OCCUPY WALL STREET AND ANTITRUST

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I. INTRODUCTION

Even its more stalwart defenders are concerned that capitalism is in crisis.[1] Alan Greenspan conceded a "flaw" in his free-market beliefs.[2] The *Financial Times*, in 2012, invited Arundhati Roy and Occupy Wall Street to share a dialogue with high-level officials and leading economists over the crisis in capitalism.[3]

The crisis in capitalism might have come as a shock to some, but not to many middle- and lower-income households. Well before 2008, middle-class Americans saw little gains in income, despite gains in productivity.[4]

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1. *See, e.g.*, Joseph L. Bower, Herman B. Leonard & Lynne S. Paine, *Global Capitalism at Risk: What Are You Doing About It?*, HARV. BUS. REV., Sept. 2011, at 106; Joseph L. Bower, Herman B. Leonard & Lynne S. Paine, Op-Ed., *Occupy Wall Street Protestors Have a Point*, HARV. BUS. SCH. WORKING KNOWLEDGE (Feb. 15, 2012), http://hbswk.hbs.edu/item/6956.html?wknews=02152012 ("[Occupy Wall Street] concerns are not very different from the concerns [authors] heard when [they] talked to business leaders around the world about the problems they thought might constitute material threats to the sustainability of market capitalism."); Frank Kane, *Capitalism Crisis a Big Part of Davos Forum*, THE NAT'L, Jan. 25, 2012, http://www.thenational.ae/thenationalconversation/industry-insights/economics/capitalism-crisis-a-big-part-of-davos-forum. In one recent survey, Republicans reacted most positively to "capitalism" (62 percent reacting positively; 29 percent reacting negatively), when compared with independents (52 percent reacting positively; 39 percent negatively), Democrats (47 percent reacting positively; 43 percent negatively), and Americans younger than thirty (43 percent reacting positively; 48 percent reacting negatively). *"Socialism" Not So Negative, "Capitalism" Not So Positive: A Political Rhetoric Test*, PEW RESEARCH CTR., May 4, 2010, http://pewresearch.org/pubs/1583/political-rhetoric-capitalism-socialism-militia-family-values-states-rights.

2. Kara Scannell & Sudeep Reddy, *Greenspan Admits Errors to Hostile House Panel*, WALL ST. J., Oct. 24, 2008, at A1, *available at* http://online.wsj.com/article/SB122476545437862295.html.

3. *See In Depth—Capitalism in Crisis*, FIN. TIMES, http://www.ft.com/indepth/capitalism-in-crisis (last visited Nov. 7, 2012).

4. Anthony B. Atkinson, Thomas Piketty & Emmanuel Saez., *Top Incomes in the Long Run of*

When mass unemployment came, the middle class shrank further.[5] America's social net, U.S. Senator Bernie Sanders described in his historic speech, is threadbare.[6] America's infrastructure is crumbling.[7] Primary and secondary education for many families is inadequate.[8] Incarcerations,[9] home foreclosures,[10] underwater mortgages,[11] the number of people in

History, 49 J. ECON. LITERATURE 3, 8 (2011) (noting how "U.S. real income per family grew at a modest 1.2 percent annual rate from 1976 to 2007" but "when excluding the top 1 percent, the average real income of the bottom 99 percent grew at an annual rate of only 0.6 percent, which implies that the top 1 percent captured 58 percent of real economic growth per family during that period").

5. *See generally* SEAN F. REARDON & KENDRA BISCHOFF, US2010 PROJECT, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970-2009 (2011) (reporting a shrinking middle class and a decrease in economically-mixed neighborhoods); Marisol Bello & Paul Overberg, *Middle Class' Share of the Nation's Income Is Shrinking*, USA TODAY (Oct. 26, 2011), http://www.usatoday.com/money/economy/story/2011-10-25/middle-class-disappearing/50914822/1.

6. BERNIE SANDERS, THE SPEECH: A HISTORIC FILIBUSTER ON CORPORATE GREED AND THE DECLINE OF OUR MIDDLE CLASS 72–73 (2011).

7. *Id.* at 40–41, 129–35, 236; ARIANNA HUFFINGTON, THIRD WORLD AMERICA: HOW OUR POLITICIANS ARE ABANDONING THE MIDDLE CLASS AND BETRAYING THE AMERICAN DREAM 94–101 (2011); *Report Card for America's Infrastructure*, AM. SOC'Y OF CIVIL ENG'RS, http://www.infrastructurereportcard.org/ (last visited Nov. 7, 2012).

8. ORG. FOR ECON. CO-OPERATION & DEV., STRONG PERFORMERS AND SUCCESSFUL REFORMERS IN EDUCATION: LESSONS FROM PISA FOR THE UNITED STATES 32–34 (2011), *available at* http://www.oecd.org/pisa/46623978.pdf ("[S]ocio-economic disadvantage has a particularly strong impact on student performance in the United States: 17% of the variation in student performance in the United States is explained by students' socio-economic background," which is significantly higher than 9 percent in Canada or Japan: "In other words, in the United States, two students from a different socio-economic background vary much more in their learning outcomes than is normally the case in OECD countries."); SANDERS, *supra* note 6, at 136–42; Martha J. Bailey & Susan M. Dynarski, *Gains and Gaps: Changing Inequality in U.S. College Entry and Completion* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 17633, 2011), *available at* http://www.nber.org/papers/w17633 (finding, from nearly seventy years of U.S. Census data, a growing gap between children from high- and low-income families in college entry, persistence, and graduation).

9. ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 5 (2011), *available at* http://www.aclu.org/prisoners-rights/banking-bondage-private-prisons-and-mass-incarceration ("The United States imprisons more people—both per capita and in absolute terms—than any other nation in the world, including Russia, China, and Iran.").

10. SYLVIA A. ALLEGRETTO, ECON. POLICY INST., THE STATE OF WORKING AMERICA'S WEALTH, 2011, at 30–31 (2011), http://www.epi.org/publication/the_state_of_working_ americas _wealth_2011/; Kara Bloomgarden-Smoke, *What's Next for Occupy Wall Street? Activists Target Foreclosure Crisis*, CHRISTIAN SCI. MONITOR (Jan. 29, 2012), http://www.csmonitor.com/ USA/2012/0129/What-s-next-for-Occupy-Wall-Street-Activists-target-foreclosure-crisis; Alejandro Lazo, *Mortgage Delinquency Rate Falls, but the Number of Homes in Foreclosure Last Quarter Remained at Record Levels*, L.A. TIMES, Feb. 18, 2011, at B2.

11. ALLEGRETTO, *supra* note 10, at 29–30; Paul Owens, *46 Percent of Homes in South Florida Underwater - Mortgages*, SUN SENTINEL (Fort Lauderdale, Fla.), Aug. 10, 2011, at 1A ("46 percent of homes with mortgages in Palm Beach, Broward and Miami-Dade counties are worth less than what's owed . . . . Nationally, about 27 percent of homes with mortgages are underwater."); *The American Cities Sunk by Underwater* Mortgages, 24/7 WALL ST. MORNING NEWSLETTER, (Oct. 28, 2011, 3:38 AM), http://247wallst.com/2011/10/28/the-american-cities-sunk-by-underwater-mortgages/.

poverty,[12] and the public's dissatisfaction with Congress are at record highs.[13] With America's debt in the trillions of dollars,[14] a larger fiscal crisis looms. Many Americans in 2012 were dissatisfied with the United States' moral and ethical climate (68 percent surveyed), the federal government's size and power (69 percent), and the state of America's economy (83 percent).[15] Given the dissatisfaction, it is a wonder why more people are not protesting.

One concern, which the Occupy Wall Street protesters and many Americans share, is that

> the current imbalance of power between mega-corporations and all other institutions and individuals in the world constitutes a danger to peace, health and prosperity. While the protesters in the Middle East rebel against powerful repressive governments, participants in the Occupy Wall Street protests share a perspective that a relatively small group of corporate and wealthy individuals now wield too much economic influence and control in the United States and the world.[16]

The concern is that government policies are skewed toward helping the wealthy and powerful.[17] Many Americans for years believed there was "too much power in the hands of a few rich people and large corporations

12. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 14 (2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf ("The number of people in poverty in 2010 (46.2 million) is the largest number in the 52 years for which poverty estimates have been published."); DANILO TRISI, ARLOC SHERMAN & MATT BROADDUS, CTR. ON BUDGET & POLICY PRIORITIES, POVERTY RATE SECOND-HIGHEST IN 45 YEARS; RECORD NUMBERS LACKED HEALTH INSURANCE, LIVED IN DEEP POVERTY 2 (2011), http://www.cbpp.org/files/9-14-11pov.pdf (noting that in 2010, 20.5 million people, 6.7 percent of the U.S. population, "lived below *half* of the poverty line (below $11,157 for a family of four)"—the highest level on record).

13. *Frustration with Congress Could Hurt Republican Incumbents-GOP Base Critical of Party's Washington Leadership*, PEW RESEARCH CTR. (Dec. 15, 2011), http://www.people-press.org/2011/12/15/section-3-views-of-national-economy-major-economic-threats/ [hereinafter *Frustration with Congress*].

14. *U.S. Nat'l Debt Clock*, http://www.usdebtclock.org/ (last visited Nov. 7, 2012).

15. Lydia Saad, *U.S. Economy Most Toxic of 24 Issues*, GALLUP POLITICS (Jan. 23, 2012), http://www.gallup.com/poll/152129/Economy-Toxic-Issues.aspx.

16. Scott T. Meier, *Imbalance of Power Imperils Prosperity*, BUFFALO NEWS, Dec. 11, 2011, at G2. *See also* DAVID ROTHKOPF, SUPERCLASS: THE GLOBAL POWER ELITE AND THE WORLD THEY ARE MAKING (2009).

17. SANDERS, *supra* note 6, at 23–24; *Frustration with Congress*, *supra* note 13 ("A 61% majority say the economic system in this country unfairly favors the wealthy, while 36% say it is generally fair to most Americans. And fully 77% say that a few rich people and corporations have too much power in this country. While still a minority view, the current survey finds 40% saying that hard work and determination are no guarantee of success, higher than in any other survey conducted over the past 17 years.").

in the United States."[18] Sixty-one percent of Americans surveyed "say the economic system in this country unfairly favors the wealthy."[19] Many believe the tax system favors the rich.[20] Some wealthy taxpayers are also dissatisfied with the tax inequities.[21] Fifty-six percent of surveyed Americans said "the power and influence of banks and other financial institutions represented a major threat to the country."[22] Over four hundred economists support Occupy Wall Street in "liberat[ing] the economy from the short-term greed of the rich and powerful one percent."[23] Students are questioning a conservative bias in economics itself.[24] As Robert J. Shiller observed, "I teach financial markets, and it's a little like teaching R.O.T.C. during the Vietnam War. You have this sense that something's amiss."[25]

So what does antitrust have to say about this public unease? The Symposium raises many interesting issues for antitrust scholars. But few will likely read the Supreme Court's *Standard Oil Co. v. United States*[26] opinion handed down a century ago. Many popular antitrust casebooks devote few pages to the case.[27] Few likely believe that the issues in

18. Andrew Kohut, Op-Ed., *Don't Mind the Gap*, N.Y. TIMES, Jan. 27, 2012, at A27, *available at* http://campaignstops.blogs.nytimes.com/2012/01/26/dont-mind-the-gap/.

19. *Id*.

20. *Id*.; SANDERS, *supra* note 6, at 26–27, 45–46, 75–76, 97 (noting that the "wealthiest 400 Americans now earn an average of $345 million a year and pay an effective tax rate of 16.6 percent, on average," which is "the lowest tax rate for wealthy individuals on record").

21. James B. Stewart, *Common Sense: At 102%, His Tax Rate Takes the Cake*, N.Y. TIMES, Feb. 4, 2012, at B1, *available at* http://www.nytimes.com/2012/02/04/business/at-102-his-tax-rate-takes-the-cake-common-sense.html?_r=1&scp=5&sq=stewart&st=cse.

22. *Frustration with Congress*, *supra* note 13.

23. *Economists Statement in Support of Occupy Wall Street*, ECON4, http://econ4.org/statement-on-ows (last visited Nov. 7, 2012).

24. *See, e.g.*, Jose A. DelReal, *Students Walk Out of Ec 10 in Solidarity with 'Occupy'*, HARVARD CRIMSON, Nov. 2, 2011, *available at* http://www.thecrimson.harvard.edu/article/2011/11/2/mankiw-walkout-economics-10/.

25. Kevin Roose, *Investment Banking at Top Colleges, Anti-Wall St. Fervor Complicates Recruiting*, N.Y. TIMES DEALBOOK (Nov. 28, 2011), http://dealbook.nytimes.com/2011/11/28/at-top-colleges-anti-wall-st-fervor-complicates-recruiting/.

26. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

27. Many casebooks either briefly summarize the case or mention it in passing. *See, e.g.*, PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 125–26, 369–70 (6th ed. 2004); EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 49, 52, 178, 309 (2008); ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAWS IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 90, 607 (2d ed. 2008); ROBERT PITOFSKY, HARVEY J. GOLDSCHMID & DIANE P. WOOD, TRADE REGULATION: CASES AND MATERIALS 25, 49–50, 58 (6th ed. 2010); LOUIS B. SCHWARTZ, JOHN J. FLYNN & HARRY FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST (6th ed. 1985); E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 25, 38, 188, 201, 238, 488, 657, 754, 827 (5th ed. 2003). One exception is ELEANOR M. FOX, U.S. ANTITRUST IN GLOBAL CONTEXT: CASES AND MATERIALS 33–40 (3d ed. 2012).

Standard Oil and this Symposium relate to their concerns. That is unfortunate. As Margaret Levenstein observed,

> In the one hundred years since the United States had the audacity to break up Standard Oil, we have lost that confidence that we can shape our own economic society, to make it serve the human beings (or the environment) that should be the goal. Not just consumers, but humans, who consume and produce and live in communities and dream and hope and despair.[28]

The concerns *Standard Oil* raised are salient today. At the forefront then and now, as Part II discusses, are issues of income inequality and crony capitalism. Part III discusses how antitrust policy lost its way during the past thirty years; Part IV addresses several current antitrust paradoxes. This Essay concludes with how Occupy Wall Street recaptures what others have long known: competition and antitrust are more political than economic concepts.[29]

II. CONCERNS IN *STANDARD OIL* AND TODAY OVER INCOME INEQUALITY AND ECONOMIC CONCENTRATION

A. WEALTH INEQUALITY—THEN AND NOW

A concern in Aristotle's time,[30] in 1890 (when the Sherman Act was enacted), in 1950 (when the Clayton Act was amended),[31] and today[32] is the destabilizing effect from extreme wealth inequality. In 1890, wealth

28. Margaret C. Levenstein, *Antitrust and Business History*, 85 S. CAL. L. REV. 451, 455 (2012).

29. RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 233 (2008).

30. ARISTOTLE, THE POLITICS OF ARISTOTLE IV, at xi § 10 (R.F. Stalley ed., Ernest Barker trans., Oxford Univ. Press 1998) ("[T]he best form of political economy is one where power is vested in the middle class, and, secondly, that good government is attainable in those states where there is a large middle class—large enough . . . [to] prevent either of the opposing extremes from becoming dominant.").

31. Senator Kefauver said,

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.

96 CONG. REC. 16,452 (1950).

32. *See, e.g.*, Zanny Minton-Bedoes, Special Report: The World Economy, *For Richer, For Poorer*, THE ECONOMIST, Oct. 13, 2012, at 2 (discussing how growing inequality "is one of the biggest social, economic and political challenges of our time").

inequality was high.[33] Senator Sherman identified this inequality of condition, wealth, and opportunity as the greatest threat to disturbing social order: this inequality "[had] grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition."[34]

As the majority and dissent in *Standard Oil* discussed, people were concerned about wealth concentrated in the hands of a few individuals and corporations. The legislative debates of the Sherman Act

> conclusively show . . . that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.[35]

Justice Harlan elaborated further,

> All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,-fortunately, as all now feel,-but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. . . .
>
> Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the anti-trust act of 1890 . . . .[36]

33. HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 237–38 (1954) (citing CHARLES B. SPAHR, AN ESSAY ON THE PRESENT DISTRIBUTION OF WEALTH 69 (1896)) (estimating that one-eighth of American families controlled nearly seven-eighths of America's wealth).

34. 21 CONG. REC. 2455, 2460 (1890).

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

36. *Id*. at 83–84 (Harlan, J., concurring in part and dissenting in part) (emphasis omitted). *See*

Economists have documented the distinctive "U" shape pattern of income disparity between 1917 and 2007.[37] Peaking in 1928, income disparity sharply declined during the Great Depression. Thereafter, "[b]etween 1947 and 1973, economic growth was both rapid and distributed equally across income classes," reported the Economic Policy Institute.[38] "The poorest 20% of families saw growth at least as fast as the richest 20% of families, and everybody in between experienced similar rates of income growth."[39] But in the late 1970s, income inequality in the United States began growing, reaching a record high in 2007.[40] As the Organisation for Economic Co-operation and Development ("OECD") noted,

> The wealthiest Americans have collected the bulk of the past three decades' income gains. The share of national income of the richest 1% more than doubled between 1980 and 2008 . . . [while] the top marginal income tax rate dropped from 70% in 1981 to 35% in 2010.[41]

Between 2002 and 2007 alone, "the top 1 percent captured over two-thirds (65 percent) of income growth."[42] In 2010, the United States had the fourth-highest income gap between the rich and poor among OECD nations (trailing only Chile, Mexico, and Turkey).[43] Although the disparity between the rich and poor widened globally,[44] the OECD observed, "nowhere has this trend been so stark as in the United States."[45]

HOFSTADTER, *supra* note 29, at 206–07.

37. Atkinson, Piketty & Saez, *supra* note 4, at 6; Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States (Updated with 2009 and 2010 Estimates)* (Mar. 2, 2012), http://www.econ.berkeley.edu/~saez/saez-Ustopincomes-2010.pdf.

38. Economic Policy Institute, *Income Inequality*, ST. WORKING AM., http://stateofworkingamerica.org/inequality/income-inequality/.

39. *Id*.

40. Atkinson, Piketty & Saez, *supra* note 4, at 6 (noting how the share of total pretax income going to the top decile income group reached almost 50 percent by 2007, the highest level on record, with a significant change in the top one percentile, which rose from 8.9 percent of total pretax income in 1976 to 23.5 percent in 2007).

41. *Divided We Stand: Why Inequality Keeps Rising*, ORG. FOR ECON. CO-OPERATION & DEV. (Dec. 5, 2011), www.oecd.org/els/socialpoliciesanddata/49170253.pdf.

42. Atkinson, Piketty & Saez, *supra* note 4, at 9. *See also* U.S. CONG. BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007, at xi (2011).

43. *Divided We Stand: Why Inequality Keeps Rising*, *supra* note 41.

44. Angel Gurría, OECD Secretary-General, Remarks at Press Conference for Divided We Stand: Why Inequality Keeps Rising (Dec. 5, 2011), *available at* http://www.oecd.org/social/name,59278,en.htm ("Income inequality in OECD countries is at its highest level for the past half century.").

45. *Growing Unequal?: Income Distribution and Poverty in OECD Countries*, ORG. FOR ECON. CO-OPERATION & DEV., at 1 (2008), *available at* http://www.oecd.org/dataoecd/47/2/41528678.pdf.

Wealth inequality is also at a record high.[46] In 1962, "the wealthiest 1% of households averaged 125 times the wealth of the median household."[47] By 2009, the wealth disparity nearly doubled: "the wealthiest 1% of households averaged 225 times the wealth of the median household."[48] Indeed, all households—except those in the top 5 percent—saw a relative decline in share of overall wealth between 1962 and 2009.[49] In 2009, the richest 20 percent of American households accumulated 87.2 percent of household net wealth, the remaining 80 percent of American households accounted for 12.8 percent of all wealth, and approximately one in every four American households had no (or a negative) net worth.[50]

Americans can accept this inequality if they or their children can become wealthy. But, contrary to this Horatio Alger belief, income mobility is lower (and income inequality is greater) in America than in many other developed countries.[51] "Americans do not have an equal shot at getting ahead, and one's chances are largely dependent on one's parents' economic position," one 2008 study found.[52] "Children born to parents in the top quintile have the highest likelihood of attaining the top, and children born to parents in the bottom quintile have the highest likelihood of being in the bottom themselves."[53] In the 1890s, the wealthy adopted a robber-baron style. Today's wealthy are turning to "despot decor."[54] Not surprisingly, the leading concern among the world business leaders at the past Davos World Economic Forum was income inequality.[55]

As income became concentrated, it became especially concentrated in

46. ALLEGRETTO, *supra* note 10, at 2.

47. *Id*. at 7.

48. *Id*.

49. *Id*. at 5.

50. *Id*. at 2.

51. ORG. FOR ECON. CO-OPERATION & DEV., ARE WE GROWING UNEQUAL? 7 (2008), http://www.oecd.org/dataoecd/48/56/41494435.pdf ("Taking the analysis of persistence of income poverty and mobility of earnings between generations together suggests that more unequal countries are prone to developing an 'underclass' who are poor themselves for long periods and so are their children."). *See also* Miles Corak, *Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility* (Inst. for the Study of Labor (IZA), Discussion Paper No. 1993, 2006), *available at* http://ftp.iza.org/dp1993.pdf; Markus Jantti et al., *American Exceptionalism in a New Light: A Comparison of Intergenerational Earnings Mobility in the Nordic Countries, the United Kingdom and the United States* 27 (Inst. for the Study of Labor (IZA), Discussion Paper No. 1938, 2006), *available at* http://ftp.iza.org/dp1938.pdf.

52. Julia B. Isaacs, *Economic Mobility of Families Across Generations*, *in* GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 19 (2008).

53. *Id*.

54. Peter York, *Dictators of Taste*, FIN. TIMES, Jan. 28, 2012, at 1.

55. Gillian Tett & John Gapper, *Income Disparity Heads List of Concerns*, FIN. TIMES, Jan. 26, 2012, at 7.

the financial services industries. The financial services industries command a high share of gross domestic product ("GDP") and overall corporate profits.[56] The profits of the financial sector and other sectors historically grew the same rate; between 1980 and 2005, however, the financial sector's profits increased 800 percent, whereas other sectors grew 250 percent.[57] Between 2001 and 2010, average compensation in the finance sector was 70 to 90 percent higher than in other industries: for those in investment banking and securities dealing, their average compensation was 300 to 450 percent higher.[58] In 1989, the chief executives at the seven largest bank holding companies "earned an average of $2.8 million, or 97 times the median U.S. household income of $28,906 for that year." By 2007, the CEOs at the six largest bank holding companies "earned an average of $26 million, or 516 times the [2007] median household income of $50,233," and "2.3 times the average total compensation of the CEOs at the top 50 nonbank companies."[59]

The financial services industries became highly concentrated after the 1980s–1990s merger wave.[60] Today, six bank holding companies—Citigroup, JPMorgan Chase, Bank of America, Wells Fargo, Goldman Sachs, and Morgan Stanley—dominate the industry. In the third quarter of 2010, the assets of these six bank holding companies were worth 64 percent of GDP—higher than in 2006 (about 55 percent of GDP) and 1995 (17 percent of GDP).[61] As one point of comparison, the combined assets of all commercial banks in 1978 were worth 53 percent of GDP.[62] The four largest U.S. commercial banking firms (Bank of America, Wells Fargo, JPMorgan Chase, and Citigroup) account for 34 percent of national deposits[63] and 56.6 percent of the market in general purpose credit card purchase volume; they originated 58.2 percent of mortgage loans by volume in 2009 and serviced 56.3 percent of such loans.[64] But the larger

56. FIN. STABILITY OVERSIGHT COUNCIL, 2011 ANNUAL REPORT 110 (2011) ("With the exception of the recent recession, finance accounted for 25 percent to 50 percent of all corporate profits over the past decade.").

57. SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 60 (2010).

58. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 56, at 110.

59. *Id*. at 110–11.

60. *See infra* text accompanying note 104.

61. Simon Johnson, *The Bill Daley Problem*, HUFFINGTON POST (Jan. 9, 2011), http://www.huffingtonpost.com/simon-johnson/bill-daley-obama-chief-of-staff_b_806341.html.

62. JOHNSON & KWAK, *supra* note 57, at 59.

63. As a point of reference, the twenty-five largest banks accounted for 29.1 percent of deposits in 1980. STEPHEN A. RHOADES, BD. OF GOVERNORS OF THE FED. RESERVE SYS., BANK MERGERS AND BANKING STRUCTURE IN THE UNITED STATES, 1980–98, at 26 (2000).

64. FIN. STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS REGARDING

issue, as the next section addresses, is the separation of risk and reward for these institutions deemed "too big and too integral to fail."

B. CONCERNS OVER CONCENTRATED ECONOMIC POWER TODAY

Few trust businesses to do what is right. But, in many countries, even fewer trust their governments.[65] The crisis in capitalism also reflects a crisis in confidence in the government. This is understandable. Once power and wealth are concentrated, economic power translates into political power, and governmental policies are directed to preserve the status quo.[66]

In the late 1800s, dominant firms enlisted the government to protect their market power with high tariffs.[67] The McKinley Tariff of 1890 was enacted the same year as the Sherman Act. On average, it increased tariff rates by nearly 50 percent for many American products.[68] The tariffs protected the domestic monopolies and cartels from competition, and helped transfer income from consumers to producers.[69] As Jeffrey A. Frieden observed, "the growth of the Sugar Trust, the Steel Trust, and other oligopolistic combines would have been impossible without America's high tariff barriers."[70]

Today, corporations and trade groups spend billions of dollars lobbying the government.[71] Lobbying makes economic sense since it can

CONCENTRATION LIMITS ON LARGE FINANCIAL COMPANIES 13, 24 (2011). *See also* SANDERS, *supra* note 6, at 37–38; Stefania Vitali, James B. Glattfelder & Stefano Battiston, *The Network of Global Corporate Control*, PLOS ONE, Oct. 2011, at 1, 4 (finding inequality of control among transnational corporations to be even greater than the inequality of household income: the 737 top firms in 2007 controlled 80 percent of the value of all transnational corporations); Andy Coghlan & Debora MacKenzie, *Revealed – The Capitalist Network that Runs the World*, NEW SCIENTIST, Oct. 24, 2011, *available at* http://www.newscientist.com/article/mg21228354.500-revealed—the-capitalist-network-that-runs-the-world.html ("In effect, less than 1 per cent of the companies were able to control 40 per cent of the entire network") (quoting James B. Glattfelder) (internal quotation marks omitted).

65. EDELMAN, 2012 EDELMAN TRUST BAROMETER EXECUTIVE SUMMARY 2–3 (2012), *available at* http://trust.edelman.com/trust-download/executive-summary/ (43 percent of surveyed U.S. executives trust the government to do what is right versus 50 percent who trust businesses to do what is right; 53 percent do not trust government leaders to tell the truth; 38 percent do not trust business leaders to tell the truth).

66. JEFFREY A. FRIEDEN, GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY 102 (2006); Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 286 (2010); HOFSTADTER, *supra* note 29, at 208.

67. FRIEDEN, *supra* note 66, at 64–65.

68. *The Tariff Bill Passed: Only Three Republican Senators Vote Nay*, N.Y. TIMES, Sept. 30, 1890; Andrew Glass, *This Day in Politics: McKinley Tariff Imposed, Oct. 1, 1890*, POLITICO, Oct. 1, 2009, http://www.politico.com/news/stories/0909/27768.html.

69. FRIEDEN, *supra* note 66, at 66.

70. *Id*.

71. *See* JOHNSON & KWAK, *supra* note 57, at 90–92, 179, 192 ("As of October 2009, 1,537

affect outcomes.[72] The Supreme Court worsened the situation when it substantially weakened the limitations on corporate political spending, and thereby vastly increased the importance of pleasing large donors to win elections.[73]

The taxpayer bailouts of the major financial institutions, automobile manufacturers, the insurer AIG, and other large corporations exposed how the economically powerful have every desire to use the government to protect their economic interests.[74] As Frank Pasquale observed,

> [Occupy Wall Street] points to a fundamental problem in today's economy: a finance class that has used connections and power, rather than hard work and productivity, to make a fortune. . . . It is crony capitalism at its worst, a mockery of the ideals that supposedly animate its defenders.[75]

Today, the six largest financial institutions are "too big and too integral to fail" ("TBTF"). Ironically, as a result of mergers during the financial crisis, they became even bigger,[76] and the industry became more concentrated as nonbank mortgage lenders exited.[77] The six institutions have paid financial penalties, but likely will avoid significant punishment

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lobbyists representing financial institutions, other businesses, and industry groups had registered to work on financial regulation proposals before Congress—outnumbering by twenty-five to one the lobbyists representing consumer groups, unions, and other supporters of stronger regulation."); D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 727–30 (2012); Maurice E. Stucke, *Crony Capitalism and Antitrust* (Univ. of Tenn. Knoxville Coll. of Law Legal Studies Research Paper Series, Paper No. 164, 2011), *available at* http://ssrn.com/abstract=1942045; Ctr. for Responsive Politics, *Lobbying Database*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/ (last updated Aug. 14, 2012).

72. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 965 (2010) (Stevens, J., concurring in part and dissenting in part); SANDERS, *supra* note 6, at 219–23. Regulators may not require much persuasion if they share the industry's biases and beliefs. JOHNSON & KWAK, *supra* note 57, at 93, 150 (observing how in the banking industry "regulatory capture is most effective when regulators share the worldview and the preferences of the industry they supervise").

73. *Citizens United*, 130 S. Ct. at 910.

74. SANDERS, *supra* note 6, at 29–33.

75. Frank Pasquale, *The Conservatism of Occupy Wall Street*, CONCURRING OPINIONS (Oct. 27, 2011, 10:37 AM), http://www.concurringopinions.com/archives/2011/10/the-conservatism-of-occupy-wall-street.html#more-51893.

76. Richard W. Fisher, President and CEO, Fed. Reserve Bank of Dall., Two Areas of Present Concern: The Economic Outlook and the Pathology of Too-Big-to-Fail (with Reference to Errol Flynn, Johnny Mercer, Gary Stern and Voltaire) (July 23, 2009), *available at* http://www.dallasfed.org/news/speeches/fisher/2009/fs090723.cfm ("Bank of America's assets grew 51 percent from June 2007 to March 2009, assisted in no small part by its acquisitions of Countrywide Financial and Merrill. Wells Fargo's asset base grew 138 percent, thanks mainly to its acquisition of Wachovia. J.P. Morgan Chase acquired both Bear Stearns and Washington Mutual and grew 43 percent.").

77. JOHNSON & KWAK, *supra* note 57, at 159–64, 171, 180.

for their misrepresentations, subprime mortgages, and high credit card interest fees and rates.[78]

Although some disagree,[79] TBTF is an antitrust issue. First, competition cannot be characterized as robust when four banks control 34 percent of national deposits, account for over half of the general purpose credit card purchase volume, and originate and service more than one of every two mortgages in America.[80]

Second, TBTF firms distort market competition and raise entry barriers. If a firm, overconfident in its risk assessment models, seeks more leverage, then ideally industry regulators, creditors, and shareholders prevent such overleveraging. But if the firm is deemed TBTF, the dynamics change. The firm has greater incentive (and freedom) to take excessive risks.[81] Shareholders and creditors know of the firm's implicit government guarantee, and will not punish this risk taking: if the risky investments work in the firm's favor, they benefit. If the risky investments fail, the government's implicit guarantee forecloses the possibility of market exit.[82] The government guarantee itself has value in reducing the firm's borrowing costs.[83] The TBTF firms thus enjoy a significant competitive advantage over smaller rivals, which can fail.[84] Smaller firms cannot undertake such risk and profit when the bets pay off. Without a government guarantee, the smaller firms incur higher costs to borrow money. So, smaller banks have a

78. SANDERS, *supra* note 6, at 182; Otmar Issing, *Too Big to Fail Undermines the Free Market System*, FIN. TIMES, Jan. 20, 2012, at 11; Edward Wyatt, *S.E.C. Is Avoiding Tough Sanctions for Large Banks*, N.Y. TIMES, Feb. 3, 2012, at A1; George Osborne, *It's a Crisis of Confidence, Not of Capitalism*, FIN. TIMES, Jan. 27, 2012, http://ft.com/intl/cms/s/0/885dea04-477e-11e1-b646-00144feabdc0.html#axzz26s7psW1p ("It was incredibly short-sighted, even stupid, of banks to pay bonuses in 2009 when taxpayers had only months earlier spent vast sums bailing them out and propping up the whole sum. It was a reward for failure, which undermined a central premise of free markets.").

79. *See, e.g.*, Lawrence J. White, *Financial Regulation and the Current Crisis: A Guide for the Antitrust Community*, *in* ABA SECTION OF ANTITRUST LAW, COMPETITION AS PUBLIC POLICY 65 (C. Compton et al. eds. 2010); Barak Y. Orbach & Grace E. Campbell, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 651–53 (2012); D. Daniel Sokol & James A. Fishkin, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 68–69 (2011).

80. SANDERS, *supra* note 6, at 188.

81. JOHNSON & KWAK, *supra* note 57, at 204.

82. *Id*.

83. *Id*. at 205 (estimating large banks' paying 0.78 percentage points less for money than small banks); FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 56, at 109 (noting that credit rating agencies "factor an explicit 'uplift'" into the ratings of financial institutions perceived TBTF, which "increased dramatically in 2008 and persists," but that markets factoring the ratings may not uplift into their evaluation of these companies' long-term debt, which means that the uplift provides "a direct benefit for the short-term funding rating for these firms" in accessing short-term wholesale funding markets that they would be unable to access with a lower rating).

84. Fisher, *supra* note 76.

significant incentive to merge so that they too become too big and too integral to fail.

Some argue that governmental subsidies pervade our economy. But the competitive distortion here arises primarily from mergers to TBTF. In any merger, the government must assess whether the merger's effect "may be substantially to lessen competition, or to tend to create a monopoly."[85] If the courts and enforcers consider only the merger's claimed efficiencies and not all the political, social, and economic costs arising from mergers to TBTF, their review is woefully incomplete.[86] As former Federal Reserve Chairman Alan Greenspan, among others, recommended, "If they're too big to fail, they're too big. . . . In 1911 we broke up Standard Oil—so what happened? The individual parts became more valuable than the whole. Maybe that's what we need to do."[87]

III. WHATEVER HAPPENED TO ANTITRUST?

Antitrust policy historically sought to prevent the concentration of economic power.[88] Before the rise of the Chicago School's neoclassical economic theories, antitrust considered the social, moral, political, and distributional ramifications of firm size upon the economy and distrusted the concentration of economic wealth.[89] Despite the Sherman Act's inconsistent enforcement over the past century, it embodied at least a competitive ideal of curbing the concentration of economic power and serving as the last obstacle to complete industrial autocracy.[90] President Franklin D. Roosevelt, for example, observed that cartels and monopolies flourished in pre-war Germany because of the absence of antitrust laws and a lack of popular distrust of the concentration of power and monopolies.[91]

To prevent concentrated economic power, the antitrust laws

85. 15 U.S.C. § 18 (2012).

86. Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 24, 28–32 (1968).

87. Michael McKee & Scott Lanman, *Greenspan Says U.S. Should Consider Breaking Up Large Banks*, BLOOMBERG, Oct. 15, 2009, http://www.bloomberg.com/apps/news?pid=email_en&sid=aJ8HPmNUfchg.

88. HOFSTADTER, *supra* note 29, at 200, 205 ("[T]he Sherman Act was simply another manifestation of an enduring American suspicion of concentrated power.").

89. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 555–57 (2012).

90. HOFSTADTER, *supra* note 29, at 195.

91. Wilhelm Cohnstaedt, *Germany's Cartels and State Control: A Revealing Study of the Reich's Post-War Industrial Monopoly Organizations*, N.Y. TIMES, May 19, 1935, at BR9; John H. Crider, *Roosevelt Calls for Cartels Curb: In Letter to Hull He Says Types of "Trusts" Used by Reich Must Be Ended*, N.Y. TIMES, Sept. 9, 1944, at 1.

historically believed in maintaining competitive market structures, rather than regulatory dictates.[92] As Alfred Kahn wrote, the "essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves."[93] By the 1960s, antitrust for some was "complex, difficult, and boring."[94] Although bigness was not per se illegal,[95] there was strong bipartisan support to enforce the Clayton Act with the aim of arresting concentration in its incipiency.[96]

With an emphasis on structural banking regulations[97] and antitrust merger review, the Court in the 1960s characterized the federal supervision of banking as one of the most, if not the most, successful systems of economic regulation.[98] Commercial banking at that time was diffused through many independent, local banks, rather than concentrated in a few nationwide banks, as in England and Germany.[99] Commercial banking was subject to various state and federal governmental controls.[100] Add to that antitrust merger review, which, consistent with the legislative intent of the 1950 amendments to the Clayton Act, sought to arrest anticompetitive tendencies and trends toward concentration in their incipiency.[101] The Court noted the "virtual disappearance of bank failures from the American economic scene."[102]

Antitrust in the 1960s significantly differs from today's policies. One positive development, over the past forty years, is that mergers' likely efficiencies, once viewed with suspicion, are now seen as a benefit. One negative development is the contraction of antitrust review, which contributed to the market failure in the financial services industries.

92. *See* Peter C. Carstensen, *Remedies for Monopolization from* Standard Oil *to* Microsoft *and* Intel*: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815, 816–17 (2012).

93. Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 39 (1953).

94. HOFSTADTER, *supra* note 29, at 189.

95. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 429–30 (2d Cir. 1945).

96. STANLEY N. BARNES & S. CHESTERFIELD OPPENHEIM, THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 117 (1955); Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction*, 64 FED. COMM. L.J. 47, 55–60 (2011) (discussing incipiency standard).

97. *See, e.g.*, Glass-Steagall Act, Pub. L. No. 73–66, 48 Stat. 162 (1933) (restricting, among other things, commercial banks from engaging principally in investment banking activities).

98. United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

99. *Id.* at 325.

100. JOHNSON & KWAK, *supra* note 57, at 34–36.

101. *Phila. Nat'l Bank*, 374 U.S. at 363.

102. *Id.* at 329; JOHNSON & KWAK, *supra* note 57, at 36 (providing figures on annual bank suspensions and failures).

Antitrust policy historically distrusted the concentration of economic power. After the Chicago School, however, even monopolies were characterized as beneficial.[103]

With lax merger review and banking deregulation, beginning in the 1980s, the financial services industry underwent a wave of record-setting mega-mergers.[104] Around four hundred to five hundred banks each year between 1986 and 1998 ceased to exist independently.[105] As the financial sector became more concentrated, by the 1990s, the U.S. Department of Justice's Antitrust Division ("DOJ") no longer considered trends of concentration and arresting competitive problems in their incipiency. Instead, the DOJ typically examined the bank merger's anticompetitive risks with respect to the exercise of market power in narrowly defined geographic markets. Focusing on short-term static price competition (such as whether the banks postmerger may raise rates for specific categories of borrowers in particular cities), the DOJ did not consider market trends and the merger's impact on the efficiency, competitiveness, and stability of the overall financial system.

Consequently, in the $70 billion merger of Travelers Group, Inc. and Citicorp in the 1990s, the United States heard numerous complaints that Citigroup would have an undue aggregation of resources and that the deal would create a firm too big to be allowed to fail.[106] In dismissing these concerns, the Federal Reserve and DOJ saw no evidence of how the size or breadth of Citicorp's activities would allow it to distort or dominate price competition in any narrowly defined antitrust market; the Federal Reserve

103. Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497 (criticizing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004)).

104. JOHNSON & KWAK, *supra* note 57, at 59, 64–87, 89; STEPHEN A. RHOADES, BD. OF GOVERNORS OF THE FED. RESERVE SYS., BANK MERGERS AND INDUSTRY-WIDE STRUCTURE, 1980–94, at 3 (1996) (finding that an average of 190 bank mergers annually between 1960 and 1982); RHOADES, *supra* note 63, at 3 (finding that an average of 420 bank mergers annually between 1980 and 1998, for a total of about 8000 mergers—"equal to about 55 percent of all banks in existence in 1980"); Robert Kramer, Chief, Litig. II Section, Antitrust Div., U.S. Dep't of Justice, "Mega-Mergers" in the Banking Industry (Apr. 14, 1999), *available at* http://www.justice.gov/atr/public/speeches/214845.pdf ("[A] number of individual mergers during the 1990's ranked among the largest U.S. bank mergers ever, in terms of the real value of assets involved, and in terms of the share of total U.S. bank assets accounted for by the merging banks."). JPMorgan Chase, for example, came from mergers involving eleven financial institutions, Bank of America from thirteen institutions, and Wells Fargo from nine institutions. *How Banks Got Too Big to Fail*, MOTHER JONES, Jan. / Feb. 2010, http://motherjones.com/politics/2010/01/bank-merger-history.

105. RHOADES, *supra* note 63, at 25.

106. Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313, 318–20 (2010).

firmly believed the federal agencies had extensive experience in developing a comprehensive, risk-based supervision plan to effectively monitor Citibank.[107]

IV. CURRENT ANTITRUST PARADOXES

Antitrust policy currently suffers several paradoxes. One paradox is that despite the quest for a single economic goal, U.S. antitrust policy today lacks any clear unifying goal. Competition officials can agree that prohibiting certain egregiously anticompetitive behavior (such as price-fixing) promotes their goal (whether it is consumer welfare, efficiency, or economic freedom). But these restraints were condemned when antitrust recognized multiple social, political, and economic goals.

A second paradox is that the Supreme Court of late has complained about the state of antitrust litigation (for example, the interminable litigation, inevitably costly and protracted discovery phase, and its fear over the unusually high risk of inconsistent results by lower courts), but the Court itself has created this predicament.[108] Over the past thirty years, the Court increasingly relied on its fact-specific weighing standard, the rule of reason, and a vague economic goal (consumer welfare) that accommodated different personal values and interpretation, and often pointed to no particular course of action.

A third paradox is, as Eleanor Fox describes, the efficiency paradox: "by trusting dominant firm strategies and leading firm collaborations to produce efficiency, modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency."[109] While recognizing dynamic competition as more important, antitrust agencies and courts have "tended to avoid dynamic efficiency analysis," focusing instead on a static price competition and productive efficiencies.[110] Courts and antitrust agencies applied a light touch to merger review under a fear of false positives and a belief that most mergers promote efficiencies, even though the empirical literature suggests the contrary.[111] While recognizing

107. *Id*.

108. *See generally* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009) (collecting and discussing many of the criticisms of the rule of reason).

109. Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77 (Robert Pitofsky ed., 2008).

110. ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF: MERGERS AND DYNAMIC EFFICIENCIES 4 (2008), www.oecd.org/dataoecd/55/48/41359037.pdf.

111. *Id*. at 6; Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1560–61 (2011).

an efficiencies defense, antitrust enforcers and courts did not account for postmerger inefficiencies or the competitive distortions in creating TBTF firms.[112]

A fourth paradox is the economic power paradox. Our constitutional framework seeks to distribute power, rather than promote its concentration. Despite the historical concerns about concentrated economic power, antitrust enforcers and courts over the past thirty years "no longer concern[ed] themselves with preventing bigness, and indeed tend[ed] instead to encourage large-scale enterprise for efficiency's sake."[113] While we saw in nature the benefits of diversity,[114] we disregarded in one of our more important industries, the financial services markets, the dangers of concentration and systemic risk.[115] Despite the public and governmental concern about protecting small businesses from unfair competitive tactics, and the importance of small companies in promoting dynamic efficiencies, the *Verizon Communications Inc. v. Law Offices of Cutis V. Trinko, LLP*[116] Court praised monopolies.

A fifth paradox is that while trust, fairness, and prosocial behavior are vital to the functioning of a market economy,[117] antitrust policy ignores these values and views market participants as amoral self-interested profit-maximizers.[118]

A sixth antitrust paradox, observed Jesse Markham, is that the government's "laissez-faire policies" over the past thirty years "led to unprecedented government intervention in the private sector."[119]

112. Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the "Too-Big-To-Fail" Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 314 (2011).

113. *Id*. at 264.

114. Thomas J. Horton, *The Coming Extinction of* Homo Economicus *and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469, 485 (2011).

115. *Id*. at 491.

116. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

117. LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 19 (2011).

118. Reeves & Stucke, *supra* note 111, at 1536–38; Maurice E. Stucke, *Money, Is That What I Want? Competition Policy & the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893, 899–901 (2010).

119. Markham, *supra* note 112, at 313.

V. CONCLUSION

The concerns in *Standard Oil* resonate today. One would expect Occupy Wall Street protesters to question current antitrust policies. But antitrust's relevancy has declined since the 1970s. As one example, antitrust, other than a savings clause,[120] is absent in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which ostensibly seeks to promote financial stability by improving accountability and transparency in the financial system, to end "too big to fail," to protect the American taxpayer by ending bailouts, and to protect consumers from abusive financial services practices.

The vested interests have little incentive to change the status quo. As Frieden described of the plantation societies in Latin America and the American South, their governments "were rarely willing or able to encourage the socioeconomic development—of infrastructure, finance, and education—needed to allow the productive forces of the society as a whole to be brought to bear."[121]

But if competition is more a political than economic concept, then one promising note is the business literature. After the financial crisis, business scholars are reconsidering capitalism, "one imbued with a social purpose."[122] In the past, the concepts of sustainability, fairness, and profitability generally were seen as conflicting.[123] But these concepts are seen as reinforcing under the principle of shared value, which "involves creating economic value for society by addressing its needs and challenges" and enhances "the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates."[124] Profits can be attained not through exploitation (for example, creating demand for harmful or useless products), but through collaboration and trust and in better helping consumers solve their problems. Sustainability, rather than a cost, represents an opportunity for companies to improve productivity and societal welfare.

120. 12 U.S.C. § 5303 (2012).

121. FRIEDEN, *supra* note 66, at 102.

122. Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011, at 77. *See also* Dominic Barton, *Capitalism for the Long Term*, HARV. BUS. REV., Mar. 2011; Rosabeth Moss Kanter, *How Great Companies Think Differently*, HARV. BUS. REV., Nov. 2011, at 66; Symposium, *Conscious Capitalism*, 53 CAL. MGMT. REV. 60 (2011).

123. Porter & Kramer, *supra* note 122, at 64.

124. *Id*. at 64, 66.

So capitalism is in crisis. But the Occupy Wall Street protesters, like many Americans, are not seeking socialism or totalitarianism.[125] Instead, they want to redefine capitalism to one imbued with a moral purpose, whereby they use their talents for the betterment of others.

125. Occupy London, *How Hayek Helped Us to Find Capitalism's Flaws*, FIN. TIMES, Jan. 26, 2012, at 11.