Spencer Weber Waller writes, "Arnold believed that the only thing that would make businessmen behave was the threat of indictment. When he brought a case, he would indict the individual defendants and have them fingerprinted like ordinary criminals."[24]

Enforcement and publicity went hand in hand for Arnold, who had a taste for the theatrical. His strategy, he once said, was to "hit hard, hit everyone and hit them all at once."[25] Soon after arriving in office, he penned a lengthy feature in the *New York Times* entitled "An Inquiry Into the Monopoly Issue" wherein he described monopoly as both a tax on society and a threat to democracy. The monopoly, he wrote, "is a dictatorial power subject to no public responsibility, which is the antithesis of our democratic tradition."[26] He promised the public prosecutions coupled with "public statements giving the reasons for [the] prosecution policy in particular cases or the reasons why the particular procedure was selected."[27]

But behind his trust-busting theatrics was a macroeconomic theory of how antitrust could fight the still-lingering Depression. The First New Deal had encouraged price-fixing and cartelization, which had done nothing to help the moribund economy and, Arnold believed, had left behind cartels and other barriers to economic growth. He believed that if he systematically broke the cartels, prices

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[23] Hawley, *supra* note 15, at 423.
[24] Spencer Weber Waller, *Thurman Arnold: A Biography* 86 (2005).
[25] Joseph Alsop & Robert Kintner, *Trust Buster: The Folklore of Thurman Arnold*, Saturday Evening Post, Aug. 12, 1939, at 5.
[26] Thurman Arnold, *An Inquiry into the Monopoly Issue*, N.Y. Times, Aug. 21, 1938, §7, at 1.
[27] Thurman W. Arnold, *Prosecution Policy Under the Sherman Act*, 24 A.B.A. J. 417, 417 (1938).

would fall, which would lead consumers to buy more, thereby increasing production incentives and generating more employment, which would allow for more consumption, spur supply, and further increase employment. Arnold saw his charge as breaking "bottlenecks to business".[28]

And bring cases he did, unlike any other antitrust enforcer before or since. By 1939, he had filed 1,375 complaints in 213 prosecutions involving 40 industries, while pursuing 185 ongoing investigations. His antitrust department grew to nearly 600 attorneys. His first success came early on, in the form of a suit against the three big car manufacturers (GM, Ford and Chrysler) who had forced dealers to use their finance companies (a tie, in antitrust terms). Arnold reinvigorated an attack on the film industry, calling it "distinctly un-American," as it was organized with a "vertical cartel like the vertical cartels of Hitler's Germany, Stalin's Russia."[29] Arnold's 1938 lawsuit against the film studios charged 28 separate violations of the Sherman Act and demanded that the film studios "divorce" their theater holdings.[30] He took on the dairy industry, impanelling a grand jury in Chicago and quickly bringing charges of a widespread conspiracy to prop up the price of milk and keep out competitors. In an act of particular courage, he filed suit against the American Medical Association, which he charged with preventing competition among health insurance plans.

Throughout these wars, Arnold liked to publicize what he had done for the public good. For example, in 1939, the construction industry came in for a "shock treatment" — a massive prosecutorial drive producing some 99 criminal actions and 22 civil suits that, Arnold claimed, saved the public over $300 million in building costs. The frenzy of activity continued even into the early days of the war, until Arnold called it quits in 1943. Even with the war beginning in Europe, the agency filed another 180 antitrust cases between 1939 and 1941.

Did his shock treatment have macroeconomic effects? It is hard, if not impossible, to isolate the effects of antitrust enforcement from other factors, but at least some scholars believe that the massive enforcement campaign contributed to ending the Depression. Einer Elhaughe notes that prices really did begin to drop across industries, and that industrial production began growing, for the first time in years, in 1938, before war spending had begun.[31] To be sure, there

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[28] *See* Thurman W. Arnold, *The Bottlenecks of Business* (1940).
[29] *Arnold Demands a Movie New Deal*, N.Y. Times, Apr. 23, 1940, at L19.
[30] His successors in office won the case and achieved a sweeping reorganization of the American film industry that ended the old studio system. See United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).
[31] Einer Elhaughe, *Horizontal Shareholding*, 109 Harv. L. Rev. 1267, 1286-90 (2016).

were other factors and regulatory programs underway, but Elhaughe makes a convincing case that Arnold's enforcement campaign helped restart the engines of the U.S. economy. The fact was, with so many economic cartels in existence, Arnold had plenty of low-hanging targets.

If, in retrospect, Roosevelt, Taft and Wilson had taken on the monopoly trusts, Jackson and Arnold's greatest contribution lay in the defeat of the cartel. Arnold wrote that "[a]fter a period of fifty years of only occasional enforcement, violations of the antitrust laws have become so common as to cause no comment. Lawyers in many communities have been scarcely aware of their existence."[32] He reversed this by systematically breaking each and every cartel in nearly every industry, and reestablishing the bite in the "per se," or categorical, rule against price-fixing.

The antitrust revivalists of the 1930s and 1940s also had something to say about monopoly, and we shall get to the famous *Alcoa* case in a moment. But first, let us turn briefly to a different topic of tremendous importance to today's economy: the matter of retail, and the effort, over the 1930s, to save small businesses from the arrival of national chains.

The Chains, Small Retailers and the Robinson-Patman Act

Well into the 1920s and 1930s, retail remained an exception to the great consolidations of the original Trust movement. The United States remained a land of small hardware stores, grocers, pharmacies, and general stores, while the "giants" of the industry were large department stores, like Macy's of New York or Marshall Field's of Chicago, which had a few branches at most. As sociologists Paul Ingram and Hayagreeva Rao write, "the independent retailer was a deeply institutionalized element of American economic and social life, ingrained in the prevailing concept of community, and a key link in the opportunity structure that was then seen as a foundation of American democracy."[33]

It was the "chain store" that challenged and transformed American retail. Among the first were J.C. Penney, Sears, and Woolworths; perhaps the most aggressive was the grocery chain A&P, short for "The Great Atlantic & Pacific Tea Company." These stores differed from department stores in two respects: scale and standardization. Whereas most retailers had been local, the chains were regional in scope, sometimes national, with hundreds and even thousands of stores around the country, all of which operated in a

[32] Thurman Arnold, *Antitrust Law Enforcement, Past and Future*, 7 Law & Contemp. Probs. 5, 12 (1940).
[33] Paul Ingram & Hayagreeva Rao, *Store Wars: The Enactment and Repeal of Anti-Chain-Store Legislation in America*, 110 Am. J. Soc. 446, 447 (2004).

similar fashion. J.C. Penney expanded from 312 stores in 1920 to 1452 stores in 1930; A&P reached over 10,000 stores by the mid-1920s and by 1930 was the world's largest retailer, with 16,000 stores and some $2.9 billion in sales.

Let us turn for a moment to the economics of the chains. As businesses, the chains were far larger than any of their competitors, including department stores. They claimed that they were more efficient, based on their "scientific management" practices. But let us focus on their size, which gave them two advantages: volume and buying power. There is an important distinction between the two. A volume discount refers to the fact that, as with any larger retailer, the chains could seek a discount on large orders. But beyond this, the chains, based on their size, could also exercise buying power: that is, demand a lower price not merely based on the size of the order, but also on their relative importance as buyers.

To make this point concrete: most producers offer volume discounts because of the certainty and reduced transaction costs inherent in one large order. As such, a coffee grower might have costs of $1 per pound for processing a bulk order and $1.50 for a small order, and might therefore give the volume buyer a price of $2 a pound instead of $3. But if the larger buyer (say, Starbucks) represents enough of the market, the buyer can demand that the coffee grower cut into its own margin — say, by selling it coffee for $1.50 instead of $2 — on pain of losing Starbucks' business.

This gave (and continues to give) the chains lower cost structures, which allowed them to cut their prices and bill themselves as cheaper alternatives to traditional stores. Lower prices were always, and will always be, the calling card of chain retail and large retail establishments.

Buying power (also known as monopsony power) was the trademark economic issue created by chain retail. In contrast, the chains, even at their height, rarely had a monopoly in sales, at least by the usual definition. At the height of the concerns over the chain movement, in the early 1930s, the chains collectively comprised some 20% of retail sales and 40% of grocery sales, which is considerable, but nowhere near the >90% monopoly on oil refining controlled by Standard Oil, or the 100% monopoly on virgin aluminum enjoyed by Alcoa. Furthermore, unlike production monopolies, which tend to raise prices across the economy, the chains tended to cut prices. But in a different way, the chains also wielded their power in a way that went beyond that of the trusts. The trusts held a power that was more distant; the chains reached into every American town and overturned the tradition of local ownership of main street retail.

As you might imagine, chains were not popular among existing retailers, wholesalers, and manufacturers. They were also resisted by local civic groups and anti-monopolists, yielding an "anti-chain" movement that launched in the 1920s and gained considerable political power. By 1929, there were anti-chain associations in some 400 cities; among the prominent individuals and groups in opposition were a diverse mix of figures that included populists like Huey Long, the future Supreme Court Justice Hugo Black, unions, agrarians and farmers. That both the Ku Klux Klan and African-American groups were in the anti-chain movement gives a sense of the breadth of the opposition.

Meanwhile, the popular campaigns against the chains were, at some level, fundamentally different than the anti-trust campaigns. Whereas the case against the trusts was economic, social and broadly political, the case against the chains was centered on the ideals of localism. The movement was grounded in the ideals of self-rule by towns and regions, the importance of protecting local businesses and communities, and a way of life implied by small retailers.

With the anti-chain movement came the birth of "shop local" campaigns, billed as a form of resistance to the intrusions of "foreign" chains which would take local money and send it off to a distant home office. Hence, for example, a southern campaign to "Keep Ozark Dollars in the Ozarks."[34] The fear was that regions would lose not just their economic life, but also their identity. As one pamphlet put it, the chains were a "privilege-seeking few—[that] seek . . . the dictatorship of big money—a state of financial feudalism . . . privilege-seeking tycoons . . . would-be dictators."[35]

Here is New Dealer and future Supreme Court Justice Hugo Black on the subject: "We are rapidly becoming a nation of a few business masters and many clerks and servants. The local man and merchant is passing and his community loses his contribution to local affairs as an independent thinker and executive. A few of these useful citizens, thus supplanted, become clerks of the great chain machines, at inadequate salaries, while many enter the growing ranks of the unemployed."[36]

The anti-chain movement did not limit itself to rhetoric, but pursued laws designed to slow, if not stop, the "invasion" of the chains. As the Great Depression hit and stayed, hurting most businesses and bankrupting many, the calls for action became stronger. By the early 1930s, numerous states had enacted anti-

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[34] Hayagreeva Rao, *Market Rebels: How Activists Make or Break Radical Innovations* 123 (2009).
[35] *Id.* at 451 (quoting Nat. Assoc. Retail Druggists J., Apr. 2, 1938, at 397).
[36] 72 CONG. REC. 1239-40 (1930).

chain taxation schemes; the Supreme Court, which struck down so much regulation during this period, upheld an Indiana tax scheme that imposed increasing taxes on businesses that operated large numbers of stores in the state. Federal anti-chain advocates pressed for a federal tax. Among the most prominent of these was Wright Patman, a Texas Congressman who made the movement into his calling and career.

By the mid-1930s, as the neo-Brandeisians gained power in Washington, the anti-chain movement began to borrow from the anti-trust tradition by focusing on the idea that the chains used methods that amounted to unfair competition. By 1935, Wright Patman had opened Congressional hearings into the buying practices of the chains that attracted national attention, especially when he revealed various predatory practices on the part of A&P, including both "killing prices" deliberated designed to destroy independent rivals and what was alleged to be a system of secret kickbacks demanded by the chains from producers. The kickbacks were tied to the idea that the chains used their buying power to induce manufacturers to favor them and discriminate against smaller rivals.

It was wrong, Patman believed, for the chain to go beyond merely gaining volume discounts (which might be available to all) and instead assert its power and size to demand discrimination in the form lower prices for itself and higher prices for its rivals. It seemed to him particularly unfair when such lower prices were disguised as rebates or advertising fees. Men like Patman saw that as nothing other than unfair competition — or more precisely, what began to be known as "price discrimination."

The push to ban price discrimination, in a Congress overwhelmingly on the side of small businesses and wholesalers, became the Robinson-Patman Act of 1936. As enacted, it banned two types of price discrimination. The first was targeted at "killing prices" used by a chain in one area but not others. It would now be illegal for a chain to lower prices in Ann Arbor, for example, while keeping prices higher elsewhere if the apparent goal was to destroy the local competitor.

The second and further-reaching ban prevented wholesalers from giving in to demands for rebates, kickbacks, and other discriminatory pricing schemes. Hence, if Walmart, the giant retailer, demands a lower price on bicycles from a manufacturer than another sports store in the same town and the wholesaler complies, the wholesaler would be in violation of the Robinson-Patman Act. The Supreme Court would later make clear how seriously it took this prohibition, when it found Morton Salt in violation of the Robinson-Patman Act for offering a lower price on salt for those who bought over 50,000 cases. Noting that only five chain stores were able to take advantage of the lowest price, Justice Black wrote that

"Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability."[37]

The Robinson-Patman Act and related state laws had a major effect on the chains over the 1930s, halting their further growth. The major grocery chains suffered a 57% loss in their stock value in 1936, and their share of sales, which peaked in 1935, began to decline.

However, at the risk of stating the obvious, the chain did not disappear, and in fact, in the form of Wal-Mart, and later Amazon, the large, centralized retailer continued to gain strength from the 1980s onward. So what happened?

By its letter, the Robinson-Patman Act would seem to make illegal the business model of firms like Walmart, which rose to prominence by exercising its buying power to cut into the margins of suppliers. Amazon does the same; its suppliers commonly complain of being squeezed. That's why it must be understood that the rise of Walmart and Amazon and the triumph of the chains is a byproduct of the *de facto* nullification of the Robinson-Patman Act that began in the 1980s.

The law has not been legally repealed, but rather, informally repealed by judges and enforcers who do not agree with its economic philosophy. That happened in part in the courts, where judges allowed manufacturers to escape the scrutiny of the law through the artifice of selling trivially different products to independent retailers and big box stores (the latter at lower prices). The law was also severely weakened by incorporating the requirements of other parts of the antitrust law, such as proof of recoupment of monopoly profit.[38] And finally, the Federal Trade Commission has all but abandoned the statute, effecting a repeal by prosecutorial discretion.

There is, to be fair, a very strong economic case against the Robinson-Patman Act – namely, that it is anti-consumer. Firms like Walmart and Amazon, by squeezing the profit margins of suppliers, make things cheaper for buyers. Hence, if lower prices for customers is to be the goal of the antitrust laws writ large, the law is counterproductive in all but very rare cases. The Robinson-Patman Act, critics charge, can also protect inefficient retailers — the local hardware store, say — instead of allowing their replacement by larger and more efficient firms.

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[37] FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948).
[38] See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

A strong Robinson-Patman Act likely makes goods more expensive, but might also protect local stores from displacement and help regional economies. The real question is whether Congress is allowed to make that choice: to favor localism over efficiency. And whether or not you believe in localism, and think smaller retailers deserve such protections, the idea that Congress doesn't get to choose is profoundly anti-democratic.

This is why it is a mistake to view the Robinson-Patman Act as an anti-trust law, as opposed to an anti-chain law, designed to promote different values. From that perspective, to say that Congress cannot level the playing field for local businesses is to take a narrow view of economic efficiency and give it an illegitimate constitutional status. For there must be room, in a democracy, for economic legislation designed to promote something other than lower prices for consumers. We are consumers, yes, but also workers, employees, producers. We do more than buy. The squeezing of suppliers and the bankrupting of rival retailers extracts costs that may not be measured in terms of lower prices, but instead are reflected by lower wages, depressed regions of the country, and so on. Surely, the law is allowed to protect non-economic values as well, such the promotion of local ownership, a vibrant main street, and the possibility of regional differences instead of homogeneity.

That said, there is room for those who agree with the goals of the Robinson-Patman Act to question its means. Monitoring the pricing practices of wholesalers may, in practice, be an unworkably difficult means of protecting local stores from chains. It might be better for regions to keep out chains themselves using zoning laws (as Vermont does), or to use the tax code to subsidize small businesses, or find other ways to help main street against chains and online retail.

This debate over retail has not and will not disappear, because it implicates values that transcend the merely economic. How people buy things profoundly impacts what cities and towns look like, and how much different parts of the country resemble each other. It has a lot to do with what Jane Jacobs called the life and death of great American cities: changes to the structure of retail help explain why American cities and towns transform from vibrant, if crowded, downtowns, to malls and strip-malls and big box stores, to today's giant warehouses.

In our times, similarly, the trend toward online sales will unquestionably transform urban landscapes; indeed, it already has. It may leave behind cities that are mainly showrooms for stuff to be bought online, interspersed with coffee shops. The impact on small towns may be even harsher, as the big box stores are driven out of business and retail ceases to employ people outside of warehouses

and delivery. And if Congress or states have such concerns, they should have the power to act.

That's why it is not hard to imagine a new set of rules designed to support local or regional retailers. To express that aim is not to provide a clear means to achieve it. The idea of policing every distribution agreement for pricing disparities would seem a daunting task. In some areas, government-run retail, like grocery stores operated by the town at cost, are appearing in American towns, operated by locals. There may be room for more public ownership of local retail following the model of the Green Bay Packers, the only NFL team owned and operated by the public. Or, if local retail is understood as a public good, it might be worth thinking differently about how it is supported.

In any event, this remains a public policy challenge that is ripe for fresh thinking. But let us now leave behind retail sales to return to the 1930s, and our pet topic, the treatment of monopoly.

Alcoa and The Problem of Persistent Monopoly

The original trust-busting era of the 1900s yielded an enforcement tradition with two main targets. The first was the abusive trust, exemplified by Standard Oil. The second was the Morgan Trust -- that is, the firm specifically created to monopolize an industry. Yet still unanswered was the question of how the government should deal with a different kind of monopolist — the "persistent trust": the firm that dominates its industry for decades, but does not have an obvious pile of corpses in its backyard.

Alcoa would become the test case for persistent monopoly. Co-founded by Andrew Mellon, it was one of the few survivors of the first wave of attacks on the trust. That's not to say it got away unscathed: in the 1900s, its price-fixing agreements with foreign cartels and exclusive agreements with power companies attracted a lawsuit from the Taft administration, but Alcoa settled in 1912 and avoided a breakup. By the 1930s, it had, for decades, held onto a persistent monopoly in aluminum product markets — most importantly, "virgin ingot," or raw aluminum, in which it held a pure (100%) monopoly.

To say Alcoa wasn't obviously abusive isn't to suggest that it was universally loved. As Matt Stoller highlights in *Goliath,* Alcoa's co-founder, Andrew Mellon, was a symbol of corporate villainy.[39] Mellon served as Treasury Secretary for Herbert Hoover and had initiated widely unpopular budget cuts that had deepened the Depression. He also evaded taxes while serving as Treasury Secretary by falsely claiming to have sold stocks (at a loss) that he

[39] Stoller, supra note 19, at 67-73.

had actually given to family members. "Alcoa had become the very model of industrial concentration," George Smith writes, "and its principal owners had become exemplars of the kind of corporate barony that seemed distant, powerful, and dangerous to the popular mind."[40] Andrew Mellon, meanwhile, was the "dour personification of the political and social bankruptcy of corporate capitalism."[41]

The question posed by the Alcoa case was a difficult one: what to do about a firm that dominates an industry for decades, enjoys an uncontested monopoly position, deters or defeats any would-be competitor, all without evidence of wrongful conduct?[42] It is a problem we continue to face today in many areas. Many broadband providers seem to enjoy a local monopoly. Is that simply something that must be accepted like a fact of nature, or should something be done? Google dominates search and search advertising: what of it?

The position of a man like Justice John Marshall Harlan was unequivocal: if you think of monopoly itself as a scourge and an evil, then the law should eliminate all monopolies, not just those with bad manners. He has been joined in this view by some economists, like Nobel Laureate Oliver Williamson, who agree on the economic merits. If monopoly is by its nature harmful, a tax on the public, then who cares if the monopolist himself is an angel or a devil? As Williamson once put it, "[The] persistent dominance of an industry by a single firm is not to be expected" and long-term, sustained dominance "should be regarded as an actionable manifestation of market failure."[43]

But there has long been resistance to action against the "innocent" monopolist, or the treatment of monopoly itself as an offense. The lawyer's instinct rebels against punishment absent some wrongful act, an *actus reus*. The business person rebels against the idea of punishing a firm for its success. Hence there has long been some line, reflected early on in Theodore Roosevelt's distinction between the "good trusts" and the "bad trusts," with evildoing, abuse, and public anger drawing the line.[44] Of course, these lines are subjective by nature: William Randolph Hearst once charged that the "good trusts" were "[those] that politically supported Roosevelt."[45]

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[40] George David Smith, *From Monopoly to Competition: The Transformations of Alcoa, 1888-1986*, at 196 (1988).
[41] *Id.* at 198.
[42] Contrary to economic logic, because classic economics predicts that an undefended monopolist will attract challengers seeking profits available to the monopolist and thus erode its market power.
[43] Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 Harv. L. R. 1512, 1514 (1972); *Id.* at 1516.
[44] There was support for both positions in the history of the Sherman Act itself.
[45] William Randolph Hearst, *Truths About the Trusts* 4 (1916).

Nonetheless, there is a powerful intuitive appeal to the good trust/bad trust approach. Many of the firms that achieve monopoly are, especially in their early years, magnificent operations, and it may seem that dismantling them would be more of a tragedy than a victory. The judge might refuse to convict a man absent wrongful deeds or an evil intent. More practically, the prosecution of a widely beloved business might be political suicide. Hence the instinct to draw *some* kind of line that differentiates the bad monopolies from the good.

Jackson prompted a reexamination of the monopoly question when he charged Alcoa with 130 violations of the Sherman Act and sought to dissolve the company. He served 26 defendants with indictments, including Andrew Mellon himself. In a memo to the Attorney General, Jackson wrote that he believed that a "100 per cent monopoly with the absolute power to exclude others constitutes an illegal monopoly *per se* under Section 2 of the Sherman Act."[46]

Alcoa immediately protested that it had done nothing wrong. Calling itself the "most investigated company in America," it told the *New York Times* that it had already been "cleared… of any charges of monopolistic practices" (in the 1912 lawsuit) and that "there are no bars to stay anyone who wants to engage in the manufacture of virgin aluminum."[47] It had not abused its power over the channels of commerce like Standard Oil had, and had never sought extraordinary profits but maintained reasonable prices. In other words, Alcoa thought itself innocent and was ready to fight it out.

There were, however, international dimensions to Alcoa that made it more complex than the "innocent monopolist" story might suggest. The government alleged that Alcoa maintained its monopoly by virtue of world-wide cartel that it managed through its Canadian subsidiary, whose president, Edward K. Davis, was the brother of Alcoa chairman Arthur V. Davis. The Canadian firm, for its part, was part of an open, and then-legal Swiss cartel, known as the Alliance Aluminium Compagnie, which restricted world production and set a global price. According to the government, there was a deal: in exchange for Alcoa not invading European and Japanese markets, its competitors had agreed to stay out of American markets, leaving Alcoa unmolested.

The Alcoa trial lasted for more than five years, produced a 58,000-page record, and ended with a victory for Alcoa in 1941. The

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[46] Pate, *supra* note 20, at 793 (quoting Memorandum for the Attorney General from Robert H. Jackson, Assistant Attorney General 2 (Mar. 16, 1937) (on file in the Library of Congress, Manuscript Division, Box 77)).
[47] *Mellon Company is Sued as Aluminum Monopoly; Its Dissolution is Sought*, N.Y. Times, Apr. 24, 1937, at 1.

trial judge, Judge Caffey, seemed to take the case as a question of corporate character: a determination of Alcoa was a good trust or bad. He believed that the government needed to show something more than "mere" monopolization, something wrongful or brutal, something more than just a friendly cartel arrangement. At trial, Judge Caffey (described by TIME as "bright-eyed [and] scrawny-necked"[48]) was seemingly charmed by Alcoa's charismatic chief executive, and impressed by the number of customers and competitors Alcoa was able to put on the stand to "praise[] its fairness as well as its helpfulness."[49] Maybe most importantly, Caffey dismissed the international cartel allegation by crediting denials by Alcoa's Canadian President, whom he found "reliable" and "candid."[50] To his mind, Alcoa was a good company, run by good men, and therefore, even if a monopolist, one of good character and hence not an illegal one. He announced his judgment by reading it out in open court over the course of nine days. To say that this drove Thurman Arnold crazy would be an understatement.

Arnold filed for an appeal, but just about then, the Japanese Navy bombed Pearl Harbor and everything was put on hold for the war. Over the 1940s, Alcoa's projected image of a "good trust" was damaged by a government investigation that accused Alcoa and other firms of complicity with German industry pre-War, in what critics called the "peace at Düsseldorf." The appeal was also complicated by the fact that Robert Jackson, who had brought the case, had now joined the Supreme Court, along with three other lawyers who had been at the Justice Department during suits against Alcoa.[51] At the time, the government had the power to appeal all antitrust cases directly to the Supreme Court. In a highly unusual move, Congress authorized the most senior judges of a lower court, the Second Circuit Court of Appeals, to hear the *Alcoa* appeal, and the task of writing the opinion was assigned to its most famous judge, Learned Hand.

Learned Hand was, at the time, surely the most distinguished jurist not on the Supreme Court, and his reputation as one of the greatest judges of the 20th century has survived, if not grown. He was a self-styled progressive, and in the 1910s he backed Theodore Roosevelt, who by that time had come to believe in regulated monopoly as the ideal form of business. Hand's private letters indicated strong personal misgivings about the *Alcoa* case, and even perhaps about antitrust itself. Nonetheless, he and his fellow judges "strove to fulfill what they regarded as their duty to apply the

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[48] *Aluminum: Judge Caffey Says It's Legal*, Time, Oct. 13, 1941.
[49] United States v. Aluminum Co. of Am., 44 F.Supp. 97, 309 (S.D.N.Y. 1941).
[50] *Id.* at 282.
[51] Stanley Reed and Frank Murphy were in Roosevelt's Justice Department, and Chief Justice Harlan Stone had represented the United States against Alcoa in the 1920s.

Sherman Act as they perceived Congress to have intended."[52] As he wrote in an internal memo: "Alcoa has had undisputed control of the ingot market from the start; it has kept it deliberately and indeed in the face of some efforts to break in. If we hold that it is not a monopoly, deliberately planned and maintained, everyone…will, quite rightly I think, write us down as asses."[53]

Hand reversed the district court's decision and authored a classic opinion that is among the most important in antitrust history.[54] As we've seen, Alcoa's defense was that it had done nothing wrong. It argued that, even if it held a monopoly, its prices were fair, and there was no economic harm to be seen. To this, Hand responded that "[t]he [Sherman] Act has wider purposes… Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone."[55]

This poetic sentence, translated into contemporary economic language, stresses the dynamic costs of monopoly -- that is, the deadening impact of monopoly on the economy, a matter distinct from the threat of higher prices. In other words, the costs include stagnation and lack of innovation. Hand was suggesting that these economic ills — resulting necessarily from the mere fact of monopolistic domination — could be the basis for legal action.

Beyond this economic point, Hand, returning to the origins of the Sherman Act, repeated that it had political goals as well. "We have been speaking only of the economic reasons which forbid monopoly," he wrote, "but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results."[56] Among those were "a desire to put an end to great aggregations of capital because of the helplessness of the individual before them…. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."[57]

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[52] Marc Winerman & William E. Kovacic, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 Antitrust L. J. 295, 304 (2013).
[53] *Id.* at 295-96.
[54] He stated that he personally did not think the company deserved it, but that it would "make an ass" of the system not to break up a dominant monopoly like Alcoa.
[55] United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 427 (2d Cir. 1945).
[56] *Id.* at 428.
[57] *Id.* at 427-28.

Was Hand saying that every trust, then, was illegal — that every monopoly was to be condemned, as Justice Harlan had thought was the real purpose of the antitrust law? Not quite: Learned Hand sustained Roosevelt's old division between good trusts and bad, but described it differently.[58] As he put it, "[a] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry….The successful competitor, having been urged to compete, must not be turned upon when he wins."[59]

But if he allowed for the idea of the innocent or accidental monopolist, Hand, in *Alcoa,* made sure it was a narrow category. Alcoa had kept its monopoly for decades and, Hand argued, used its size to ensure no challenger would grow enough to challenge its dominance. As he wrote, "[Alcoa's] size, not only offered it an 'opportunity for abuse,' but it 'utilized' its size for 'abuse,' as can easily be shown...[Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."[60] Ultimately, not to find Alcoa guilty of monopolization would "emasculate the Act; would permit just such consolidations as it was designed to prevent."[61] [62]

With *Alcoa,* the big case tradition took a new step: sustaining monopoly (here coupled with entering into a foreign cartel agreement) was now a violation of the Sherman Act. This view is very similar to the view that takes monopoly, by itself, as a plague on the competitive economy. The judicial elaboration of this view reached its fullest extent in the hands of district Judge Wyzanski in the mid-1960s. As he wrote, "More than seven decades of Sherman Act enforcement leave the informed observer with the abiding conviction that durable non-statutory monopolies … are, to a moral certainty, due to acquisitions of competitors or restraints of trade."[63]

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[58] At some level, Hand was compelled to follow the holding of U.S. Steel, which had insisted that holding size and power alone was not an offense and that there needed to be anticompetitive conduct to prove a violation of the Sherman Act.

[59] *Id.* at 430.

[60] *Id.* at 430-31.

[61] *Id.* at 431.

[62] While the government won the case against Alcoa, it technically did not break up the company, for things had changed dramatically by the end of the litigation. By the end of the war, the government itself had built its own aluminum production capacities that amounted to two thirds of national production, and competition in the market was achieved by selling wartime aluminum assets to Alcoa's competitors.

[63] United States v. Grinnell Corp., 236 F.Supp 244, 248 (D.R.I. 1964).

They are, he wrote, "the achievement of the quiet life after the enemy's capitulation or his defeat in inglorious battle.[64]

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The World War was now over, the United States was at the peak of its power and confidence, and support for the antitrust movement was at perhaps an all-time high. That reflected not just resistance to American big business, but the sense that a horrible lesson in the dangers of monopoly had been taught by the Third Reich and the Japanese Empire. It is to those lessons that we now turn.

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[64] *Id.* The Supreme Court, affirming the decision, did not endorse the presumption. Instead, it stated the following, more ambiguous standard:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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