Journal of Antitrust Enforcement Advance Access published August 16, 2013

Journal of Antitrust Enforcement, (2013), pp. 1–26
doi:10.1093/jaenfo/jnt008

The market for bigness: economic power and competition agencies' duty to curtail it

Adi Ayal*

In its early days antitrust policy was motivated largely by public fears regarding economic power, the excess influence owners of large businesses might exert over political and commercial markets. Over time, antitrust enforcement has come to focus exclusively on market power, the ability to raise prices or reduce output in narrowly defined product markets. This article calls for a return to the wisdom of days past, less for the populist reasons then articulated, and more due to the 'influence effect', the scale and scope economies in procuring political influence and their detrimental effects on democracy. After delving into the market and political effects created by big business, the recent financial crises and Too-Big-To-Fail (TBTF) dynamic are discussed. The main problem, it is argued, is not potential business failures and resulting bailouts, but the influence TBTF institutions exert 'while business is going well'. Preventing excess economic power and TBTF firms is a task originally entrusted to antitrust agencies, and this article calls for reaffirming this obligation. There are practical difficulties and political risks inherent in combating economic power, and these are discussed. In the end, such difficulties are very real and require careful formulation of enforcement strategy, but antitrust agencies should not shy away from the task.

Keywords: antitrust, economic power, democracy, too-big-to-fail, systemic risks, enforcement agencies

JEL codes: A13, D2, D21, D43, D63, G28, K21, L4 and L5

I. Introduction

Economic power is at the heart of antitrust. The very name given to competition law in the USA stems from the powerful trusts formed in the mid-19th century,

* Phd Economics (UC Berkeley), Phd Law (BIU). Email: adi.ayal@biu.ac.il. My thanks to Eleanor Fox, Bob Marshall, and participants at the Oxford Antitrust Enforcement Symposium for illuminating critique and comments. Special thanks to Michal Gal and Thomas Cheng for discussion of our common interests, Byung Geon Lee for information regarding the Korea Fair Trade Commission, and Enrique Vergara for examples in Chile. Alex Weinberg and Keren Morad provided excellent research assistance.

and the popular outcry surrounding their economic prowess and questionable tactics. The practice of antitrust, though, has evolved over time to focus on narrowly defined markets, and analysis is based on separation between the different antitrust markets each firm is involved in. This unitary focus blinds us to the effects of economic power, which have to do with social and political realms, beyond the purely price and output effects in the separate antitrust markets.

The purpose of this article is to argue that antitrust enforcement should rekindle its focus on economic power, and avoid being misled by the overly narrow definitions commonly used when assessing market power. The argument is for inclusion rather than exclusion, thus market power is important and current enforcement policy is appropriate and beneficial, though not exhaustive. Economic power poses no less a threat to the interests antitrust was formed to protect, and seems to be growing unchecked. The antitrust focus on narrowly defined markets and quantifiable evidence produces a selection bias, in that only dangers associated with raising price and reducing output 'of clearly delineated products' are dealt with, while the political ramifications and social harms caused by economic power are ignored. This article outlines the types of harm associated with aggregate concentration and the reasons antitrust agencies should address them. I also note potential drawbacks to the suggestions made herein, and the risks antitrust agencies undertake when getting involved in the murky battlegrounds involving politics and public perception, not to speak of invoking the wrath of the biggest and most powerful players on the economic scene. While difficult and risky, when economic power threatens democratic ideals, it must be curtailed, and antitrust agencies have both the wherewithal and the integrity to do so.

This article proceeds as follows: Section II introduces the problem of economic power and the difficulty of defining 'bigness'. Section III discusses political capture as one of the main problems caused by economic power, relating it to the literature on regulation. In Section IV, I turn to antitrust as a tool securing competitive benefits, both economic and social. Democracy, I argue, is closely linked to competition, and provides an independent justification for antitrust intervention when economic power is accumulated. Section V reviews the Too-Big-To-Fail (TBTF) issue, refusing simplistic allegations of antitrust failure, yet describing the financial crisis and bailout as symptomatic of an underlying problem with large firms—relevant throughout their lifetime rather than merely during business failure. Sections VI and VII discuss economic power as a target for antitrust agencies, and the pros and cons of burdening existing agencies with this formidable task.

II. What is bigness and why fear economic power?

Bigness is a vague concept, prone to misunderstanding and misrepresentation, as is concentration. 'Bigness' is commonly associated with Louis Brandeis and his famous writings on the rising industrial concentration in the late 19th and early 20th centuries.[1] In that context, bigness connotes large firms exerting power and influence over politicians on one side and smaller merchants on the other. Politicians feared the power that bankers and industrialists held as financiers as well as providers of jobs and owners of (or collaborators with owners of) media outlets. Merchants feared clashes with owners of such firms, as reprisals in the marketplace could be harsh. The result, aggregated under the term 'economic power', was that those controlling large shares of wealth had the power to intimidate and coerce others to do their bidding, in both political and industrial spheres.

Economic power was the target of early competition policy, named in the USA after the legal mechanism the law initially targeted—the Antitrust law. The 'trust-busters' had their sights on Rockefeller's use of the legal trust which allowed for agglomeration of shares in various firms within a centrally controlled management structure.[2] Created to overcome state incorporation laws which prohibited firms from owning other firms' shares (or sometimes merely out-of-state firms' shares), the trust was a common-law legal mechanism which created a semi-corporatist structure outside the boundaries of corporate law. It should be noted that the trust as a mechanism was not forbidden, but its use as a legal shield was precluded by the broad wording of the Sherman Act.[3]

The targeting of economic power was a strong talking point in favour of intervention in the early days of American antitrust.[4] It was also derided as populist demagoguery and reflecting an irrational hatred of 'big business' and corporate agglomeration.[5] Over time, the focus on economic power gave way to the focus on market power, the ability to influence prices and output in clearly defined 'antitrust markets'. Market power came to dominate antitrust discourse due to the relative precision of its definition and the use of mathematically formulated economic models which could be used for its assessment.[6] Precision of analysis

[1] See LD Brandeis, *Other People's Money and How the Bankers Use It* (1914); 'Competition and Smallness: A Dilemma Re-examined' (1956) 66 Yale Law Journal 69.

[2] See R Chernow, *Titan: The Life of John D. Rockefeller Sr.* (Random House 1998) chs 6 and 7.

[3] Indeed, the same broad wording allowed the Supreme Court in 1904 to declare that mergers were subject to antitrust scrutiny well before Congress codified the same in the Clayton Act. See, *Northern Securities Co. v United States* 193 US 197 (1904), as well as G Bittlingmayer, 'Did Antitrust Policy Cause the Great Merger Wave?' (1985) 28 Journal of Law and Economics 77, arguing that the Sherman Act induced widespread merger activity in order to circumvent antitrust scrutiny of cartels, and that the *Northern Securities* case was the dominant cause of the merger wave's demise, as such circumvention could no longer be expected to succeed.

[4] See, eg RJ Peritz, 'A Counter-History of Antitrust Law' (1990) Duke Law Journal 263; AJ Meese, 'Liberty and Antitrust in the Formative Era' (1999) 79 Boston University Law Review 1; E Foner, *Give Me Liberty! An American History* (W. W. Norton & Co. 2006) ch 17; TB Nachbar, 'Monopoly, Mercantilism & the Politics of Regulation' (2005) 91 Virginia Law Review 1313.

[5] For example, ES Rockefeller, *The Antitrust Religion* (Cato Institute 2007) 8. Rockefeller (no relation to John D) argues that the antitrust laws as a whole are based on an 'irrational fear of corporate consolidation' and that their main effect is to enrich defence lawyers at the expense of the public. He advocates educating the public as to their mistake, and repealing the antitrust laws altogether.

[6] See generally, R Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008).

allowed for predictability in implementation and focus on clearly understood economic effects, primarily the increase in prices and reduction of output. Much has been written on the ascendancy of the Chicago School of antitrust analysis, as well as the criticisms against its focus on simplistic models and unrealistic assumptions, and I shall not bore the reader with yet another survey. This focus on price and output assumes a clearly defined antitrust market consisting of a precisely delineated product. Such product definition generally focuses on one good at a time, examining pricing and output effects while ignoring political influence and democratic ideals of the sort that will dominate our discussion below.[7]

Economic power is harder to delineate than market power, which has sets of analytic tools which economists readily use to discern its extent. Of course, market power is hard to measure as well, and scores of antitrust lawyers thrive on the difficulties of defining markets and estimating demand.[8] Still, economic power is more difficult to define and more prone to arguments about appropriate measurement proxies. These difficulties, and their influence on enforcement policy, affect the policy question of whether antitrust agencies can and should address economic power, to be discussed in section 'Antitrust agencies as agents of change' below. Here, though, I assume for sake of argument that economic power is the ability to use business size and multi-market dominance to motivate submission by parties needing to stay on good terms with 'the big guy'. The big guy may be the Rockefeller of the day, or may be a large firm or business group. Today it is usually a conglomerate operating as 'a community of interests' whereby members or subdivisions rely on the collective reputation of the group as a whole. It is this reputation effect, together with economic power bestowing economies of scale and scope in markets for social bads that will be discussed in four categories: political influence, democratic effect, extension of market dominance, and creation of systemic risks.

III. Political effects: scale and scope economies in influence

The most potent fear expressed when economic power is discussed, is that large firms influence politics, and that state government is captured by big business. Capture theory is well known in the studies of regulation, and denotes conditions

[7] There are exceptions to this rule, to be addressed below. Specifically, multi-market contact examines firm interaction across product lines using an interrelated approach based on similar models, stressing signalling and tacit collusion. Also, efficiencies are achieved across markets and time, transcending the specific product approach of antitrust markets. While these are important, and will form part of our analysis, I stress the political and social ramifications which escape detection when focussing on market power rather than economic power.

[8] L Kaplow, 'Why (Ever) Define Markets' (2010) 124 Harvard Law Review 437.

whereby state-appointed regulators act to the benefit of regulated firms rather than to the benefit of the state or its citizens.[9] Reality rarely comes in a binary state, thus the question is not whether regulators are fully captured or not at all, but 'to what extent' are they influenced by personal incentives which make 'playing nice' with the regulated firms a good idea. In other words, to what extent is there an agency problem between the principal-state which would be served by certain regulations and enforcement, and the agent-regulator who chooses to be more permissive towards influential firms (or stricter on their competitors).

Regulatory capture occurs for a variety of reasons. The 'revolving doors' effect (or 'turnstile effect'), operates where current regulators foresee future employment or lucrative business association with the regulated firms.[10] Conversely, sometimes regulators are hired from within industry, due to the need of practical expertise in the field, creating similar agency problems.[11] Political capture is more often associated with politicians requiring funds in order to get elected (and re-elected), thus becoming beholden to businesses which helped finance their campaigns. In either case, businesses requiring political support will be willing to pay for it, and governmental regulation has become an essential input to almost every large business.

Economic power exacerbates the political and regulatory capture problem, since influence is subject to economies of scale and scope.[12] A governmental actor swayed by promises of future employment or campaign contributions (or threatened by future retribution), is likely to be a good friend more than once. Indeed, often this kind of influence works best when cultivated slowly, in gradual steps, where big favours are asked only after small ones were granted. This allows for selection bias as to the agent's loyalty, as well as the fact that previous favours stain the agent's reputation, thus he is in less of a position to refuse later on. Similarly, a firm or business group able to garner political assistance on one issue, is likely to use the same contacts to help with other issues later on. As the governmental actor in question is higher in rank or better connected, he or she is more likely to be able to influence larger swaths of government action, in multiple offices and fields of regulation.

[9] Classic studies include: GJ Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell Journal of Economics and Management Science 3; RA Posner, 'Theories of Economic Regulation' (1974) 5 Bell Journal of Economics and Management Science 335; S Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 Journal of Law and Economics 211. For an overview, see DC Mueller, 'Public Choice: An Introduction' in *The Encyclopedia of Public Choice* (Springer 2003).

[10] See, eg Y-K Che, 'Revolving Doors and the Optimal Tolerance for Agency Collusion' (1995) 26 Rand Journal of Economics 378; DJ Salant, 'Behind the Revolving Door: A New View of Public Utility Regulation' (1995) 26 Rand Journal of Economics 362.

[11] RHK Vietor, *Contrived Competition: Regulation and Deregulation in America* (Belknap Press 1994).

[12] This is related to (but goes well beyond) the well-known 'repeat player' advantage in litigation and legal services, see M Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95.

Collectively, as more governmental actors are indebted to a particular business group, it becomes more difficult for others to refuse it. This stems from two separate effects: First, its influence within government often means the firm can create immediate hardships for those refusing to play ball. Since government is itself a networked bureaucracy, each agent depends on others, thus influence is contagious, spreading among agents within government as those indebted to business groups pressure others to fall in line as well. Second, a collective effect of cognitive dissonance is in effect, whereby each governmental actor is pressured to interpret the situation as one of legitimate consideration, rather than illegitimate political capture. This effect is both internal and external. Internally, an agent wants to fit in, and avoid thinking of his colleagues as morally corrupt. When possible, the agent is also better off thinking of his assent as legitimate. This is especially so when it is coupled with personal interest, allowing psychological and material benefits to intertwine. Externally, the corrupted colleagues pressure the 'independent thinker' to cooperate, in order to avoid looking bad by comparison. This can be interpreted either as a strategic action protecting themselves from rebuke, or due to their truly internalizing the cognitive dissonance effect, causing them to believe their actions are appropriate and others should fall in line as well. Regardless of the source of such collective effects, they produce contagion and cascade effects, creating economies of scale and scope in the markets for political influence.

Business groups operating in multiple industries subject to governmental regulation are even more invested in lobbying and the market for influence. The larger the affected interest, the more prominent are economies of scale. The more interests affected, in multiple industries, the more prominent are economies of scope. Both types of economies are present in markets for political influence, and the more we are worried about such influence, the more our definition of economic power should be formulated with these markets in mind. In other words, firms or business groups holding prominent stakes in industries where regulation is a central input, should be judged as holding more economic power than firms operating in unregulated markets. This issue will be discussed later, when discussing enforcement in sections 'Targeting economic power' and 'Antitrust agencies as agents of change' below.

Size in itself is not an antitrust offense, nor should it be determinative of economic power. On the other hand, size is closely correlated with the magnitude of economic effects stemming from certain regulations, provided size is adequately measured. It is not market capitalization per se which determines the relevant 'size', but proneness to misusing economic stature and the ability to carry influence beyond the democratic ideal. As Luigi Zingales stated: 'the most powerful argument in favour of antitrust, is one that is rarely made: antitrust law reduces the political power of firms'.[13] Zingales goes on to explain that

[13] L Zingales, *A Capitalism for the People: Recapturing the Lost Genius of American Prosperity* (Basic Books 2012) 38.

'the larger the firm, the easier for it to overcome the fixed cost of lobbying, and the higher the returns will be'.[14] Fixed costs are one of the contributing factors to economies of scale, and when returns are proportional to affected size (as in all percentage effects), size does matter.

An example might illustrate: consider a firm whose market capitalization is $100 million. Any politically affected regulation that increases return-on-equity by 1 per cent is worth $1 million to the firm. If the firm doubles its size (as measured by market capitalization), its return on such a regulation doubles as well. On the cost side, if there is a fixed cost to lobbying, as Zingales suggests, a firm standing to gain $1 million from affecting regulation and another firm standing to gain $10 million, both have to pay the fixed sum, creating a huge cost advantage to the larger firm. This creates an incentive for such firms to collaborate on lobbying expenses, and an incentive to increase corporate size in order to reap such benefits while economizing on costs (including legal repercussions). Beyond fixed costs, if the larger firm is able to use political and regulatory contacts created in one area of operations to the benefit of other divisions, economies of scale are created that go beyond the fixed-cost argument. If political influence has contagion effects, so that having good contacts make creating additional ones in other spheres easier, economies of scope come into effect as well.

The political-influence effect has been called 'economic entrenchment', due to business groups' ability to influence both public policy and institutional factors.[15] Diversified business groups, especially in developing countries, are often controlled through a pyramidal structure which strengthens agency problems and grants specific families much more political influence than their capital share would seem to denote. The result is that political power is related to extent of control, rather than extent of ownership, exacerbating the democratic problem assessed below.[16] Of course, important issues arise regarding tunnelling and expropriation of corporate benefits, as agency problems are exacerbated when management is appointed by the 'family in charge' to the detriment of non-affiliated stakeholders. Still, this is not my focus here, thus I sidestep the corporate governance issue in order not to dilute the main points of political influence and democratic harm, which are more closely related to antitrust.[17]

[14] ibid.

[15] R Morck, D Wolfenzon and B Yeung, 'Corporate Governance, Economic Entrenchment, and Growth' (2005) 43 Journal of Economic Literature 655.

[16] This is one of the major issues addressed by the Korea Fair Trade Commission, in its restrictions on *chaebols*, see text at notes 36–40 below.

[17] There are, of course, efficiency-related explanations for all types of business groups, including pyramidal structures and family-controlled conglomerates. See eg RW Masulis, PK Pham and J Zein, 'Family Business Groups Around the World: Financing Advantages, Control Motivations, and Organizational Choices' (2011) 24 Review of Financial Studies 3556. As explained below, my focus on the problems antitrust enforcement must take into account stems not from a dismissal of legitimate reasons for conglomeration, but from my wishing to bring concerns usually ignored to centrestage. Once the problems I highlight are taken into account, a case-by-case assessment in required to determine whether benefits outweigh costs, or the converse is true. For a classic account of how such pyramids grow and the agency costs they create, see, LA Bebchuk, R Kraakman and

Economies of scale and scope in political influence are a relevant factor in firm growth, but beyond that, in firm diversification and creating networks of collaboration.[18] In merger terminology, it is not merely horizontal mergers that we should be worried about—but conglomerate merges as well. Of course, conglomerate mergers create many other types of economies as well, unrelated to political influence, thus are often beneficial to society as well the merging firms. Nonetheless, the current micro-market focus dominating most antitrust enforcement agencies should not blind us to the cross-market economic power effects that large conglomerate mergers and business alliances may create. Put succinctly, efficiencies are important and should be conserved, conglomeration allows for efficiency in attaining both social goods and social bads. When size and scope allow for reducing costs of production and marketing, these are socially beneficial efficiencies, yet when the same factors allow for more 'efficient' political lobbying and exercise of market control—they should be curtailed.

My argument is not that antitrust should target size, however that may be measured, but that bigness, in the sense of overarching economic power, is a serious antitrust concern.[19] What this bigness is, and what parameters should be used to assess it, requires more consideration and will be addressed later, after considering the other harms economic power causes and the justifications for curtailing it.

IV. Competition as democracy in action: values in markets

Beyond the direct political influence that economic power rewards and instigates, is the more general fear that allowing agglomeration of economic power threatens the basic democratic ideal of a society comprised of equally empowered citizens exchanging their wares in a free market. The free markets of unfettered competition are modelled as containing infinite consumers and producers, all comparable to their peers and none empowered with more influence than another. Of course, such markets exist in textbooks and nearly nowhere else, but the ideal upon which such models were built includes more than the first and

G Triantis, 'Stock Pyramids, Cross-ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-flow Rights' in *Concentrated Corporate Ownership* (University of Chicago Press 2000).

[18] Such diversification may be motivated by strategic concerns, and thrive even in conditions where underlying fundamentals make diversified entry inefficient. See, HD Dixon, 'Inefficient Diversification in Multi-market Oligopoly with Diseconomies of Scope' (1994) Economica 213–19, modelling specific *diseconomies* of scope to show that even when production technologies are strictly inferior, strategic considerations may dominate, leading to overall welfare loss.

[19] It should be noted that economy-wide conglomerates are often the product of state support, either directly or indirectly. In this article I focus on indirect measures, in creating incentives for growth by bestowing advantages on the wide-and-far reaching conglomerates. There are also sometimes direct measures, in state-sanctioned licensing requirements favouring large firms or stability-seeking measures whereby the state uses conglomerates to facilitate investment or public-private partnerships. See, D Maman, 'The Emergence of Business Groups: Israel and South Korea Compared' (2002) 23 Organization Studies 737.

second welfare theorems equating efficiency with competition and the market's invisible hand. The paradigm of competition as an essential part of democracy is a guiding force which has much to do with the overwhelming popular support for antitrust. Antitrust is not merely an economic statute, but symbolizes democratic ideals as well, that none may accumulate sufficient power to force others into commercial submission.

Economic power is no less of a problem in this regard than is market power, perhaps even more so. When a few large players are recognized as dominant powers in a single antitrust-defined market, we call this oligopoly and are very aware of potential tacit collusion, the stickiness of prices, retardation of innovation, and enhancement of entry barriers. Large firms interacting with other large firms often leave smaller players operating in niche markets, with little access to where most of the action is. When markets are intertwined and the large firms operate in several important markets simultaneously, similar effects permeate throughout, impeding competition both as an economic concern and a democratic one. The economic component is related to multi-market-contact, facilitating tacit collusion among the larger players and intimidating the smaller ones from competing 'too vigorously'.[20] The multi-market-contact mechanism facilitates collusion among the large business groups, and has been discussed widely. Here I focus on add-on effects, stressing the way this dynamic influences interactions with firms and individuals 'beyond' the oligopolistic pressures exuded between the business groups themselves. Of course, this is not to downplay the importance of within-market effects, which can be quite large.[21]

Large conglomerate firms enjoy economies of scale in the purchase of many cross-market inputs, such as advertising, services (eg legal, accounting, consulting), and perhaps most importantly—financial support in the market for credit.[22] Mid-sized firms providing such services to large conglomerates are in no position to cross swords with them, and often exercise self-censorship with regards to any conflict of interest they might experience when serving other customers. Smaller

[20] D Bernheim and MD Whinston, 'Multimarket Contact and Collusive Behavior' (1990) 21 RAND Journal of Economics 1 provide one of the first thorough investigations of the issue, modelling strategic and competitive implications. For anecdotal empirical support, see, WN Evans and IN Kessides. 'Living by the "Golden Rule": Multimarket Contact in the US Airline Industry' (1994) 109 The Quarterly Journal of Economics 341, documenting 'price-wars' played in subsets of contacts and constraining firm-wide pricing through relatively and localized small trigger strategies. For discussion of multi-market contact as an informational mechanism, directly influencing collusive practices, see H Matsushima, 'Multimarket Contact, Imperfect Monitoring, and Implicit Collusion' (2001) 98 Journal of Economic Theory 158. But see CJ Thomas and RD Willig, 'The Risk of Contagion from Multimarket Contact' (2006) 24 International Journal of Industrial Organization 1157, modelling multi-market contact as inducing a monitoring problem, which may reduce ex ante incentive for such collusion due to informational costs.

[21] Indeed, Giancarlo Spagnolo has shown that conditions facilitating collusion across multiple markets are much more prevalent than assumed theretofore. Wealth effects of the large firms make investment in one market dependent on profits in others, creating interdependencies between them and concavity of each firm's objective function. This effect is sufficient to create collusive outcomes. See G Spagnolo, 'On Interdependent Supergames: Multimarket Contact, Concavity, and Collusion' (1999) 89 Journal of Economic Theory 127.

[22] SX Li and R Greenwood, 'The Effect of Within-industry Diversification on Firm Performance: Synergy Creation, Multi-market Contact and Market Structuration' (2004) 25 Strategic Management Journal 1131.

competitors exercise similar self-censorship as mentioned earlier, but may be further constrained when service providers refuse their business. In a sense, this takes the multi-market-contact argument a step further, in considering not merely firms 'meeting each other' in the different markets, but also the network of firms doing business with each other.[23] The standard paradigm of antitrust-defined-markets focuses on distinct products in which each of the diversified firms has a significant market share. Here we consider the power exercised by firms not merely with respect to consumers (through pricing), but with respect to suppliers and business contacts more generally. The economic effect may be chilling to competition, inducing 'playing nice' so as not to raise the giant. Beyond this effect, though, it also extends existing market power over time, as in order to challenge a business group with economic power, a competitor must not only enter the relevant product markets, but also create a network of contacts and input providers, well beyond the obvious production facilities and marketing venues.[24]

Large groups enjoy significant scale and scope economies in access to suppliers and markets as well as in prices offered to them due to bulk discounts and the like. Allowing size to grow unchecked shifts the market towards long-term oligopoly, not merely in specific product markets but in economy-wide conglomerates. These may turn into dominant players that the state itself becomes protective of, as demonstrated by Charles Wilson, then president and CEO of General Motors (GM) in his Senate confirmation hearings as Secretary of Defense: 'what was good for our country was good for General Motors and vice versa. The difference did not exist. Our company is too big. It goes with the welfare of the country.'[25] Wilson was not referring to dominance in a specific product market, or even to GM's dominance in car manufacturing generally, but to the immense employment and economic effects stemming from any change in GM's position.[26] These effects permeated through large swaths of the American economy due not only to the size of GM, but mainly due to its network of suppliers, customers, and business dealings. Today the intertwining web of

[23] AV Shipilov, 'Firm Scope Experience, Historic Multimarket Contact with Partners, Centrality, and the Relationship Between Structural Holes and Performance' (2009) 20 Organization Science 85; A Zaheer and others, 'Strategic Networks' (2000) 21 Strategic Management Journal 203; I Robson and V Rawnsley, 'Co-operation or Coercion? Supplier Networks and Relationships in the UK Food Industry' (2001) 6 International Journal of Supply Chain Management 39.

[24] C Roseira, C Brito and SC Henneberg, 'Managing Interdependencies in Supplier Networks' (2010) 39 Industrial Marketing Management 925.

[25] Wilson was often misquoted as saying that 'what is good for GM is good for the country', and attacked for the hubris this suggested. After attempting (and failing) to set the record straight for years, he gave up and accepted the misquote as good enough: 'I have never been too embarrassed over the thing, stated either way'. See J Hyde, 'GM's 'Engine Charlie' Wilson Learned to Live with a Misquote' *Detroit Free Press* (14 September 2008).

[26] Interestingly empirical research has shown that changes in relative positions of large firms within an economy are associated with *more* growth in GDP, productivity and capital. Reminiscent of Schumpeter's 'creative destruction', economies experiencing big business turnover benefit from the experience, even when large incumbents do not. See K Fogel, R Morck and B Yeung, 'Big Business Stability and Economic Growth: Is What's Good for General Motors Good for America?' (2008) 89 Journal of Financial Economics 83 who show that this effect is more pronounced the more technologically developed the economy in question.

economic effects is much better understood, and Wilson's statement reads eerily prescient of the 'TBTF' rhetoric associated with the financial bailout of 2008 addressed later. Yet before we move on to then-predicted and now-proven economic effects of size, it is important to delve into the democratic values involved.

Antitrust is state policy, democratically created in order to satisfy aggregate preferences and promote welfare. If citizens' welfare in a democratic state increases when the state is seen as fair and just, this should enter our objective function no less than the amount of products available for purchase. In fact, antitrust was chosen not merely for its economic effect, but for its democratic content, the idea that 'competition between the many is better than coordination among the few—regardless of resulting prices and output'. Some may decry this tendency as 'irrational' or inefficient, but none challenge the historical account of competition and trader freedom as important to the populace enacting antitrust laws.[27] Respecting the place of democratic values within the antitrust equation stems from respecting the place of antitrust within society. Antitrust is part of a whole, created and enforced in order to facilitate a social order extending well beyond price and output of specific products, or even ensuring consumers a larger surplus when shopping.

Antitrust is about competition, as the term is understood by laymen expecting to be able to choose between different providers and enjoy autonomy in the marketplace. Autonomy and freedom of choice are no less (if not much more) important than price, and competition is supposed to ensure them—both as democratic values and as contributing to economic efficiency. If and when these ideals collide, eg when economies are attained by large firms or conglomerate combinations which limit provider choice, decision-makers need to address the issue and find an appropriate balance, but the answer should definitely not be that price trumps choice, or efficiency outweighs democracy, regardless of circumstances.[28] There will be times where citizens are better served by limiting choice to a small extent in order to create large efficiencies, or facilitate long-term growth. But the preference ordering between economic and democratic values is far from obvious, and is definitely not lexical. In other words, the normative discussion should focus on relative weights and the practical application should focus on case-specific circumstances and local effects, rather than

[27] See RJ Peritz, *Competition Policy in America: History, Rhetoric, Law* (rev edn 1996) 15, characterizing John Sherman as focussing on this concern, rather than the cheap products consumers might enjoy as a side-benefit of his proposed bill; JW Burns, 'The New Role of Coercion in Antitrust' (1991) 60 Fordham Law Review 379, describing the initially central role of 'trader freedom' in antitrust jurisprudence; AJ Meese, 'Economic Theory, Trader Freedom, and Consumer Welfare: State Oil Co. v. Khan and the Continuing Incoherence of Antitrust Doctrine' (1999) 84 Cornell Law Review 763, arguing that the rejection of trader freedom as an independent goal of antitrust is unwarranted, though realizing that contemporary judicial opinion is not expected to change: 'Although it appears that the Court will have to determine explicitly whether trader freedom merits normative significance under the antitrust laws, history suggests that it will not do so any time soon.' ibid 786.

[28] I delve into this issue elsewhere, developing a fuller theory of the balancing test required in antitrust law. See A Ayal, *Fairness in Antitrust: Protecting the Strong from the Weak* (Hart Publishing forthcoming 2014).

assuming ex-ante that only price and output matter, and blinding ourselves to the broader context.

Obviously, the broad reading of antitrust advocated here raises issues of implementation, and the ability of real-world antitrust agencies to weigh indeterminate factors while avoiding excess discretion and politicization of the enforcement process. These are important and difficult issues, to be outlined below in section 'Antitrust agencies as agents of change', but obviously requiring much deliberation and analysis. The point here is not to argue that democratic values are easily achieved or are costless to protect, but that they require our attention, and should not be ignored or dismissed simply because antitrust is easier applied when based on focussed quantifiable parameters. The tendency to focus on micro-markets defined one product at a time is obviously helpful due to the applicability of micro-economic models and empirical measurement techniques. Yet this same tendency causes us to ignore effects which the models assume away, making us similar to those looking for their lost coin under the lamp 'because there's more light there'.

The democratic values argument connects strongly with the view that competition is a protected value not merely as a proxy for its expected economic results, but that the 'process in itself' is important. The democratic state relies for its justification on citizens' relinquishing their prerogative of self-reliance in the enforcing of agreements and protection of interests. The individual vests the state with a monopoly on the justified use of force, relying on a social contract binding all others alongside him, so that all enjoy the state's protection. For this conceptual move to work, all participants must likewise be bound by state rules and regulations, with none being powerful enough to thwart state enforcement of the rule of law.[29] Economic power bestows not merely the power to compel others to 'play nice' within commercial relations, but in the extreme, also the power to compel the state to grant special favours. The central mechanisms by which this is achieved, the scale and scope efficiencies in procuring political and regulatory influence, were addressed above in section 'Political effects: scale and scope economies in influence'. Here, though, my argument goes further. Capture theory focuses on the micro-foundations of what essentially is a value issue, enveloping society and citizen participation within it. Democracy requires belief in its benefits so that its cost may be borne without regret. The existence of economic power held by large firms or conglomerates affects not merely economic indicators or the efficiency of state regulation. It affects popular belief in the system itself, the underlying fabric which binds us together and instils the cooperation and enthusiasm of citizens to trust that innovation and investment, both material and spiritual, will be rewarded individually and collectively.

[29] See D Levy-Faur, 'The Odyssey of the Regulatory State: From a "Thin" Monomorphic Concept to a "Thick"and Polymorphic Concept' (2013) 35 Law and Policy 29, extending the well-known 'monopoly on force' issue to a presumed monopoly on creating, monitoring, and enforcing rules and regulations.

When citizens lose their belief in society's normative underpinnings, when they become cynical and see economic and social status as achievable only by and through the largest players in the market, they suffer both directly and indirectly. Directly, because morality and belief in justice of purpose are very much a part of each individual's welfare. Indirectly, because when individuals lose hope of being able to reap their just rewards, they cease sowing. They limit investment in their own human capital, and aim for short-term, opportunistic profiteering, or for downright rent-seeking. When all the good places at the table are taken, the less well-off either sulk at their seats or plan a revolution—neither being a favourable prospect for society.

Efficiency has wrongly been equated with higher output and lower prices. While these are important and relevant components, efficiency is a much broader concept. Efficiency is attained when the preferred results are achieved at lowest possible cost, taking into account all preferred results and all relevant costs. These include values as to the type of society wished for, one's place in such a society, the attainment of moral ideals, externalities of all types, psychic costs, and any other parameter influenced by the decision in question.[30] Obviously, measurable parameters are easier to explain and more susceptible to oversight, making them better from a regulatory perspective which values limiting agency discretion for fear of capture or personal agendas. Still, selection bias in admitting relevant parameters to the discussion should not be allowed to taint the result. If we truly believe that society is better served by considering political clout and aggregate effects, this should play a part in our regulatory agenda.

V. Stability and systematic risks: TBTF as an antitrust concern

The economic crisis of 2007–2008 brought the financial sector and specifically its concentration and interconnectedness to public scrutiny. The consolidation of financial institutions, together with the increasing prevalence of complex financial instruments being used in non-traditional industries, made what should have been a private problem into a social one. In a competitive economy, the fact that some banks and investment firms made bad bets as to the housing market, would have resulted in a 'market correction' with or without causing some firms to fail and be replaced by others. Firm failure is often a tragedy to those involved, and the larger the firm, the harder the fall and the more people will be affected. These include investors of all kinds, but also workers, suppliers, customers, and scores of businesses and individuals whose fate is intertwined with that of the failing firm in complex ways.

[30] See M Stucke, 'Should Competition Policy Promote Happiness?' (2013) 81 Fordham Law Review 2575; ME Stucke and AP Grunes, 'Antitrust and the Marketplace of Ideas' (2001) 69 Antitrust Law Journal 249.

Still, firm failure is an integral part of a vibrant economy, and generally is not an evil which government steps in to prevent.[31] The Schumpeterian idea of 'creative destruction' colours the way we view markets, and having some firms gain from others' losses is an integral part of our concept of competition.[32] The financial crisis stood out in this respect since the failing firms were not merely huge, but also had other large firms immensely dependent on them. The fear, therefore, was of a cascade of business failures, causing a 'domino effect' which could cause entire industries to fail and instigate an economy-wide great depression.

The 'TBTF' characterization was widely used to describe why government bailout was necessary. Essentially, the US government stepped in and provided ex post insurance for investors who made an ex-ante choice not to buy such insurance, creating a moral hazard problem for future events. If government bailout of large firms is to be expected, why pay for insurance? Moreover, the argument continues, why not engage in risky investments? If such investments pan out, the firms (and their private stakeholders) can expect to reap the benefits. If they tank, the public will step in to help break the fall. The economics of risk-taking have thus shifted once bailouts are taken into account.[33]

Many have characterized the TBTF problem as an antitrust failure, since the firms in question were allowed to grow, mostly through consolidation and (approved) mergers.[34] At the time, some argue, antitrust agencies ignored systemic risks and allowed commercial and investment banks to merge activities and grow unchecked. Others argue that TBTF was a regulatory failure, having little to do with antitrust and more to do with the repeal of banking regulations and lack of understanding as to the systemic consequences of certain financial transactions. The novelty of instruments such as mortgage-backed securities and the credit-default swaps used to hedge their risks, caused serious financial institutions to underestimate the risk they are taking. Assuming regulators could understand what the most sophisticated firms, backed by scores of analysts and experts failed to, may be overoptimistic as to governmental oversight.

[31] This is not to say that the state is oblivious to the harms involved. A myriad of rules and regulations exist in order to minimize social losses, including bankruptcy laws, regulations as to worker compensation, insurance mandates regarding private insurers and state-backed deposit insurance, and more.

[32] See JA Schumpeter, *Capitalism, Socialism and Democracy* (2nd edn, Harper & Bros 1947) ch 8. For a recent exposition of Schumpeter's scholarship and intellectual development, see TK McGraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Harvard University Press 2007).

[33] JW Markham, 'Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the "Too-Big-To-Fail" Phenomenon' (2011) 16 Fordham J Corp & Fin L 261.

[34] ibid and cites therein. See also D Amel and others, *Consolidation and Efficiency in the Financial Sector: A Review of the International Evidence,* (August 2002) <www.federalreserve.gov/pubs/feds/2002/200247/200247pap.pdf> accessed 2 August 2013, arguing that merged banks exhibit high levels of x-inefficiency, which should lead agencies to second-guess efficiency justifications for proposed mergers and examine more carefully why such mergers are carried out. Still, this view is not universally shared. See eg A Devlin, 'Antitrust in an Era of Market Failure' (2010) 33 Harvard Journal of Law and Public Policy 557, arguing that drawing lessons from the recent financial crisis is a misguided endeavour, as the collapse had nothing to do with price-theoretic assumptions and modelling of antitrust.

Still, it is not a failure of prescience as to never-before-encountered financial instruments which is most troubling. Nor, in my opinion, is the bailout, which created ex-post governmental subsidization of risk, the central issue. The firms denoted as TBTF were granted unexpected relief, and not all were saved.[35] Arguments that ex-post relief shifts future expectations and creates ex-ante incentives favouring excessive risk-taking, implicitly assume firms are willing to risk utter failure, and that it plays a large part in their operational strategy. I find this argument implausible, as most risks are not life-threatening, and most business failures do not lead to bankruptcy—the only scenario in which TBTF bailouts become relevant.

To the contrary, 'the main problem with TBTF firms is that they are seen as such during their lifetimes, not just in their death throes'. If a firm is so important to the economy that its failure cannot be accepted, it is important enough to exert influence and induce deference. TBTF should be seen not just as a problem relevant to bailouts or system collapse when large institutions fail, but as a problem of ongoing economic power while the business is thriving. TBTF, in other words, is a symptom of an underlying issue which was ignored when mergers were approved and size grew unchecked. It is precisely the type of growth which would have been carefully scrutinized had economic power been targeted by antitrust agencies.

TBTF is not merely a financial institutions problem. In Korea, not unlike the USA, aggregate size captured the public and regulatory eye only when financial collapse made the issue impossible to ignore. Prior to 1997, conglomerates and large business groups (nicknamed *chaebols*, which translate roughly to 'wealth-families') dominated the economic landscape in the country, exerting political influence commensurate with their centrality.[36] *Chaebols* focussed on growth rather than profit (a.k.a. 'empire building') and were shielded from the economic effects of this policy by a combination of forgoing external credit markets and governmental control of the exchange rates.[37] Through maintaining an artificially high exchange rate, the destruction of economic value was absorbed by reduction of economy-wide foreign investment and currency reserves rather than company-specific stock price depreciation. This policy backfired when a system collapse brought in the IMF and foreign control, leading to internal shakeup and

[35] See JR Macey and JP Holdcroft, 'Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation' (2010) 120 Yale Law Journal 1368 at 1386 (documenting the allowed failure of Lehman Brothers). On the other hand, Macey and Holdcroft argue that political reality makes state intervention aimed at preserving large businesses unavoidable, as 'in democracies politicians who decline to pursue a dramatic response to crises are unlikely to survive', ibid 1382.

[36] E Han Kim and W Kim, 'Changes in Korean Corporate Governance: A Response to Crisis' (2008) 20 Journal of Applied Corporate Finance 47.

[37] See S Lee and others, 'Disappearing Internal Capital Markets: Evidence from Diversified Business Groups in Korea' (2009) 33 Journal of Banking & Finance 326 show the extent of internal capital markets in Korean *chaebol* groups before the crisis, as well as their disappearance thereafter. The pre-crisis inefficiency in investment was borne by *chaebols* in order to maintain control, while the entry of banks and debt markets observed post-1997 created a financial substitute, but at the expense of *chaebol* power.

political upheaval. After the electorate replaced the entrenched government, the Korean Fair Trade commission instituted a de-concentration regime regarding industry-wide economic power, beyond the usual antitrust focus on specific markets.[38]

One of the driving mechanisms allowing aggregation of economic power in Korea, was a stark separation of ownership and control. The average controlling block consisted of a 23 per cent stake in outstanding stock. Despite owning less than one-quarter of the firm's capital, almost-absolute control was achieved by assuring block-owners a majority vote at each junction through well-planned conglomerate and pyramidal corporate structures.[39] Simply put, if firm A owned 51 per cent of firm B's voting shares, and firm B owned 51 per cent of firm C's voting shares, a majority owner of firm A's shares holds absolute power in any majority vote in all three companies, despite holding 26 per cent of firm B's capital and less than 14 per cent of firm C's capital. Using conglomerate structure, ownership and control can be infinitely separated, allowing the aggregation of power both vertically (across firms) and horizontally (across industries). Economic power in Korea was further translated to political protection and media forbearance both by the large business groups being 'too large to annoy' and their holding large stakes in some of the leading media outlets.[40] Students of antitrust are especially sensitive to media agglomeration, and combining newspaper ownership with large business interests further exacerbates the issues.[41]

[38] See E Han Kim, 'Globalization of Capital Markets and the Asian Financial Crisis' (1998) 11 Journal of Applied Corporate Finance 30–39, focussing on corporate governance issues and protection of shareholder interests. The shareholder value perspective and the aggregate-public perspective merge in situations of system collapse, where all stakeholders, direct and indirect, benefit from intervention. The democratic harm perspective is illuminated by political ramifications, such as the replacement of the entrenched party through popular vote. See EH Kim and W Kim, 'Changes in Korean Corporate Governance: A Response to Crisis' (2008) 20 Journal of Applied Corporate Finance 47, at 48.

[39] This is after direct links via holding companies were outlawed as far back as 1986, and various measures were implemented thereafter. Direct limitations pushed *chaebols* to seek indirect mechanisms and choose opaqueness as a strategy. The KFTC attempted limitations on *chaebols* beginning in 1987, though only after the financial crises of 1997 did they prohibit debt guarantees and impose direct sanctions totalling over 470 billion won (approx. $400 million) in order to combat *chaebol* internal transactions. See, Korea Fair Trade Commission, *2011 Annual Report*, at 12, 21–22. One should not mistake governmental restrictions on *chaebols* with their elimination. The KFTC currently defines 'large business groups' (LBG) by the economic value of total assets, allowing sizable formation but subjecting them to special limitations. As of May 2010, 53 *chaebols* were designated, and restricted, by the KFTC. ibid 112.

[40] 'The Samsung Group, the biggest chaebol, owned Choong-Ang Daily, one of the two most widely subscribed newspapers in Korea. The Federation of Korean Industries, a lobbying organization for chaebol and other large corporations, owns the Korea Economic Daily, one of the leading business newspapers in Korea'. Kim and Kim (n 38).

[41] While most commentators see a definite trend of media concentration, reality is more complex, see, EM Noam, *Media Ownership and Concentration in America* (OUP 2009). For discussion of the media/antitrust interaction, see eg ME Stucke and AP Grunes, 'Toward A Better Competition Policy For The Media' (2009) 42 Connecticut Law Review 101, explicating the importance of the media in the marketplace of ideas, and calling on Congress to formulate a national media policy taking this into account; K Conrad, 'Media Mergers: First Step in a New Shift of Antitrust Analysis?' (1997) 49 Federal Communications Law Journal 675, arguing in favour of stringent antitrust intervention in media markets. But see, HA Shelanski, 'Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest' (2006) 94 California Law Review 371, delineating a democracy argument and an efficiency argument in media regulation, and arguing that antitrust alone is

Even beyond media markets, economic power was characterized above as having to do with political influence and democratic ideals. Preventing private actors from achieving economic power relies on a belief in the marketplace being a public good, where private initiative is allowed to thrive 'as long as the public good is protected'. The process of competition depends on each actor being small relative to the market as a whole, positing all participants as price takers rather than price makers. From a democratic point of view, this has to do with maintaining a framework wherein the state is dwarfed by none, and holds a monopoly on the use of force. The democratic state is obviously not omniscient and is prone to multiple failures and mistakes, yet it enjoys popular support as the lesser of evils when compared to other forms of government.

Interestingly, antitrust was recently compared to religion in that 'both serve to humble the seemingly powerful to a something greater than themselves'.[42] A similar sentiment permeates the 'competition as democratic value' argument: that regardless of economic stature, a democratic state should dwarf all participants so that all are humbled, and none become more powerful than the framework allowing them to operate within it. This does not mean that the state should be economically large, in terms of ownership or operation of industry. A democratic state can be economically minimalist by allowing almost all industries to be privately run, as long as competition among many relatively small business actors are maintained. Thus the private sector may (and should) dwarf the state in the aggregate, but no 'individual' private actor should hold power to keep the state at bay. Thus privatization, as a process of the state relinquishing ownership and control, can (and should) be carried out under the framework offered here. As long as economic power formerly held by the state is relinquished to viable markets consisting of independent actors, rather than centralized large bureaucracies, no one firm need acquire significant economic power in the transition and all can benefit from its implementation.

Economic power, as exemplified by TBTF firms, thwarts these ideals, as some firms become so important that the state cannot function without them. In the extreme, this leads to bailouts at times of failure, but during less extreme and more prevalent times, this leads to such firms influencing regulation, exerting pressure on politicians, and using state institutions to further corporate aims. It is difficult to blame such firms for using their centrality and necessity as levers of pull. Economic evolution operates on them as well, and if they do not use all

unlikely to protect the democracy interest. In order to overcome the antitrust deficiency, ME Stucke and AP Grunes, 'Antitrust and the Marketplace of Ideas' (2001) 69 Antitrust Law Journal 249 argue that antitrust analysis should focus on competition in editorial content, rather than traditional financial indicators. JT Lang, 'Media, Multimedia, and European Community Antitrust Law' (1997) 21 Fordham International Law Journal 1296 discusses the European perspective, arguing that these issues will continue to arise in member-state litigation, as their core difficulties have yet to be worked out. I thank Professor Lang for pointing out the intricacies plaguing this issue, and its centrality within any debate of aggregate economic power.

[42] TW Smith, 'An Iconoclastic Attack on the Antitrust Community: A Review of Edwin S. Rockefeller's the Antitrust Religion' (2010) 5 NYU Journal of Law & Liberty 436, at 444.

means at their disposal to maximize profits and protect their status, they will be replaced by other firms with fewer qualms. Thus it is the state's responsibility to prevent the growth of unchecked power, to ensure that state power is truly greater than any firm or business group, and that public policy is aimed at aggregate concerns rather than used to further private interests. The state should thus prevent the emergence of TBTF firms, not because of potential future bailouts, but because of actual and current influence. As Walter Adams and James Brock stated: 'antitrust is founded on a theory of hostility toward private concentration of power so great that even a democratic government can be entrusted with it only in exceptional circumstances'.[43] When firms are so large and important as to preclude letting them die a natural death, their power is too great to let them lead a natural life. As Simon Johnson of MIT stated in his Senate Testimony: 'Anything that is "too big to fail" is now too big to exist'.[44]

VI. Targeting economic power

Those convinced that economic power can be a problem may advocate taking aggressive or defensive measures. Aggressive measures might include breaking up large firms, as discussed in the banking industry after TBTF 2008. There, to many it seemed in retrospect that financial firms had grown too large. Some cited arguments to the same effect that were made all along, during consolidation and prescient of the crisis.[45] Defensive measures may include refusing consolidation and applying a stricter scrutiny to conglomerate mergers. All measures, of course, should be considered in a 'detailed case-specific manner', refusing a populist push for intervention and at the same time refusing the mantra of 'conglomerate mergers pose no antitrust problem'. It is precisely the examination 'whether' a specific merger poses a problem which this article is trying to induce. A move away from a predisposed assertion that only measurable market power in a narrowly defined antitrust market matters, while economic power does not.

Bigness is a broad concept, as is economic power. Democracy and competition entail maintaining the interaction of many small players rather than few large ones. The ideal of 'one person, one vote' governs democracy, along with a court system ensuring that no large player (the majority) can use its power to exploit the small (minority). In the marketplace, it is antitrust that governs competition,

[43] W Adams and JW Brock, 'Antitrust & Enforceability: An Empirical Perspective' in H First and others (eds), *Revitalizing Antitrust in its Second Century: Essays on Legal, Economic, and Political Policy* (Praeger 1991) 152.

[44] Testimony to the House Committee on Financial Services, Hearing on 'Systemic Risk: Are Some Institutions Too Big To Fail And If So, What Should We Do About It?', Tuesday, 21 July 2009. Submitted by Professor Simon Johnson, MIT Sloan School of Management.

[45] For example, G De Nicolo and ML Kwast, 'Systemic Risk and Financial Consolidation: Are They Related?' (2002) 26 Journal of Banking & Finance 861–80; GH Stern and RJ Feldman. *Too Big to Fail: The Hazards of Bank Bailouts* (Brookings Institution Press 2004); for a literature review regarding bank consolidations, see R DeYoung, DD Evanoff and P Molyneux, 'Mergers and Acquisitions of Financial Institutions: A Review of the Post-2000 Literature' (2009) 36 Journal of Financial Services Research 87–110.

ensuring the existence of many small players, and preventing the large from skewing the playing field to their advantage.

Bigness allows for efficiencies, not just in influence and social bads but also in producing and marketing goods. Economies of scale induce large factories and facilities, economies of scope induce multi-product firms and chain stores.[46] The history of antitrust is familiar with anti-chain store litigation, chain-store taxes, and the like. Some decry populist tendencies to vilify the big, and we should be wary of throwing out the baby with the bathwater.[47] Bigness allows for reducing costs and (if not overcome by market power) lowering prices.[48] There are advantages to size that society should preserve, and combating economic power should be balanced with promoting efficiency.

Conglomerates and large firms should similarly not be portrayed as sinister rent-seekers or compulsive shoppers for political influence. Most firms, most of the time, are efficiency-maximizing devices employing organizational tools to cut costs and increase revenues. One of the most touted justifications for large business groups is their enhanced stability. Firms within a conglomerate structure can operate as an internal credit market, a family of firms coming to each other's aid when one is troubled, sharing risk and diversifying it.[49] Citing stability as an advantage of size might seem puzzling in the wake of bailout 2008, since there the opposite seemed to be true. But systemic risk is a broader issue than firm failure, and stems from different attributes, only some of them interrelated.[50] Stability may be seen as a short- and medium-term advantage conglomerates enjoy. In the long-term, presumptive stability of large business groups becomes a drawback, as when what was a stable infrastructure for multiple uses collapses, many parasitic and complementary mechanisms 'along for the ride' collapse as well, leading to system failure and contagion within markets and communities.

[46] Indeed, fear of the impact chain stores may have on society led to widespread resistance to their proliferation. Partly, this is explained by support for mom-and-pop stores (and local businesses more generally) driven out of business due to their lacking such efficiencies. Partly, this reflects fear of change and resistance accompanying most new organizational forms. See P Ingram and H Rao, 'Store Wars: The Enactment and Repeal of Anti-Chain-Store Legislation in America' (2004) 110 American Journal of Sociology 446; R Schragger, 'The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940' (2005) 90 Iowa Law Review 1011; TW Ross, 'Store Wars: The Chain Tax Movement' (1986) 29 Journal of Law and Economics 125.

[47] See B Orbach and GC Rebling, 'The Antitrust Curse of Bigness' (2012) 85 Southern California Law Review 605, for an extreme form of this argument, characterizing the fear of bigness as irrational and advocating public education to remove it from consideration.

[48] OE Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoffs' (1968) 58 American Economic Review 18.

[49] See M Granovetter, 'Business Groups and Social Organization' in NJ Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (2nd edn, Princeton University Press 2005) 429. On the other hand, some argue that the credit-related advantages of inter-related business groups suffers from decreasing marginal utility, making them more relevant to developing economies than developed ones. See L Fauver, J Houston and A Naranjo, 'Capital Market Development, International Integration, Legal Systems, and the Value of Corporate Diversification: A Cross-Country Analysis' (2003) 38 Journal of Financial and Quantitative Analysis 135.

[50] M Dewatripont, J-C Rochet and J Tirole. *Balancing the Banks: Global Lessons from the Financial Crisis* (Princeton University Press 2010); K Schaeck, M Cihak and S Wolfe. 'Are Competitive Banking Systems More Stable?' (2009) 41 Journal of Money, Credit and Banking 711.

Conglomerates also share reputation, enhancing the individual reputational mechanisms each firm uses to signal credit or trustworthiness.[51] Relatedly, shared reputation makes each of the inter-related firms more menacing as conveyors of credible threats, inducing cooperation and fulfilment of obligations among those contracting with the business group.[52] These mechanisms reduce various costs, and pose a partial solution to the inefficiency created by agency problems and private information.[53] Conglomerates can also operate as internal labour markets, with successive tasks within the organization used to filter successful applicants for jobs higher up in corporate hierarchy or requiring organizational knowledge. In short, consolidation, both within and across organizational units, produces multiple benefits whose contribution to overall efficiency must not be forgotten or ignored.[54]

Similar to Williamson's well-known trade-off model, here too, efficiencies of all sorts must be counted against the potential social costs of economic power. Non-intervention and trust in the invisible hand of market mechanisms leaves corporate incentives as the primary mover of organizational structure, for better and for worse. For better, since optimization in the face of multi-factorial costs and production functions leads corporate actors to seek the path of least resistance, minimizing costs, and innovating around difficulties to find the optimal size and structure. For worse, since the evolutionary struggle between corporations (or any profit-maximizers for that matter[55]) leads to maximization of corporate, rather than social, welfare. Externalities are not counted, and quantification bias causes certain costs and benefits to be more heavily weighted than others.

Free market non-intervention should not be expected to lead to social optimization, for that we need antitrust agencies (or other state actors). State agencies are presumed to operate in the interest of society at large, internalizing externalities and assessing overall impact, rather than merely assessing market effects.

[51] T Hoshi, A Kashyap and D Scharfstein, 'Corporate Structure, Liquidity, and Investment: Evidence from Japanese Industrial Groups' (1991) 106 Quarterly Journal of Economics 33.

[52] Oliver Williamson developed an institutional theory based on these issues as constraining opportunism, see eg OE Williamson, 'Credible Commitments: Using Hostages to Support Exchange' (1983) 73 The American Economic Review 519–40; OE Williamson, 'The Theory of the Firm as Governance Structure: From Choice to Contract' (2002) 16 The Journal of Economic Perspectives 171–95

[53] See OE Williamson, 'The Logic of Economic Organization' (1988) 4 JL Econ & Org 65; O Hart, 'An Economist's Perspective on the Theory of the Firm' (1989) 89 Colum L Rev 1757; B Holmström and J Roberts, 'The Boundaries of the Firm Revisited' (1988) 12 Journal of Economic Perspectives 73.

[54] For a survey of potential advantages and disadvantages of such business groups and their relation to state and capital market development, see RN Langlois, 'Business Groups and the Natural State' (2012) Journal of Economic Behavior & Organization and cites therein. For a positive account of pyramidial business groups, finding more benefits than drawbacks, see RW Masulis, PK Pham and J Zein. 'Pyramids: Empirical Evidence on the Costs and Benefits of Family Business Groups Around the World' (2009) SSRN eLibrary.

[55] Some argue that corporation *are* different from other types of profit maximizers, since corporations are by definition state-created artificial entities with *only* profit maximization as a motive for existence. Individuals, on the other hand, have moral compunctions and social norms as constraints on their profit-maximizing incentives, leading them to lead less of a unitary existence and consider factors beyond their self-benefit. See J Bakan, *The Corporation: Pathological Pursuit of Profit and Power* (Free Press 2004); K Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago Press 2006).

Of course, state agencies are far from perfect, as our discussion of the public choice literature above exemplified. Still, even imperfect and occasionally biased state agencies are usually better guardians of the public interest than self-serving economic units. The result being that economic power should be assessed at the agency level, considering it among other factors to deduce whether to allow a merger, challenge a business practice, or in the extreme—seek dissolution of an existing business group.

The question arises, which parameters should be assessed in order to deduce economic power, and how to balance them against other considerations. In the wake of the financial crisis, some suggested economic size as measured by market capitalization, some focussed on market shares or dominance in multiple related markets, and some suggested liabilities and should be measured—as the risk of business failure depends on their leverage.[56] This article does not presume to provide an answer, or even discuss the issue in detail.[57] If the article is successful, it will provide incentive for digging deeper in that direction, and push antitrust specialists to consider more than specific micro-market power, one product at a time. I do, though, need to address counter-arguments as to the justifiability (and wisdom!) of placing the burden on antitrust agencies rather than other state actors. Even if I am correct that economic power is a problem, and given that more work is necessary to perfect our understanding of economic power and its determinants, some might argue that antitrust should be left out of it, and this is a claim I hope to counter in the next section.

VII. Antitrust agencies as agents of change

Even if it is a good idea to curtail economic power, it might be argued that antitrust agencies should not be involved. Such a sentiment can be substantiated by two prongs of argumentation: that antitrust agencies might lose their professional focus, and that they might become corrupted in the process. The professionalization argument relies on the fact that current antitrust enjoys a relative consensus that enforcement is based on precise economic models and leaves little room for personal agendas or discretion.[58] Antitrust, according to this view, has become technocratic, with the accompanying benefits of objective standards (usually rules), which constitutes an improvement upon previously ambiguous enforcement principles.[59]

[56] JR Macey and JP Holdcroft, 'Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation' (2010) 120 Yale Law Journal 1368; AS Edlin and RJ Gilbert, 'It Works for Mergers, Why not Finance' (2010) 7 The Economist's Voice.

[57] In my defence, the lack of a clear-cut answer stems both from the constraints imposed by space and reader attention (ie some ideas require more than one article), and from the ambiguity of the subject and inherent difficulties of arriving at prescriptive results, see T Khanna and Y Yafeh, 'Business Groups in Emerging Markets: Paragons or Parasites?' (2007) 45 Journal of Economic Literature 331.

[58] DA Crane, 'Technocracy and Antitrust' (2008) 86 Texas Law Review 1159.

[59] DA Crane, 'Rules versus Standards in Antitrust Adjucation' (2007) 64 Washington and Lee Law Review 49. See also his *The Institutional Structure of Antitrust Enforcement* (Oxford University Press 2010).

The technocracy argument for antitrust seeks to reduce agency (as well as court) discretion in order to facilitate a more predictable enforcement policy, allowing for business planning and reducing the costs associated with bearing risks as well as direct litigation expenses. While these are worthy goals, they cannot justify ignoring the historic aims of antitrust intervention and the very real social costs outlined above. If economic power is a problem, it requires consideration even if antitrust becomes more complex as a result. The advantages of predictability and precision do not justify ignoring those problems that require a more nuanced enforcement strategy, or the development of new metrics with which to assess the problem. Expanding the set of issues which enforcement agencies must tackle will definitely create new challenges, and probably raise new questions, but this is no justification for doing nothing and pretending the problem does not exist. 'Professionalization, in other words, is a value to be earned by directed action to solve relevant problems, not by reducing intervention to only those issues easily solved.'

The second argument against antitrust agencies playing a part in solving the economic power problem, is that their intervention will lead to increased politicization of antitrust. Since the firms and business groups to be targeted are the largest and most diverse, we should expect them to fight back using all means at their disposal—including political influence. Furthermore, since economic power is intertwined with existing political influence, we should expect captured branches of government to ally themselves with the targeted firms, creating immense pressure on antitrust agencies, from multiple directions. One might expect difficulties in budget allocations, informal pressure both direct and indirect, and increased partisanship when appointing agency officials.

Politicization is indeed a problem, and should be viewed as a cost of expanding the purview of antitrust agencies.[60] Yet similarly to the professionalization argument, it amounts to a cry for doing nothing in order not to disturb the status quo and incur the costs necessary to secure the benefit. If the economic power problem is small, or will tend to solve itself, one might hesitate to make the necessary sacrifices. Yet there is no reason to think that this is the case. To the contrary, firms grow larger, international alliances more networked, and the role of state antitrust agencies more dependent on out-of-state events.[61]

Antitrust agencies are the right institution for the job not merely due to their initially being formed to tackle precisely this issue (though they were, and should). Antitrust agencies are those tasked with protecting competition and

[60] Although we should not delude ourselves as to the current state antitrust is in. Public choice issues are alive and well in antitrust, and politicization exists even without specifically targeting economic power. See eg RL Faith, DR Leavens and RD Tollison, 'Antitrust Pork Barrel' (1982) 25 Journal of Law and Economics 329; FS McChesney and WF Shughart (eds), *The Causes and Consequences of Antitrust* (University of Chicago 1995); FS McChesney, 'Economics versus Politics in Antitrust' (1999) 23 Harvard Journal of Law & Public Policy 133.

[61] See generally, RA Epstein and MS Greve (eds), *Competition Laws in Conflict: AT Jurisdiction in the Global Economy* (AEI Press 2004), as well as the ICN Report on the Objectives of the Unilateral Conduct Laws, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> accessed 2 August 2013.

maintaining a marketplace where small actors are not pushed out by the large. This is true not only within specific product markets, but also with regard to political influence, regulation-intensive markets, and access to credit and supplier networks. They accumulate expertise in assessing efficiencies, understanding economic effects of market structure, and assessing the viability of competition along multiple dimensions. They are, in short, society's expert on the matters having most to do with economic power, and should shoulder the burden of curtailing it.

Theoretically, constraining firm size or scope could be attained via corporate law. One might imagine setting limits on registered capital, fields of operation, or formation of subsidiaries. The problem with such an approach is that corporate law can set limits, but they would apply equally to all corporations, regardless of specific circumstances. Corporate law, especially as to limits on incorporation, operates by precise rules, with no flexibility on application. This is a huge problem when the corporations involved operate in totally different fields, each with its own unique characteristics and justifying different levels of size and interconnection. Furthermore, corporate law has no enforcement agency, precluding nuanced application or ongoing examination.

The problem with turning to corporate law for help with the economic power is most apparent when examining the legal history—both corporate and antitrust. *Dodge v Ford*, one of the most-taught cases in American corporate-law classrooms, is often touted as the source of the shareholder primacy rule, that firms are run in the interests of existing shareholders rather than the managers' (or majority owners) ideologies, or even public benefit.[62] The case, most often remembered for Henry Ford's courtroom statement that lowering car prices is more important than maximizing profit, actually centred on the firm's exceeding its allowed capital. Shareholder primacy, while perhaps important, was discussed in the case only as *obiter dictum*, having nothing to do with the court's order to distribute dividends. The second case to be remembered in this context, is *Standard Oil*, discussed above.[63] There, the trust dismembered by the Court was formed precisely in order to circumvent then-relevant corporate limits on forming subsidiaries. As firms were not allowed to hold shares in other firms, holding companies were not an option, thus the trust was used to achieve the same purpose.

Turning to the strict rules and procedures corporate law provides, produces not only grossly overstated or understated application (depending on the case involved), but also a procedural barrier which would just cause the relevant firms to seek alternative legal mechanisms, producing yet additional costs and imperfections. Since the same mechanisms which serve to facilitate economic power

[62] *Dodge v. Ford Motor Co.* 170 N.W. 668 (Mich. 1919); LA Stout, 'Why We Should Stop Teaching Dodge v. Ford' (2008) 3 Virginia Law and Business Review 163.

[63] *Standard Oil Co. of New Jersey v United States*, 221 U.S. 1 (1911).

are those used for multiple beneficial purposes, the answer cannot be procedural and technocratic, but must be flexible and allow for discretion in application. It is, in short, a task for antitrust agencies applying safe-harbour screening followed by case-specific analysis under the rule of reason. It is precisely their expertise and ability to provide repeated examination of the changing circumstances of economic reality that is required here. Antitrust has long been a limiting force on political capture and private interest guiding governmental behaviour. It is used to break-up (or prevent the accumulation of) concentrations of power, and reduce rents extracted by strong incumbents, in both industry and political markets.[64] It is antitrust that must step up to the complexities and help curtail economic power.[65]

Antitrust agencies have multiple means at their disposal: they might apply stricter scrutiny to conglomerate mergers, they might take up an advisory position to other governmental units when privatizing state-owned industries or allocating licenses within regulated industries, they might examine business alliances and networks of contracts. Since political influence is a major component of the problem, they might apply stricter standards to regulation-intensive markets and those where economic circumstances indicate concentration is likely. They might even choose to operate within the extant framework of delineating antitrust markets, only defining these more broadly, such as focussing on markets such as industry-specific credit, mega-superstores, or one-stop-shopping centres.[66] They might even define markets based on size or scope of contractual interactions, separating between small and large enterprises who serve different types of customers. At the same time, discretion should be used as to when economic power poses more (or less) of a problem. Regulated industries, media markets, and those where political actors control essential inputs to commercial success, should be more carefully assessed. Markets where entry is expected, technology developed, and innovation high, should be left to their own

[64] See SJ Weymouth, 'Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries' (8 May 2009). CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, documenting how incumbent producers and organized labour join forces to resist antitrust intervention, while outsiders (consumers, unorganized labour, and entrepreneurs) lobby for it in order to gain access to necessary inputs and markets. Interestingly, Weymouth documents how democracy in developing countries favours outsiders, but at the expense of facilitating regulatory capture.

[65] This does not mean that antitrust cannot be assisted by other legal mechanisms. Notably, tax law can be, and was, used for similar purposes. See R Morck, 'How to Eliminate Pyramidal Business Groups: The Double Taxation of Intercorporate Dividends and other Incisive Uses of Tax Policy' in JM Poterba (ed), *Tax Policy and the Economy* (2005) 135 (advocating tax policy as the preferred state mechanism to combat bigness and economic power, and reviewing Roosevelt's actions against the trusts of his time). See also, JL Simon, 'Antitrust and the Size Problem: The Graduated Corporate Income Tax as an Anti-Bigness Device' (1972) 6 Antitrust Law and Economics Review 53.

[66] This can be used to narrow markets, such as in the FTC analysis of the Staples-Office Depot merger, or broaden them, such as in the Chilean Competition Tribunal's analysis of integrated retail when considering the merger a major supermarket chain and a major surface-store retailer, essentially defining a relevant market for one-stop-shoppers. See, *FTC v Staples, Inc.*, 970 F Supp 1066 (D.D.C 1997), and *Resolucion 24/2008, Tribunal de Defensa de la Libre Competencia*, respectively.

devices as much as practical. Here, too, discretion and professional assessment should be used to guide enforcement strategy and prioritization.

In short, competition agencies are tasked with a complex problem requiring case-specific analysis. It is a difficult task, requiring formation of measurable parameters to assist application and limit undue discretion. It is towards this direction that we must travel, and the legal and economic academy is tasked with formulating standards and measurement proxies that will later be used within rule of reason adjucation. The road is long, yet worthy of travel, and we must not let the difficulties intimidate us.

VIII. Conclusion

Antitrust was formed with economic power in mind. The political ramifications and the threat to democracy were no less of interest than product-specific market power which allows producers to raise price and reduce output. Economic power is at the root of public support for antitrust, and most laypersons think of large firms and political clout when clamouring for antitrust protection. Antitrust professionals, on the other hand, tend to focus on mathematical formulae and clearly delineated economic models which separate between narrowly defined markets and focus on price and output.

This article argued for infusing contemporary competition policy with an age-old sense of purpose, of using antitrust to combat undue influence. After assessing the difficulties involved, and the risks antitrust agencies undertake in targeting economic power, I conclude that while potentially unpleasant, the task is too important and too central to their underlying justifications for them to ignore. Enforcement agencies must thus shoulder the burden and help rid society of firms and business groups that are too big to exist. Bigness is not about market value or purely economic size. Bigness should be interpreted as an idiom symbolizing the extraction of benefits and exploitation of political mechanisms, to be constrained where possible, and prevented where appropriate. There are efficiency reasons for increase in size and scope, and these should be considered and retained. Yet 'efficiency' reasons can mask rent-seeking, and sometimes economic costs should be borne in order to protect democratic ideals. This article calls for such intervention, to be applied with care and case-specific detail. Antitrust agencies can and should undertake this difficult mission.

In order to avoid misunderstanding, it is important to be clear. Nothing in this article contradicts the basic tenet the US Supreme Court made sure to stress when condemning *Standard Oil*: 'size, aggregated capital, power, and volume of business are not monopolizing in a legal sense', or stated more succinctly in *Alcoa:* 'size does not determine guilt'.[67] The point is not that size 'in itself'

[67] *United States v Standard Oil*, 221 U.S. 1 (1911), at 10. *United States v Aluminum Co. of America*, 148 F.2d 416 (1945) at 429.

should be held illegal, but that the ability to influence markets, both political and otherwise, can be a problem—one that should be carefully assessed and potentially addressed. Antitrust agencies, despite the difficulties spelled out above, should incorporate the analysis of economic power into their market assessments and their enforcement actions. There are difficulties ahead, both in developing careful modes of analysis and in articulating where the limits of intervention lie, but these difficulties should guide enforcement—not prevent it. Historically, the threats relating to economic power loomed large in the imagination of the populace for whom antitrust laws were enacted, as they did in legislative debate and judicial precedent. Over time, the professionalization of antitrust and its reliance on micro-models of distinct markets promoted market power analysis, at the expense of assessing economic power. The recent financial crises brought the issue back into focus, through the prisms of TBTF and institutional interdependencies. It is time for antitrust to reassert its prerogative and obligation, and take bigness seriously.