

# MARKET STRUCTURE AND POLITICAL LAW: A TAXONOMY OF POWER

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## INTRODUCTION

Market structure is deeply political. One reason is that all markets are governed by law.<sup>1</sup> The structure of a market at any given time is the product of political decisions—made and not made—about how players in that market will be allowed to use their power. Another reason market structure is political is that power in the market affects us as citizens. Ever-increasing corporate size and concentration undercut democratic self-governance by disproportionately influencing governmental actors, as recognized by campaign finance reformers. Often overlooked, corporate structure is also political because it inscribes what we can and cannot do, and hence imposes on citizens a form of private governance unaccountable to the public. In competitive markets, the freedom to choose among buyers and sellers limits the power of any one actor. Conversely, in highly concentrated markets a few dominant companies can assume enough power to restrain, and even control, the actions of others.

Because market structure is political, legal rules—like those found in antitrust or the public purpose doctrine adopted by the Federal Communications Commission (FCC)—can shape economic power and potentially divest it when it threatens to undermine the political system. This premise, shared by Thomas Jefferson, Woodrow Wilson, and Louis Brandeis, is based on the understanding that decentralized economic power and democratic self-government are deeply intertwined.<sup>2</sup> Oligarchy or monopolization in one realm (political or

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1. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 122 (2001).

2. *See generally* LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS*

economic) leads to monopolization and oligarchy in the other. Unfortunately, this belief has fallen into desuetude in law as legal scholarship has built up a division between the study of economic and political power. The separation constitutes an unnecessary—and arguably ideological—division that has undermined the capacity of laws to explicitly regulate the economy and the political system respectively. Therefore, the regulation of one must be understood in terms of its impacts on the other.

The goal of this Article is to create a way of seeing how market structure is innately political. It provides a taxonomy of ways in which large companies frequently exercise powers that possess the character of governance. Broadly, these exercises of power map onto three bodies of activity we generally assign to government: to set policy, to regulate markets, and to tax. We add a fourth category—which we call “dominance,” after Brandeis—as a kind of catchall describing the other political impacts.<sup>3</sup> The activities we outline will not always fit neatly into these categories, nor do all companies engage in all of these levels of power—that is not the point. The point is that Bank of America and Exxon govern our lives in a way that, say, the local ice cream store in your hometown does not. Explicitly understanding the power these companies wield as a form of political power expands the range of legal tools we should consider when setting policy around them.

The taxonomy intends to categorize activities ranging from the most obvious exercises of political power to the least obvious. Some exercises of political power are fairly overt—such as spending money to elect or defeat a candidate. Some are largely interpreted as non-political, but have political import, such as money spent by a company attempting to oust a rival. There are various kinds of power in between, including the power wielded by creating and disseminating public information.

Any final definition of “power” is elusive. Thomas Hobbes defined power as a man’s “present means, to obtain some future apparent good.”<sup>4</sup> It is also frequently described as “that state of affairs which holds in a given relationship, A-B, such that a given influence attempt

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OF LOUIS D. BRANDEIS (1934); WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 163 (1913).

3. We recognize the fundamental indeterminacy of these terms. We use them as scaffolding and to encourage a way of seeing.

4. THOMAS HOBBS, *LEVIATHAN* 54 (Cambridge Univ. Press 1904) (1651).

by A over B makes A's desired change in B more likely."<sup>5</sup> Power may be exercised through force, coercion, tradition, wealth, social status, resource control, information, or persuasion. Likewise, "politics" is not susceptible to easy definition. For our purposes, we are interested in the ways in which companies either act as political institutions (by claiming authority to govern, either within their industry or within society as a whole), or as political organizations, by greatly impacting those political institutions, either through design or structure. Our taxonomy is not absolutely inclusive, but covers the primary ways in which companies in modern American society wield power.

Our purpose is to create an integrated vantage point through which to see the political effects of how markets are structured. We hope to expand the academic scope of those studying elections, and support a larger understanding of how concentrated corporate power perverts the democratic polity through means other than campaign donations and lobbying. The implication is that those concerned with preserving authentic democratic self-governance should focus their efforts on restoring antitrust policy, and that campaign finance reform should be seen as deeply connected to antitrust policy. Because of the dynamic interaction between these forms of political economic power, concentrated market structure enacts a form of private governance that threatens democratic self-government.

This Article joins a new frontier in the debate about the scope of antitrust, adding to a growing body of scholarship.<sup>6</sup> We begin in Part I

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5. OLANIKE F. DEII, *GENDER AND RURAL DEVELOPMENT: INTRODUCTION* 269 (2011).

6. We build on scholars such as Maurice Stucke, Rudy Peritz, and Tom Horton, to expand a field that has for decades limited itself to addressing consumer welfare. *See, e.g.*, RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* 241 (rev. ed. 2001); Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 *MCGEORGE L. REV.* 823 (2013); Rudolph J. R. Peritz, *A Counter-History of Antitrust Law*, 1990 *DUKE L.J.* 263 (1990); Maurice Stucke, *Reconsidering Antitrust's Goals*, 53 *B.C. L. REV.* 551 (2012). We also, however, draw from thinkers not traditionally thought of as writing in the field of "competition policy," like banking expert Simon Johnson and telecommunications scholar Susan Crawford. *See generally* SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE* (2013) (discussing the political power of the telecommunications industry); SIMON JOHNSON & JAMES KWAK, *13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* (2011) (discussing the political impact of finance concentration). Others have thoroughly explored the history of political antitrust and explained why the modern "efficiency and consumer welfare" model of antitrust is "bad history, bad policy, and bad law." Robert Pitofsky, *The Political Content of Antitrust*, 127 *U. PA. L. REV.* 1051, 1051-53 (1979). We also expand on academics like corporate law and governance professor James Kwak, who interrogates forms of political influence, like cultural and cognitive capture, that operate outside of material self-interest. *See* James Kwak, *Cultural Capture and the Financial Crisis*, in *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT*

by developing our taxonomy of political power, documenting how the absence of competition enables companies to exert power over individuals in explicit and implicit ways, implicating us as citizens. In Part II, we document how the law traditionally viewed company size and concentration through a political lens, and why that changed. In Part III, we suggest that America should return to a political vision of corporate structure, and examine the implications this has for recovering antitrust policy.

Throughout, we discuss size and concentration, which we take to be connected. Our concern with size is with regard to size relative to the total economy. A company's political power is at its apex when it is both large in terms of the economy and plays a dominant role in its own markets.

Because companies wielding these forms of power enact a form of governance over us, in Part IV we argue that corporate market structure rules should be understood as political rules. The mutual segregation of corporate law and political theory has undermined each field's capacity to explain, understand, and propose solutions. Therefore, scholars and lawmakers ought to treat a certain category of corporations (as defined by structure and size) as political organizations, and treat the rules governing those corporations as "political rules."

Our goal is not to sketch out specific solutions but to create a way of thinking about the problem and gesture to a traditional means of addressing it. A political economy dominated by large companies, along with economies of scale in the purchase of political power, is a problem for representative democracy. For democratic purposes, an economy populated by many small businesses is preferable to an economy dominated by large and concentrated industries. Excessive corporate size tends to hurt democratic self-government because it enables a handful of actors to purchase disproportionate political power and to subject citizens to systems of private governance that become less accountable the bigger and fewer the corporations.

We will use the words "antitrust" and "monopoly" throughout the Article. In doing so, we do not refer to the particular meanings as interpreted in existing law. Instead, we refer to a general spirit. Antitrust means, for us, government power to limit company size and

concentration; this incarnation is an ethos, not a legal term. Monopoly for our purposes refers to “situations in which sufficient control would be exercised over price by an individual producer or by a colluding group of producers to make possible monopoly profits, i.e., profits above the rate necessary to induce new investment in other industries not subject to monopoly control.”<sup>7</sup> This definition animates our usage, but does not exhaust it: Monopoly-like or even oligopolistic situations can enable the exercises of political power we describe below, and hence also warrant the concerns we raise in this Article.

### I. FORMS OF PRIVATE GOVERNANCE

It is beyond the scope of one article to explore all the political-economic repercussions of an economy dominated by large companies. Instead, we will focus on three broad forms of political power: (1) the power to set policy, (2) the power to regulate, and (3) the power to tax. We discuss each in turn with an eye to how these exercises of power exhibit characteristics of governance. We are not saying these activities are always conducted with explicit political intent or that they are all innately political—just that when large companies in uncompetitive markets undertake them, the power they levy is government-like. Because these activities can set policy, regulate, and tax, they affect our lives not just as consumers but also as citizens.

In business law, these forms of power might be called a subset of “nonmarket” strategies. As David Bach and David Bruce Allen wrote recently:

Nonmarket strategy recognizes that businesses are social and political beings, not just economic agents. Because companies create and distribute value, a plethora of actors seek to influence them—formally, through laws and regulation, and informally, through social pressure, activism and efforts to shape the public perception of business. Companies can’t escape this. Smart executives, therefore, engage with their social and political environment, helping shape the rules of the game and reducing the risk of being hemmed in by external actors. Yet, few companies are prepared to do the hard work and commit long term to developing an effective nonmarket strategy. Fewer still understand how to integrate market and nonmarket strategies to sustain competitive

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7. NAT’L RES. COMM., THE STRUCTURE OF THE AMERICAN ECONOMY: PART I BASIC CHARACTERISTICS 139 (Gardiner C. Means ed., 1939).

advantage.<sup>8</sup>

Nonmarket strategy includes public relations, lobbying, legal change, and market structure. Put another way, “Nonmarket issues can play out in multiple settings, from courtrooms and regulatory proceedings to parliamentary committee hearings and industry forums all the way to the news media, the public domain or the blogosphere.”<sup>9</sup>

Though we do not discuss every nonmarket strategy here (most importantly, we do not engage with the complicated political role of direct-to-consumer advertising), the word “nonmarket” is helpful because it signals that regulation—in the form of antitrust laws or other rules—would not interfere with “the market,” even according to the terms of the market participants. However, our investigation is more expansive than the strategy described above. First, we are examining the political role of companies, not simply the political choices facing an individual company. Second, we are less interested in the actual strategic choices made, and more interested in the exercise of power. When it comes to democracy, the accidental feudal lords are every bit as important as those who set out to gain political power. Therefore, our portrait assumes the unity of the “company,” instead of treating shareholders and insiders differently.

When describing the power exercised by these companies, we use terms like “dominant,” “monopolistic,” and “oligopolistic.” Our use of these terms is consciously imprecise. Because we are interested in categorizing the forms of power born of size and concentration, debates about the technical contours of these terms are secondary, and potentially irrelevant, to our work.

#### *A. Power to Set Policy*

The five categories of power we describe below are political because they drive legislation, sway rule making, and shape regulatory agendas. These vectors of power point to Washington, D.C. These activities range from highly conscious, overtly political, and semi-visible (i.e., campaign donations and lobbying), to subtle and largely invisible (i.e., directing the politics of employees). The source of the power is not always size, but size coupled with concentration

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8. David Bach & David Bruce Allen, *What Every CEO Needs to Know About Non-Market Strategy*, MIT SLOAN MGMT. REV. (Apr. 1, 2010), <http://sloanreview.mit.edu/article/what-every-ceo-needs-to-know-about-nonmarket-strategy/>.

9. *Id.*

intensifies the force and reach of these categories of power.

### 1. Power through Campaign Funding

The first way companies exercise political power is the most obvious. We call this “overt investments for direct political influence.” They include all the overt uses of financial resources to shape public policy and influence the traditional political process in ways favorable to the company.

Companies spend a lot of money in politics. Companies may lobby elected officials directly, lobby regulators, or play a large role in trade associations that lobby. Companies can either create PACs that spend money on campaigns, making access to decision-makers easier, or use SuperPACs or LLCs to spend independently. During the financial reform bill fight of 2010, the financial industry officially employed 2565 lobbyists, used media campaigns to explain how the crisis happened, and donated generously to candidates.<sup>10</sup>

Charities aspire to exert influence this way too. Though some socially responsible spending is done for non-political reasons, some is done to enable political power. One recent instance of such strategic involvement in charities comes from Comcast’s pending merger with Time Warner Cable. Executive Vice President David Cohen oversees government affairs at Comcast, but also runs its charitable foundation, which gave \$320,000 to the Hispanic Chamber of Commerce over a five-year period.<sup>11</sup> When the Comcast merger was announced, the New York Times reported on the connection, noting that one of the first supporters of the merger was the Hispanic Chamber.<sup>12</sup> Another example of this kind of political involvement is Toyota’s successful lobbying to get California to give low-emissions vehicles preferred high-occupancy vehicle lane access: “With minimum financial investment, Toyota managed to give its product a decisive competitive advantage.”<sup>13</sup>

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10. Suzanna Andrews, *The Woman Who Knew Too Much*, VANITY FAIR (Nov. 2011), <http://www.vanityfair.com/politics/features/2011/11/elizabeth-warren-201111>.

11. Eric Lipton, *Comcast’s Web of Lobbying and Philanthropy*, N.Y. TIMES, Feb. 20, 2014, [http://www.nytimes.com/2014/02/21/business/media/comcasts-web-of-lobbying-and-philanthropy.html?\\_r=0](http://www.nytimes.com/2014/02/21/business/media/comcasts-web-of-lobbying-and-philanthropy.html?_r=0).

12. *Id.*

13. See Bach & Allen, *supra* note 8.

## 2. Power through Staffing and Recruiting from Government

The second way in which corporations exercise political power is by staffing employees of and recruiting employees from government. This famed “revolving door” enables companies to shape political outcomes explicitly by writing policy and taming enforcement, and implicitly by inculcating worldviews and inscribing the parameters of possible outcomes. The former agribusiness lobbyist who joins the Food and Drug Administration may loosen labeling requirements if he intends to return to industry, while the Department of Justice enforcer who aspires eventually to join J.P. Morgan may hesitate to antagonize a potential employer.

Congressional aides frequently rotate through the revolving door. Since 2007, more than 1650 staffers have registered to lobby within a year of leaving Capitol Hill.<sup>14</sup> The economics line up: Roughly two-thirds of revolving door lobbyists generate more revenue trying to influence legislation than lawmakers earn for writing legislation.<sup>15</sup> And companies pay a premium for public sector experience—lobbyists who have served in government generate three times as much in revenue than those who have not.<sup>16</sup>

A paragon of revolving door dynamics is the Securities and Exchange Commission (SEC). The last six SEC enforcement chiefs have taken jobs at top private firms and banks including JPMorgan Chase and Bank of America.<sup>17</sup> According to the Project on Government Oversight (POGO), from 2001 through 2010 more than 400 SEC alumni filed close to 2000 disclosure forms stating they planned to represent a client before the agency.<sup>18</sup> As the POGO

14. Eric Lipton & Ben Protess, *Law Doesn't End Revolving Door on Capitol Hill*, N.Y. TIMES DEALBOOK (Feb. 1, 2014, 12:50 PM), [http://dealbook.nytimes.com/2014/02/01/law-doesnt-end-revolving-door-on-capitol-hill/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2014/02/01/law-doesnt-end-revolving-door-on-capitol-hill/?_php=true&_type=blogs&_r=0).

15. Lee Drutman & Alexander Furnas, *K Street Pays Top Dollar for Revolving Door Talent*, SUNLIGHT FOUND. BLOG (Jan. 21, 2014, 9:00 AM), <http://sunlightfoundation.com/blog/2014/01/21/revolving-door-lobbyists-government-experience/>.

16. *Id.*

17. Ben Protess, *Slowing the Revolving Door Between Public and Private Jobs*, N.Y. TIMES DEALBOOK (Nov. 11, 2013, 1:35PM), [http://dealbook.nytimes.com/2013/11/11/slowing-the-revolving-door-between-public-and-private-jobs/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2013/11/11/slowing-the-revolving-door-between-public-and-private-jobs/?_php=true&_type=blogs&_r=0).

18. PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS: REVOLVING DOOR AT SEC CREATES RISK OF REGULATORY CAPTURE 8 (2013), available at <http://s3.documentcloud.org/documents/602191/20130211-dangerous-liaisons-sec-revolving-door.pdf>. As POGO notes, “Those disclosures are just the tip of the iceberg, because former SEC employees are required to file them only during the first two years after they leave the agency.” *Id.* at 2.



report explains, former SEC employees have, among other favorable outcomes, helped companies win exemptions and obtain regulatory relief in the form of “no action letters.”<sup>19</sup> The New York Times found close to 350 instances over the last decade where the SEC gave major Wall Street banks and other financial institutions a pass on fraud and related sanctions.<sup>20</sup>

It is difficult to prove that ties to corporations or aspirations to work for them ever shape any particular vote or decision on enforcement or policy, as officials can always offer explanations for why they believe a certain choice advanced the public interest.<sup>21</sup> And at least one study has rebutted the idea that revolving door dynamics weaken SEC regulation.<sup>22</sup> Some people even argue that the desire to join private practice actually incentivizes tough enforcement, which can raise one’s profile and showcase one’s expertise.<sup>23</sup>

Rank material self-interest is not the only driver of regulatory capture, however. Even if enforcers do not explicitly or consciously trace industry demands, social ties between regulators and the regulated can tilt policy. James Kwak and others expand traditional capture theory to include non-rational forms of influence—like identity, status, and relationships—that gently yet insistently tug policy in a direction favorable to the regulated. Kwak terms this phenomenon “cultural capture.” Highly pedigreed financiers and financial regulators will share alumni networks and block parties, and the nature of those bonds matters. Asking how economic policies that contributed to the 2007 financial crash had won such widespread credence, Kwak writes:

Although several signs of traditional capture were present— notably a well-oiled revolving door between regulatory agencies and industry—the argument for capture in the strict sense is

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19. *See id.* at 10–14.

20. Edward Wyatt, *SEC is Avoiding Tough Sanctions for Large Banks*, N.Y. TIMES, Feb. 3, 2012, <http://www.nytimes.com/2012/02/03/business/sec-is-avoiding-tough-sanctions-for-large-banks.html>.

21. Nor do industry ties necessarily predict lax enforcement. For example, Gary Gensler, a former partner at Goldman Sachs, served as an aggressive head of the Commodities Futures Trading Commission.

22. Ed deHaan et al., *Does the Revolving Door Affect the SEC’s Enforcement?*, AM. ACCT. ASS’N (August 2012), <http://pogoarchives.org/m/fo/sec-revolving-door-study-july2012.pdf>.

23. *Id.* *See also* Jed S. Rakoff, *Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/>.

weakened by a plausible alternative explanation: that agency officials were genuinely persuaded by the argument that free financial markets were good for the public. In this light, the important question is why theories of the world that are wrong or at least widely contested gain broad acceptance in a specific community—here, the community of financial regulatory agencies. Where the underlying theories require highly specialized expertise (such as advanced degrees in financial economics) and are empirically contested, it would be naïve to expect policy debates to turn solely on the intellectual merits of the parties' positions. Cultural capture provides an alternative explanation of how policy is formed—neither through simple corruption nor through purely rational debate, but through the soft pressures that arise from the specific characteristics of the regulatory community.<sup>24</sup>

Notably, even after the financial collapse proved certain deregulatory theories wrong, those theories still shaped how officials responded. The way regulators handled the wreckage—their instincts, their priorities—was very telling of the assumptions they shared with financial executives. This is not per se a criticism of how the Treasury Department and Federal Reserve steered us through the aftermath—when each day brought fears of new tremors—but an observation that certain policies that would have rankled financial executives were never on the table. A team comprised of Larry Summers and Timothy Geithner shared a worldview with Jamie Dimon and Lloyd Blankfein: a set of unspoken beliefs about the role and benefits of markets. That common ideology narrowed the Overton window, foreclosing a certain set of policy responses.<sup>25</sup>

### 3. Power through Creating Information

Another way companies exert political power is through creating and disseminating information, both to encourage a favorable (de)regulatory environment, and to steer specific rules or laws. Industry trade groups frequently publish reports opining on policy, or directly hire scholars to produce research. Many professorships and university positions are founded or funded by companies and their charity arms.

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24. Kwak, *supra* note 6, at 71.

25. The “Overton window” describes the relatively narrow range of potential ideas and policies that decision-makers and influencers consider politically acceptable, and hence possible.

For example, the four biggest telecommunications carriers—AT&T, Verizon, Sprint, and T-Mobile—spent approximately \$37 million in 2013 lobbying the FCC on a range of policy issues. But they spent almost twice as much on “influence campaigns”—paying universities, think tanks, and public relations firms.<sup>26</sup> By issuing an onslaught of research, companies can shape policy through “information capture.” As Wendy Wagner writes:

In the regulatory context, information capture refers to the excessive use of information and related information costs as a means of gaining control over regulatory decision-making in informal rulemakings. A continuous barrage of letters, telephone calls, meetings, follow-up memoranda, formal comments, post-rule comments, petitions for reconsideration, and notices of appeal from knowledgeable interest groups over the life cycle of a rulemaking can have a “machine-gun” effect on overstretched agency staff.<sup>27</sup>

To take a recent instance of how this can play out, as part of the 2008 Farm Bill, Congress instructed the United States Department of Agriculture (USDA) to update the Packers and Stockyards Act, a 1920s-era law in disrepair. In 2010 the USDA published its proposed rule, which would have closely policed how meat packers and processors wield their market power against farmers, and reined in abusive practices, such as the payment scheme known as the “tournament system.”<sup>28</sup> These rules would have ushered in sweeping reforms across the industry, leveling the playing field between the world’s biggest meat companies and independent farmers. So the meat lobby got working. By late 2010, the National Chicken Council had commissioned a study estimating that the rule would cost the broiler industry more than \$1 billion over five years.<sup>29</sup> The National

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26. Allan Holmes, *The Wireless Wars*, SLATE (Mar. 21 2014, 6:00 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/03/at\\_t\\_verizon\\_t\\_mobile\\_sprint\\_and\\_auctioning\\_airwaves\\_the\\_corporate\\_giants.html](http://www.slate.com/articles/news_and_politics/politics/2014/03/at_t_verizon_t_mobile_sprint_and_auctioning_airwaves_the_corporate_giants.html). As James Thurber, a professor at American University who has been studying lobbying for thirty years, noted: “Lobbying isn’t just what the federal registered lobbyists do. It’s an orchestration of a variety of techniques and influence. . . . This includes all the advertising, white papers, surveys, grass-roots, and top-roots activities going on.” *Id.*

27. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010).

28. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35343 (proposed June 22, 2010). *See infra* note 44 and accompanying text.

29. Thomas E. Elam, *Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact*, NAT’L CHICKEN COUNCIL (Nov. 16, 2010), <http://www.nationalchickencouncil.org/wp-content/uploads/2011/12/111610-FarmEcon-Economic-Impact-Study-of-Proposed-Rule.pdf>.

Meat Association funded research that approximated the new rule would cost the United States economy close to 23,000 jobs.<sup>30</sup> The American Meat Institute released yet another report pegging the cost at \$14 billion of GDP, \$1.36 billion in lost tax revenue, and 104,000 jobs.<sup>31</sup> Tyson, meanwhile, submitted a 335-page legal brief, which challenged almost every portion of the rule, as well as the agency's authority to enforce it. In a notable concession to the industry, the USDA agreed to conduct a cost-benefit analysis of the rule. And by the time it issued the final rule, over half of the provisions had been diluted or abandoned, including one that would have made it easier for farmers to sue meat companies for unfair or deceptive practices.<sup>32</sup>

Research has been a key weapon for financial institutions striving to thwart new regulations in the wake of the 2007 crash. The Dodd-Frank Wall Street Reform and Consumer Protection Act—the 828-page financial reform law Congress passed after the crisis—delegated significant rulemaking for around 400 regulations to government agencies, inviting parties to besiege policymakers with studies to shape final outcomes. The Securities Industry and Financial Markets Association paid top professors at Stanford, Harvard, and other elite institutions to produce research commenting on the proposed rules.<sup>33</sup> These studies uniformly decried the regulations, predicting they would raise costs across the board and sap markets of liquidity. Scholars also published these views in the op-ed pages of the New

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30. *Economic Impact of GIPSA's Proposed Rules*, NAT'L MEAT ASS'N (Nov. 8, 2010), <http://www.meatami.com/ht/a/GetDocumentAction/i/64288>.

31. Ron Hays, *USDA Secretary Vilsack Says Agency Will Perform Cost Benefit Analysis of GIPSA Rule*, OKLA. FARM RPT. (Dec. 14, 2010), [http://oklahomafarmreport.com/wire/emails/media/01347\\_Oklahomas\\_Farm\\_News\\_Update12142010.html](http://oklahomafarmreport.com/wire/emails/media/01347_Oklahomas_Farm_News_Update12142010.html).

32. *Compare Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration*, 76 Fed. Reg. 76874, 76884 (Dec. 9, 2011) (to be codified at 9 C.F.R. pt. 201) (“[T]he provisions in the final rule were modified . . . to reduce, and in some cases substantially reduce the single greatest cost, which was the cost that could potentially arise due to the potential for litigation or administrative action.”), *with Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008*, 75 Fed. Reg. at 35340 (proposed June 22, 2010) (noting that the P&S Act envisioned private litigation as being a potential remedy, as it sets forth procedures for such litigation).

33. In 2011 the House of Representatives repealed a requirement that those giving expert testimony reveal their ties to the private sector. Lee Fang, *The Scholars who Shill for Wall Street*, THE NATION (Oct. 23, 2013), <http://www.thenation.com/article/176809/scholars-who-shill-wall-street#>; Emily Flitter et al., *Special Report: For Some Professors, Disclosure is Academic*, REUTERS (Dec. 20, 2010), <http://www.reuters.com/article/2010/12/20/us-academics-conflicts-idUSTRE6BJ3LF20101220>.

York Times and Wall Street Journal, and testified in congressional hearings on issues like derivatives regulation or the Volcker Rule—often without disclosing their financial conflicts-of-interest.<sup>34</sup>

Beyond issuing reports directly and paying academics for specific studies, companies also embed themselves in information streams. For example, since 1967 DuPont has run the DuPont Young Professors program, which provides \$75,000 in annual grants to “encourage highly original research of value to DuPont while helping the young professors begin their academic career.”<sup>35</sup> Looking through rosters of faculty at American universities, you will find positions like the Merck Professor of Biochemical Engineering at Berkeley University, the Tyson Chair in Food Policy Economics at the University of Arkansas, and the Walgreen Distinguished Service Professor at the University of Chicago. In 2001, the Charles G. Koch Charitable Foundation donated \$3 million to George Mason University to expand a program in “experimental economics.”<sup>36</sup> The growing reach of corporate influence on scholarship has been chronicled both by Jennifer Washburn in *University, Inc.* and the 2010 film “Inside Job.”<sup>37</sup>

The point here is not that all privately funded study is an overt attempt by corporations to influence policy or the political process—a billionaire might fund, say, cancer research because he lost a loved one to the disease, or space exploration because of a childhood dream.<sup>38</sup> But information and how it is interpreted are integral to how government makes decisions on an issue (not to mention how public opinion understands it or a journalist reports on it), and at any given moment on any given topic the total set of available information is shaped, in increasing part, by corporations looking to advance favorable policy.<sup>39</sup> In this way, companies play the role of political actor.

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34. Reuters reviewed ninety-six testimonies given by eighty-two academics to the Senate Banking Committee and House Financial Services Committee between late 2008 and 2010 and found no clear standard for disclosure and that a third of those testifying did not reveal their financial affiliations. Emily Fliter et al., *supra* note 33.

35. Press Release, DuPont on DuPont Young Professors (June 16, 2011), available at [http://www2.dupont.com/Media\\_Center/en\\_US/daily\\_news/june/article20110616a.html](http://www2.dupont.com/Media_Center/en_US/daily_news/june/article20110616a.html).

36. *Id.*

37. See generally JENNIFER WASHBURN, *UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION* (2006); *INSIDE JOB* (Sony Pictures Classics 2010).

38. Williams J. Broad, *Billionaires with Big Ideas are Privatizing American Science*, N.Y. TIMES, Mar. 15, 2014, [http://www.nytimes.com/2014/03/16/science/billionaires-with-big-ideas-are-privatizing-american-science.html?\\_r=0](http://www.nytimes.com/2014/03/16/science/billionaires-with-big-ideas-are-privatizing-american-science.html?_r=0).

39. *Id.*

#### 4. Power to Direct the Politics of Employees and Contractors

Dominance and lack of competition also empower companies to direct the political choices made by employees and suppliers. This exercise of power is more common in monopsony situations than monopoly.

Take chicken farming. Four poultry processors control around 53 percent of the market in the United States.<sup>40</sup> Regionally, concentration is even higher.<sup>41</sup> Practically this means that chicken farmers are often beholden to a single company, with scant bargaining power to negotiate the terms of their contracts. The industry is vertically integrated, which means processors hatch the chicks, mix the feed, slaughter the birds, and package the meat for market.<sup>42</sup> They leave farmers to actually raise the birds, the riskiest and most capital-intensive part of the business. Farmers usually take on hundreds of thousands of dollars in loans to build poultry houses and purchase heaters to warm the birds and ventilation systems to cool them, all to the company's specifications.<sup>43</sup> Meanwhile, farmer pay is unpredictable and occasionally arbitrary because chicken processors like Tyson pay farmers through the "tournament system," which pits farmers against one another by pegging their pay to their ranking, with no accountability or transparency.<sup>44</sup> Farmers know that if they protest or challenge the company, it can cut them off—and sink their livelihood.

In 2009, the Obama administration announced it would convene a series of workshops to assess the state of consolidation in agricultural markets. Attorney General Eric Holder and Agriculture Secretary Tom Vilsack toured the country to hear directly from farmers about the conditions they faced.<sup>45</sup> For many farmers, the opportunity was a lifeline. But in the days before the poultry hearing in Alabama, representatives from Tyson and Pilgrim's Pride visited farmers to warn them that if they spoke out at the hearing they would face

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40. *The Economic Cost of Food Monopolies*, FOOD & WATER WATCH (Nov. 2, 2012), <https://www.foodandwaterwatch.org/reports/the-economic-cost-of-food-monopolies/>.

41. *Id.*

42. CHRISTOPHER LEONARD, *THE MEAT RACKET* 23 (2014); Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov. 2012), [http://www.washingtonmonthly.com/magazine/november\\_december\\_2012/features/obamas\\_game\\_of\\_chicken041108.php?page=all](http://www.washingtonmonthly.com/magazine/november_december_2012/features/obamas_game_of_chicken041108.php?page=all).

43. Khan, *supra* note 42.

44. *Id.*

45. *Id.*

retaliation.<sup>46</sup> As farmers at the hearing recounted, scores of others had not shown up or were afraid to speak up because of the companies' threats.<sup>47</sup> For many farmers, their economic dependence lost them their right to free speech and assembly.

In other instances, companies like Tyson do not need to exert their power; its sheer existence quells dissent. For example, Christopher Leonard narrates the account of Tyson employee Perry Edwards in *The Meat Racket*:

[Perry] Edwards did not see any evidence that Tyson Foods delivered sick birds to [long-time farmers] Jerry and Kanita Yandell to retaliate against them for any perceived bad behavior. But what he observed was that the company had the ability to do so if it wanted to. Farmers around Waldron did not have the front-seat view of this power that Edwards was afforded. But they knew it existed. They felt it. They perpetually feared it. And for that reason, they often stifled their complaints and took what Tyson gave them.<sup>48</sup>

Political power is also expressed through direct communication to employees about the political preferences of CEOs (an expression enabled by *Citizens United v. Federal Election Commission*<sup>49</sup>). Although the letters may not, according to law, intimidate the employees, they can strongly communicate a preference and list reasons justifying it. During the 2012 election, presidential candidate Mitt Romney asked business owners to use their power in this way: "I hope you make it very clear to your employees what you believe is in the best interest of . . . their job . . . in the upcoming elections."<sup>50</sup> Real estate developer David Siegel sent a long letter to his employees, telling them that if Obama won, he would probably end up on a beach

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46. *Id.*

47. U.S. DEP'T OF JUSTICE, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 10 (May 2010), available at <http://www.justice.gov/atr/public/reports/283291.pdf>.

48. LEONARD, *supra* note 42, at 38. Political suppression is also common in battles over unionization. For example, in 2012 a federal judge found that Target managers had threatened to discipline employees who talked about the union and threatened to shut the store if workers voted in favor of unionization. Steven Greenhouse, *Union Gets New Election at Target*, N.Y. TIMES, May 21, 2012, <http://www.nytimes.com/2012/05/22/business/new-union-vote-ordered-at-target-store-in-valley-stream-ny.html>.

49. 558 U.S. 310 (2010).

50. Nate C. Hindman & Christina Wilkie, *Wynn Employee Voter Guide Pressures Workers to Vote Right*, HUFFINGTON POST, (Oct. 26, 2012), [http://www.huffingtonpost.com/2012/10/25/wynn-employee-voter-guide\\_n\\_2018595.html](http://www.huffingtonpost.com/2012/10/25/wynn-employee-voter-guide_n_2018595.html).

“without employees.”<sup>51</sup> And Steve Wynn sent a voter guide to his employees.<sup>52</sup> It is not clear that these crude tactics work: One Wynn Resorts employee said, “Now that I’m being told who to vote for by my overlord, maybe I’ll just vote for Obama.”<sup>53</sup> However, if employees feel pressure or are otherwise influenced, these communications act as a form of employer-employee political power.

### 5. Too Big to Fail

Even in the absence of resources devoted to purchasing political influence, a company with a large relative size to the economy will have power. Bank of America’s assets are over 1 percent of the United States GDP.<sup>54</sup> Exxon Mobil made \$45 billion dollars in profits in 2008.<sup>55</sup> When the relative size of a company is significant—certainly anything approaching 1 percent of GDP—democratic choices become constrained by the self-interest of the individual corporation. The relative size makes it incumbent upon legislators to design laws that will at a minimum ensure the stability of the company. Dominant firms breed uncertainty and instability in key resources—and that uncertainty leads to political power.<sup>56</sup> If Lockheed Martin goes under and lays off all its employees, it will have an impact on the entire economy. Therefore, the largest companies, even without lobbying, can make demands of government based on the threat of their own failure.

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51. Scott Keyes, *Billionaire CEO Threatens to Fire Employees if Obama Wins*, THINKPROGRESS (Oct. 9, 2012), <http://thinkprogress.org/economy/2012/10/09/978211/david-siegel-fire-employees/>.

52. Hindman & Wilkie, *supra* note 50.

53. *Id.*

54. As of December 2013, Bank of America’s total assets amounted to \$2.1 trillion, while the United States GDP hovered around \$16 trillion. See *Holding Companies with Assets Greater than \$10 Billion*, NAT’L INFO. CTR., <http://www.ffiec.gov/nicpubweb/nicweb/top50form.aspx> (last updated Dec. 31, 2013); *US Real GDP by Year*, MULTPL.COM, <http://www.multpl.com/us-gdp-inflation-adjusted/table> (last updated Mar. 31, 2014).

55. John Porretto, *Exxon Mobil Reports Record \$45.2 Billion Profit for 2008*, HUFFINGTON POST, (Jan. 1, 2009), [http://www.huffingtonpost.com/2009/01/30/exxon-mobil-reports-recor\\_n\\_162468.html](http://www.huffingtonpost.com/2009/01/30/exxon-mobil-reports-recor_n_162468.html).

56. As Simon Johnson and James Kwak argue in their book, blogs, and articles, this structure reeks of oligarchy. Gigantic firms are a real threat to self-government. If big corporations can demand bailouts and dictate policy it takes away the ability of the people to choose the policies they most want. The policy is “chosen” by the people in the same way that someone with a gun to their head “chooses” to do what the holder of the gun tells them to. See *generally* JOHNSON & KWAK, *supra* note 6.



Companies that are large relative to the size of American GDP use this power by threatening to collapse or leave if their demands are not met. After the recent financial crisis, because of the size (relative to the economy) of the biggest banks and investment firms, politicians made the decision that they should not be allowed to fail and bring the country down with them. Putting aside the banks causal role in the crisis (which is itself arguably a function of relative size), imagine that there were 10,000 banks, instead of 5, facing restructuring. The government could have allowed some to fail while others were restructured. Though the government might still have chosen to provide a bailout, it could have had more bargaining power with the banks in determining the size of the bailout. You can think of this kind of size as the “too big to fail” rent, a promised subsidy that enables cheap capital and that cheapens the cost of seeking political power.

### *B. Power to Regulate*

We describe two exercises of power: the power to govern what is in a market and the power to self-regulate. Both are political because they enable private actors to steer markets in a way akin to regulation. Unlike the power to set policy, the power to regulate bypasses Washington. It governs through the marketplace. Notably, this form of power is largely born through economic dominance and market power.

As we describe above, large companies routinely win favorable regulations by influencing the political process through lobbying and revolving door tactics. A more direct and less visible way to set regulations is to be a monopolist. The standards a dominant company sets can determine the course of an industry much like a government agency does. Take, for example, how Wal-Mart steered the deodorant market. Through the early 1990s, almost all deodorant containers came packaged in a paper-box. Wal-Mart executives decided the box added unnecessary cost, and told suppliers to eliminate it.<sup>57</sup> So the suppliers did. Today practically no deodorant comes packaged in a box. As Charles Fishman observes, “[w]hole forests have not fallen in part because of the decision made in the Wal-Mart home office at the intersection of Walton Boulevard and SW 8th Street in Bentonville,

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57. CHARLES FISHMAN, *THE WAL-MART EFFECT: HOW THE WORLD’S MOST POWERFUL COMPANY REALLY WORKS—AND HOW IT’S TRANSFORMING THE AMERICAN ECONOMY* 1 (2006).

Arkansas, to eliminate the box.”<sup>58</sup> Seen this way, the effects of Wal-Mart’s decision resemble a prohibition by the Environmental Protection Agency designed to save trees.

What is more, the more concentrated the market, the greater the governing power. For example, if we have a competitive shampoo market, whether there are toxins in our shampoo will be determined by hundreds of executive teams at hundreds of firms with competing interests. But if one company monopolizes the shampoo market, that same decision will be made by a few executives sharing one common interest. In the latter scenario, the shampoo company enjoys power akin to a government, without being accountable to the public. Similarly, if there is only one seller of all books, that seller is capable of exercising arbitrary power over the content of our books—akin to the censorship power of government.

A recent example of how dominant companies become de facto regulators centers around Zilmax, the feed hormone used to bulk up cattle in the final weeks of their lives. Though the additive hit commercial markets in 2007, research showing it harmed the quality of beef kept feedlot owners from buying it.<sup>59</sup> Enter Tyson, JBS, Cargill, and the National Beef Packing Company. Once the four meatpackers, which control 85 percent of the market, began accepting Zilmax-fed animals, its adoption rapidly spread across the whole industry.<sup>60</sup> By late 2012, even feedlots leery of its side effects realized they would have to start using it if they wanted to stay in business.<sup>61</sup> But when reports surfaced that cattle fed with Zilmax were struggling to walk and were displaying strange symptoms, its abandonment was equally swift. On August 9, 2013, Tyson, the biggest meat company in the world, announced it would no longer buy Zilmax-fed livestock. On August 16, Zilmax-producer Merck said it was suspending sales.<sup>62</sup> No government agency intervened at any point; rather, it was a handful of executives that governed the quality of our beef supply.

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58. *Id.* at 2.

59. Christopher Leonard, *Why Beef is Becoming More Like Chicken*, SLATE (Feb. 14, 2013, 4:55AM), [http://www.slate.com/articles/health\\_and\\_science/food/2013/02/zilmax\\_the\\_cattle\\_growth\\_drug\\_that\\_s\\_making\\_beef\\_more\\_like\\_chicken.2.html](http://www.slate.com/articles/health_and_science/food/2013/02/zilmax_the_cattle_growth_drug_that_s_making_beef_more_like_chicken.2.html).

60. *The Economic Cost of Food Monopolies*, *supra* note 40.

61. Leonard, *supra* note 59.

62. Theopolis Waters & Tom Polansek, *Amid Cattle Health Concerns, Merck Halts Zilmax Sales*, REUTERS (Aug. 16, 2013), <http://www.reuters.com/article/2013/08/16/us-merck-zilmax-idUSBRE97F0S320130816>.

Meanwhile, policies set by Facebook regulate the online privacy of over 1.2 billion users worldwide.<sup>63</sup> Four airline companies govern which cities in America receive affordable and regular air service and which are cut from the grid.<sup>64</sup> Rules decided by the Chicago Mercantile Exchange—which has swallowed up the Chicago Board of Trade, the Kansas City Board of Trade, and the New York Mercantile Exchange—now determine how our corn, wheat, and oil are priced.<sup>65</sup>

This observation about de facto regulatory power is different from a critique of deregulation. We are not arguing that companies are presently making decisions that ought to be made by government. We are saying that when you have one company or small group of dominant companies making decisions that effectively set standards for the rest of the industry, those outcomes take on the character of governance. The crucial difference, of course, is that corporations, unlike government, are not accountable to the public.

The other form of regulatory power is more overt and often comes in the form of an explicit suggestion that an industry “self-regulate.” There is a large body of literature—both praising and critical—of corporate self-regulation. An industry “self-regulates” when most of the industry participants agree on standards of professionalism or safety, appropriate content, or environmental rules. Therefore a dominant company within an industry can directly “regulate” that industry through a trade association or other important self-regulatory body.

### *C. Power to Tax*

The most difficult form of private political power to document is the power to impose a tax on the public. Unlike the power to set policy or to regulate—whose exercise does not always guarantee the desired outcome, or whose direct impact can be difficult to assess—the power to tax costs the public immediately, at the moment the

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63. Jemima Kiss, *Facebook's 10th Birthday: From College Dorm to 1.23 Billion Users*, THE GUARDIAN, Feb 3, 2014, <http://www.theguardian.com/technology/2014/feb/04/facebook-10-years-mark-zuckerberg>.

64. Phillip Beau, *New American Airlines Means 'Big 4' Control US Skies*, CNBC (Feb. 14, 2013), <http://www.cnbc.com/id/100461115>; Lina Khan & Philip Longman, *Terminal Sickness*, WASH. MONTHLY (March/April 2012), [http://www.washingtonmonthly.com/magazine/march\\_april\\_2012/features/terminal\\_sickness035756.php?page=all](http://www.washingtonmonthly.com/magazine/march_april_2012/features/terminal_sickness035756.php?page=all).

65. The three major exchanges—where the bulk of commodity futures are traded—are self-regulatory organizations. “Although all four exchanges have been merged to form CME Group, each exchange remains a separate self-regulatory organization.” *Rulebooks*, CME GROUP, <http://www.cmegroup.com/market-regulation/rulebook/> (last visited June 10, 2014).

power is exercised. Admittedly, “tax” is imprecise. We use “tax” to connote the systemic capture of resources for private ends. One dictionary defines tax as “a compulsory contribution to state revenue, levied by the government on workers’ income and business profits or added to the cost of some goods, services, and transactions.”<sup>66</sup> By definition it might seem that a private party cannot “tax” because the direction in which the money flows is innate to the meaning of tax. But for a significant and longstanding part of economic theory, monopolies were thought to impose a kind of tax. As Arnold Kling puts it, describing consumer costs when there is a monopoly: “Note that if the industry were competitive and the government imposed a \$200 per bushel tax on wheat, the result for the consumer would be the same. There is the same ‘deadweight loss’ for the economy. The only difference between a government tax and the monopoly ‘tax’ is that the ‘profits’ accrue to the government.”<sup>67</sup>

It is widely established—in both antitrust theory and the world around us—that size and concentration correspond with market power. Market power enables a company to raise what it charges consumers and lower what it pays suppliers. The higher margins that it pockets serves to transfer wealth from consumers and suppliers to its own account. It, in essence, imposes a tax on those subject to its power.

This wealth transfer empowers the company at the expense of its customers and suppliers, both politically and economically. Oftentimes these transfers will accrue in fractions of pennies, almost imperceptibly. Barry C. Lynn recounts how Henry Osborne Havemeyer, after rolling up seventeen sugar refineries, astutely asked, “Who cares for a quarter cent of a pound?”:

Havemeyer meant that he did not intend to use the power he had amassed over our supply of sugar to gouge us suddenly and violently. Rather, he intended to collect his quarter of a penny tax from us quietly and steadily, the same way our local governments collect a few pennies from us quietly and steadily every time we buy a Slurpee at 7-Eleven. . . . For many decades, every time an American sprinkled some sugarcane crystals into his or her tea, Havemeyer and his family became just a bit richer and hence a bit

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66. *Tax Definition*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/us/definition/english/tax> (last visited June 19, 2014).

67. Arnold Kling, *The Problem of Monopoly*, ARNOLDKLING.COM, <http://arnoldkling.com/econ/markets/monopoly.html> (last visited June 19, 2014).

more politically powerful than you and me.<sup>68</sup>

These wealth transfers are all the more subtle in dull and quotidian industries like, for example, container board, the corrugated material we use to box over 95 percent of all delivered packages in the United States.<sup>69</sup> As noted in a recent Goldman Sachs memorandum, steady consolidation since the 1990s has handed the top four companies control over 70 percent of the market, with the largest player alone holding 33 percent.<sup>70</sup> In subsequent years the firms restricted supplies and raised prices.<sup>71</sup> Margins spiked from 10 percent in 2003 to 18 percent last year—while the containerboard prices we all pay jumped 90 percent.<sup>72</sup> Or take the seed industry, in which Monsanto controls upwards of 80 percent of genetic traits embedded in corn and soybeans, and together with DuPont sells 70 percent of all corn seed.<sup>73</sup> Since Monsanto's roll-up of independent seed companies, its net profits have grown from \$267 million in 2003 to \$2.5 billion last year—a staggering tenfold increase over ten years.<sup>74</sup> The inflation-adjusted price farmers pay for corn seed, meanwhile, has shot up 166 percent since 2005.<sup>75</sup>

When sufficient market power enables a company to extract more wealth from consumers and employees than the company could absent that market power, the additional income it collects acts like a tax. Furthermore, the wealth transfers in concentrated markets are political because they make big companies bigger and enrich their executives and shareholders, handing both the firm and top individuals more political power.

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68. BARRY LYNN, CORNERED: THE RISE OF MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 48 (2010).

69. GOLDMAN SACHS GLOBAL INV. RES., DOES CONSOLIDATION CREATE VALUE? 10–11 (2014).

70. *Id.* at 10.

71. *Id.* at 10–11.

72. *Id.*

73. Christopher Leonard, *Monsanto Squeezes Out Seed Business Competition*, HUFFINGTON POST, (Dec. 13, 2009), [http://www.huffingtonpost.com/2009/12/13/monsanto-squeezes-out-see\\_n\\_390354.html](http://www.huffingtonpost.com/2009/12/13/monsanto-squeezes-out-see_n_390354.html); Jeff Swiatek, *AgReliant: Corn Seed Breeder Growing Competition*, INDIANAPOLIS STAR, Nov. 4, 2013, <http://www.indystar.com/article/20131103/BUSINESS/310280001/>.

74. Emiko Terazono & Neil Munshi, *Monsanto at Centre of Intensifying Debate on Food*, FIN. TIMES, Feb. 26, 2014, <http://www.ft.com/cms/s/0/e5eef102-9990-11e3-b3a2-00144feab7de.html>.

75. Jacob Bunge, *Big Data Comes to the Farm, Sowing Mistrust*, WALL ST. J., Feb. 25, 2014, <http://online.wsj.com/news/articles/SB10001424052702304450904579369283869192124>.

### *D. Dominance*

Our taxonomy illustrates how size absent competition can impose a form of private governance on the public. A dominant company is unaccountable to citizens for the power it exerts, yet that power determines and even constrains their actions. The first three categories—campaign funding, staffing and recruiting from government, and controlling information streams—capture how companies strive to influence the political process. These forms of power are the most discrete and discernible; projects like *opensecrets.org* devote significant resources to tracking them.<sup>76</sup> Other forms of power—“too big to fail,” political punishment, regulation, and tax—illustrate forms of political power exercised outside the traditional political process. This key influence is won not just through size and capital but also—crucially—through market structure. These forms of corporate power can undercut democratic self-governance in ways untouched by campaign finance reform. The political process is not the only highway to undue political control.

In addition to operating outside of the traditional political process, this type of power is notable because its application does not always require its active exercise. Power can arise purely out of dominance. As Justice Louis Brandeis stated:

Restraint of trade may be exerted upon rivals; upon buyers or upon sellers; upon employers or upon employed. Restraint may be exerted through force or fraud or agreement. It may be exerted through moral or through legal obligations; through fear or through hope. It may exist, although it is not manifested in any overt act, and even though there is no intent to restrain. Words of advice, seemingly innocent and perhaps benevolent, may restrain, when uttered under circumstances that make advice equivalent to command. For the essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises.<sup>77</sup>

In other words, power can be experienced without being exercised. Our taxonomy is not exhaustive, and never could be, precisely because power exerts itself in infinite discreet guises. That this power still threatens democratic self-government—even when it does not manifest as concrete schemes or donations—suggests that

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76. See generally OPEN SECRETS, <https://www.opensecrets.org>.

77. *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting).

reformers should look beyond policing activity. They should also target structural advantages that derive from concentration and size.

There are other incidental political impacts of market structure on political society as a whole not captured by the seven ways we discuss. For democratic self-government to work, society must be populated by people who are educated enough to know the impacts of policies, and be somewhat capable of imagining other policies or other impacts. There is something harder to capture than information alone that is critical for successful self-government—it is a sense among the governed that they are fundamentally competent to challenge the decisions of their representatives and that they experience actual power in the political process. Without this experience of power, citizens will engage in self-government in the most limited of ways—voting—and their ability to govern themselves will be restricted by the choices presented by those in power. The exercise of power cannot be taught by a textbook—it is a habit. Of course the most extreme Jeffersonian view is that self-government requires a country of yeoman farmers who are trained and accustomed to power.<sup>78</sup> John Stuart Mill and William Greider have also argued that the experience people have 364 days a year necessarily impacts how they conduct themselves on the one day a year when they vote. If someone is constantly told what to do, prohibited from questioning authority, punished for raising complaints, and rewarded for docility in all other aspects of their lives, how can we expect her when she encounters a Congress member on the street, to ask about why the new health care law does not provide for dental policy, even if her daily grievance is the inability to pay for dental care?<sup>79</sup>

Access to the experience of power is directly related to corporate structure. When there are bigger businesses, there are fewer people in management positions, and more people who have no daily relationship to power (or who experience it only as subjects). There are fewer people who work with or witness executive decision-making. Imagine five major tire companies in this country instead of one thousand, and five executives instead of one thousand. If evenly distributed over the fifty states there would be twenty executives in each state willing to challenge political power, instead of five states

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78. See generally Benjamin F. Wright, *The Philosopher of Jeffersonian Democracy*, 22 AM. POL. SCI. REV. 870 (describing the works of John Taylor, one of Thomas Jefferson's contemporaries, who wrote extensively on the American farmer as the democratic ideal).

79. See, e.g., WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE* (1993).

with executives and forty-five with none. Setting aside their expertise in tires, those twenty executives could be political presences in every major city in the country, both exhibiting and modeling the vibrant sense of self that is required for true self-government.

If one out of every twenty people in a society is in a decision-making role, that mode of thought—of responsibility taking—has a chance of being part of the civic culture. The culture of responsibility taking deeply infuses itself into our lives and changes our internal grammar from “x is happening to me” to “I am part of changing x.” The internal grammar of the private decision-maker bleeds into the internal grammar of the citizen—when she is fluent with power in one sphere, it bleeds to the other.

## II. THE POLITICAL ECONOMIC LENS OF TRADITIONAL ANTITRUST

The idea that companies can act as a form of private government is not new. The primary expression of this concept is in competition policy. “Monopoly” was originally used to describe an exclusive grant of power from the government to work a particular trade or sell a specific good.<sup>80</sup> In Britain, monarchs would sometimes abuse this power. Dissatisfied with the funds Parliament allocated her, Queen Elizabeth routinely issued royal monopolies as a revenue-generating scheme.<sup>81</sup> Citizens protested that these exclusive trade privileges imposed an undue burden on them in addition to the burden they already bore paying taxes to Parliament.<sup>82</sup> The higher prices they paid to the royal monopoly served, in essence, as a private tax that accrued to the Queen.<sup>83</sup>

Thomas Jefferson was openly anti-monopoly, as seen in his fear of how patents distort power in the political marketplace.<sup>84</sup> He supported an anti-monopoly provision in the Constitution’s Bill of Rights, putting it on par with the First Amendment.<sup>85</sup> Though the Whigs and the Democratic-Republicans disagreed on the importance of monopolies, even the most whiggish centralizer assumed that for most

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80. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983, 984 (2012).

81. *Id.* at 989.

82. *Id.* at 989–90.

83. *Id.* at 990.

84. Silvio Bedini, *Godfather of American Invention*, in SMITHSONIAN BOOK OF INVENTION 82–83 (Alexis Doster, III et al. ed., 1978).

85. HOWARD WALTER CALDWELL & CLARK EDMUND PERSINGER, *A SOURCE HISTORY OF THE UNITED STATES* 279 (1909).



industries, a widely distributed array of producers was necessary.<sup>86</sup> A popular economic textbook from the 1860s stated: “A general Distribution of Capital is . . . of prime importance. By this is meant such a condition of things that the capital of a country shall be in many hands rather than few. . . . [G]reat aggregation of capital in the possession of individuals is disadvantageous because it leads inevitably to despotic assumption.”<sup>87</sup> Articles in the *Harvard Law Review* and the *North American Review* condemned the growth of concentrated economic power as “feudalism” and a “great, unscrupulous, powerful plutocracy.”<sup>88</sup> One contemporary decried the “political menace that resided in these stupendous aggregations of wealth.”<sup>89</sup> The belief that decentralized economic power was essential for (and inextricable from) political liberty was a mainstay view of the day.

The first federal antitrust law, The Sherman Act, was understood at the time in terms that we now associate with campaign finance laws.<sup>90</sup> When the Sherman Act passed Congress in 1890, Senator John Sherman called it, “A bill of rights, a charter of liberty,” and crowed about its importance in both economic and political terms.<sup>91</sup> Senator Sherman viewed the monopolist as another form of monarch. On the floor of the Senate in 1890, he declared:

If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.<sup>92</sup>

Law Professor James May’s exploration of the Sherman Act’s intellectual antecedents shows that for Senator Sherman and the Act’s congressional supporters, economic and political freedoms were seen as part of a piece. May summarizes the debates around the enactment of the Sherman Act as indicating a “widespread congressional

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86. Calabresi & Leibowitz, *supra* note 80, at 993.

87. FRANCIS WAYLAND, *THE ELEMENTS OF POLITICAL ECONOMY* 92 (1886).

88. James Hudson, *Modern Feudalism*, 144 N. AM. REV. 277, 290 (1887); D.M. Mickey, *Trusts*, 22 AM. L. REV. 538, 549 (1888). We are indebted to David Millon for these quotations. See generally David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1227–28 (1988).

89. E. Benjamin Andrews, *Trusts According to Official Investigations*, 3 Q.J. ECON. 117, 150 (1889).

90. 15 U.S.C.A. §§ 1–7 (West 2014).

91. 21 CONG. REC. 2461 (1890).

92. 21 CONG. REC. 2455, 2457 (1890).

commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization.”<sup>93</sup> Put another way, as earlier historians claimed, the “primary motivation of Congress in enacting the Sherman Act and every significant amendment was concern about the abusive behavior of economic giants, real or imagined, and sympathy for their victims, consumers and businessmen deprived of alternatives and opportunities.”<sup>94</sup> The Act grew out of a long “tradition that aimed to control political power through decentralization of economic power.”<sup>95</sup>

This ideology persisted in related legislation of the early twentieth century. In 1914, during the passage of the Federal Trade Commission Act, Senator Cummins explained, “we must do something to preserve the independence of the man as distinguished from the power of the corporation; that we must do something to perpetuate the individual initiative.”<sup>96</sup> Senator Cummins argued for a strong antitrust policy despite some economists’ claims that big companies were better for the consumer. Conceding the point that aggregation of capital might lead to cheaper goods, he argued that “we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.”<sup>97</sup> The “single master mind” to which he referred was a form of tyranny that could destroy self-government, even if it came in the technical form of a private company.

Passed in 1914, the Clayton Act prohibited a corporation from acquiring another corporation when the acquisition would result in a substantial lessening of competition, or would create a monopoly in any line of commerce.<sup>98</sup> The debates around the Clayton Act—explored thoroughly by May—show the same political cast. The House Committee Report on the Act argued that “the concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown

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93. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 288 (1989).

94. Harlan Blake & William Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 384 (1965).

95. Millon, *supra* note 88, at 1220.

96. 51 CONG. REC. 12,742 (1914).

97. *Id.*

98. *Id.*

to such an enormous extent” and it had to be stopped lest it “threaten the perpetuity of our institutions.”<sup>99</sup> One congressman explained:

Enterprises with great capital have deliberately sought not only industrial domination but political supremacy as well. . . . Great combinations of capital for many years have flaunted their power in the face of the citizenship, they have forced their corrupt way into politics and government, they have dictated the making of laws or scorned the laws they did not like, they have prevented the free and just administration of law.<sup>100</sup>

Senator Taft’s 1914 book echoed these themes, arguing that antitrust was essential in fighting the “plutocracy” of the “great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us.”<sup>101</sup>

Ironically, the greatest burst of antitrust enforcement—as distinguished from the antitrust laws themselves—was accompanied by an effort to tone down the political content. Thurman Arnold, who brought antitrust and competition policy to the center of the Roosevelt Administration’s economic policy, downplayed the political problems of scale and concentration, and focused on the economic harms.<sup>102</sup> Arnold is widely recognized for bolstering antitrust by adequately staffing and funding its enforcement.<sup>103</sup> It is unclear what we should make of Arnold’s agnosticism about the political impacts of antitrust. On the one hand, one could see Arnold as redefining antitrust for the country by justifying his enforcement on economic grounds. On the other hand, one could see him as finally enforcing a policy that the public had long clamored for—the fact his own emphasis was on economy instead of politics and power is of little import. Regardless of Arnold’s framing, the law maintained a political cast after World War II.

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99. H.R. REP. NO. 63-627, at 19 (1914).

100. 51 CONG. REC. 9086 (1914).

101. WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 4 (1914).

102. See generally SPENCER WEBER WALLER, *THURMOND ARNOLD: A BIOGRAPHY* (2005).

103. Under Arnold’s tenure, “the number of Antitrust Division employees grew from eighteen to nearly five hundred, and the budget more than quadrupled.” Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN’S L. REV. 570, 582 (2004). The Division reached its peak in 1942 “with a staff of 583 persons and a budget of \$2,325,000. Between 1938 and 1940, the number of new cases jumped from eleven to ninety-two, while the number of investigations jumped from fifty-nine to two hundred fifteen.” *Id.*

Courts, while looking at market share, did not limit themselves to economic analysis, but saw the role of antitrust in terms of limiting concentrated power in both the economic and political spheres.<sup>104</sup> Cartels and dominant business interests were associated with the political economies of Japan and Germany—anti-big-business sentiments may have come from experience with business cartels associated with harsh World War I governments in these countries. In 1941, the Supreme Court in *United States v. Hutcheson*<sup>105</sup> openly read the antitrust statutes in light of, and to be harmonized with, earlier labor acts that had declared a commitment to decentralized economic power as part of the public policy of the United States.

In the major antitrust treatise of the late 1950s, Karl Kaysen and Donald Turner wrote about the goals of antitrust.<sup>106</sup> Kaysen and Turner were both Harvard Law Professors, and Turner later became the chief antitrust lawyer in President Johnson’s Justice Department. They argued that the goal of antitrust was a “proper distribution of power” in the economic sphere.<sup>107</sup> This goal, they said, derived from the work of Thomas Jefferson and principles of autonomy that were central to American political ideology.<sup>108</sup> Moreover, they argued that “business units are politically irresponsible, and therefore large powerful business units are dangerous.”<sup>109</sup> They saw the goal of the Sherman Act as being to “protect equal opportunity and equal access for small business for noneconomic reasons: concentration of resources in the hands of a few was viewed as a social and political catastrophe.”<sup>110</sup>

Turner and Kaysen’s view was reflected in contemporary court cases, although the courts were more constrained by the brief text of the Act. In 1945, Judge Learned Hand in *United States v. Aluminum Company of America (Alcoa)*,<sup>111</sup> first discussed the economic arguments against monopoly but endorsed the “belief that great industrial consolidations are inherently undesirable, regardless of their economic results.”<sup>112</sup> He referred to Senator Sherman’s stated

104. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

105. 312 U.S. 219 (1941).

106. See generally CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959).

107. *Id.* at 17.

108. *Id.* at 17–18.

109. *Id.* at 17.

110. *Id.* at 19.

111. 148 F.2d 416 (2d Cir. 1945).

112. *Id.* at 428–29.

concerns about limiting aggregated capital because of the “helplessness of the individual before them.”<sup>113</sup> Moreover, he noted that later statutes including the Surplus Property Act and the Small Business Mobilization Act had been rightly interpreted in *Hutcheson* to shape the meaning of the antitrust Acts. “Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.”<sup>114</sup> Antitrust as a force for decentralization was important “for its own sake and in spite of possible cost.”<sup>115</sup>

In 1948 in *United States v. Columbia Steel Co.*,<sup>116</sup> Justice Douglas explained:

We have here the problem of bigness. . . . The philosophy of the Sherman Act is that . . . all power tends to develop into a government in itself. Power that controls the economy . . . should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and command of the Sherman Act.<sup>117</sup>

In 1950, Congress amended the antitrust laws by passing the Celler-Kefauver Act, in response to a burst of merger activity.<sup>118</sup> Like in the Sherman Act, precise definitions were lacking, but the Celler-Kefauver Act pressed both political and economic aims. In this era, the Antitrust Division tended to be very successful in blocking mergers<sup>119</sup>—and the political vision persisted. In 1959, Carl Kaysen

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113. *Id.* at 428.

114. *Id.* at 429. When the Norris-LaGuardia act of 1932 was passed, not an antitrust act itself but a labor rights act, it explained that it was the “public policy of the United States” to protect individual unorganized workers in the face of corporate power. Norris-LaGuardia described corporate power in terms of “prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association.” 29 U.S.C.A. § 102 (West 2014).

115. *Aluminum Co. of America*, 148 F.2d at 429.

116. 334 U.S. 495 (1948).

117. *Id.* at 535.

118. Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950).

119. See JONATHAN BAKER & CARL SCHAPIRO, *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 235–67 (Robert Pitofsky ed., 2008).

and Donald Turner proposed “no fault” concentration legislation.<sup>120</sup>

In *Brown Shoe Co. v. United States*<sup>121</sup> in 1962, the Supreme Court said that Congress’s vision in the Sherman Act was to “promote competition through the protection of viable, small, locally owned business.”<sup>122</sup> Congress understood that this vision might lead to higher costs and prices, due to costs associated with “fragmented industries and markets.”<sup>123</sup> However, Congress “resolved these competing considerations in favor of decentralization.”<sup>124</sup>

Likewise, in *United States v. Philadelphia National Bank*,<sup>125</sup> the Supreme Court upheld the block of a bank merger between the second and third largest regional banks, which would have led to one bank controlling 30 percent of commercial banking.<sup>126</sup> Despite the lack of evidence that this 30 percent interest would have negative effects on competition, the Court held that it need not have “elaborate proof of market structure, market behavior, or probable anticompetitive effects.”<sup>127</sup> Instead, the high market share alone showed “inherently anticompetitive tendency.”<sup>128</sup> The Clayton Act barred “anticompetitive mergers, benign and malignant alike,” and in interpreting the statute, the Court recognized that there were concerns about concentration that were not directly measurable.<sup>129</sup>

From the mid-1960s to the early 1980s, there was a sea change in the understanding of antitrust, and a hard-fought intellectual battle over its purposes. Chicago school theorists Richard Posner and Robert Bork—building on the work of Aaron Director—argued that current doctrine was based on flawed economic ideological premises and that efficiency and consumer welfare—not the goal of aiding small businesses or having a decentralized economy—were the only legitimate goals of the antitrust statutes.<sup>130</sup> Posner argued that there was no justification for “using the antitrust laws to attain goals unrelated or antithetical to efficiency, such as promoting a society of

120. See KAYSSEN & TURNER, *supra* note 106, at 265–72.

121. 370 U.S. 294 (1962).

122. *Id.* at 344.

123. *Id.*

124. *Id.*

125. 374 U.S. 321 (1963).

126. *Id.* at 371.

127. *Id.* at 363.

128. *Id.* at 366.

129. *Id.* at 371.

130. See Robert H. Bork & Ward Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 375 (1965).

small tradespeople.”<sup>131</sup> Bork similarly argued that any political or social concerns were necessarily indeterminate, created unmanageable standards, and were normatively unjustifiable.<sup>132</sup>

In every important way, these theorists won the war. However, the political vision of antitrust remained an essential part of the antitrust lawyer’s understanding at least through the early 1980s. Though the courts turned away from checking anything but bad behavior, politicians with a different economic vision, concerned about concentration qua concentration, continued to fight for decentralizing economic laws.<sup>133</sup> In 1968, a White House Antitrust Task Force recommended limiting mergers for companies with more than \$500 million in sales or \$250 million in assets.<sup>134</sup> In 1972, Senator Hart proposed a “no fault” de-concentration law that would have set an absolute cap on how concentrated industries could become.<sup>135</sup> In 1979, Ted Kennedy introduced a bill that would have limited mergers of companies with over \$2 billion assets (close to \$6 billion in today’s dollars).<sup>136</sup> There was a fierce intellectual debate over the 1968 report and the 1979 bill, coming as they did when the law and economics models were gaining strength, and when the traditional, political antitrust people still had significant political power.<sup>137</sup>

Donald Turner, among others, argued that antitrust had always been a unique area of law—somewhere between constitutional and traditional statutory law—and that it would always reflect the economic views of the country.<sup>138</sup> But Turner became increasingly isolated in the 1970s, as the dominant figures in the field adopted variations of the Posner/Bork model, rejecting both limitations on corporate size and arguments for decentralized corporate

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131. RICHARD A. POSNER, *ANTITRUST LAW* 2 (2d ed. 2001).

132. See generally ROBERT BORK, *THE ANTITRUST PARADOX* (2d ed. 1993).

133. Phil Neal et al., *Report of the White House Task Force on Antitrust Policy*, 2 *ANTITRUST L. & ECON. REV.*, winter 1968–69, at 11, 14–15.

134. Charles Berry, *Economic Policy and the Conglomerate Merger*, 44 *ST. JOHN’S L. REV.* 266, 266 (1970).

135. Phil Neal et al., *supra* note 133, at 11.

136. 125 *CONG. REC.* 12,828–29 (1979).

137. For opposition to the bill, see Donald Baker and Karen Grimm, *S. 600—An Unnecessary and Dangerous Foray into Classic Populism*, 40 *OHIO ST. L.J.* 847 (1979). For a discussion of the debate, see PERITZ, *supra* note 6, at 379 and Herbert Hovenkamp, *The Neal Report and the Crisis in Antitrust*, 5 *COMPETITION POL’Y INT’L* 217 (2009) (chronicling the harsh reaction to the Report that advocated aggressive use of antitrust laws).

138. Donald Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 *HARV. L. REV.* 1207, 1222 (1969) (citing Justice Hughes for his description of the ways in which the antitrust acts have features similar to the Constitution).

competition.

Unfortunately, when the Posner/Bork model came to dominate antitrust, it did not just infect the particular field of antitrust law, but also the larger understanding of the relationship between corporate and political law. We have lost, therefore, the intellectual habit of seeing through the integrated lens that the earlier political antitrust framework provided. We see political problems in isolation from economic ones, diminishing our capacity to analyze either arena accurately.

The ideological radicalism of these public choice theorists did not lie in their commitment to “efficiency” and modeling, but in their core belief that politics and economics are severable. Though their sub-theories were debated and discussed at the time, and the empirical evidence for their claims successfully challenged, the great success of the “law and economics” movement was in shaping the taxonomies of study. Economics and business are one area of study; constitutional law and election law are another.

This separation of economic and political thinking goes very deep and has shaped popular media, political rhetoric, and activist groups. Since the 1970s, reformers from left and right have turned their energies toward laws regulating the shape of the governing institutions (like Congress), instead of laws regulating the creation and shape of the influencing institutions (like Bank of America).<sup>139</sup> Though right and left democracy reformers have different sets of beliefs about corporate law and liabilities, it is rare that either focuses on antitrust or corporate size and structure. This is not merely intellectually troubling, it is historically strange; prior to the 1970s, reformers would talk about money and politics in terms of market structure as something government could do something about.

It is no accident that the law and economics movement started in antitrust, which seemed a bit of a backwater, and spread from antitrust out into other parts of business law. If the law and economics scholars could convince others that antitrust—the most political of economic laws—had nothing to do with political culture or elections, or with representative democracy and power, then it would be far

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139. The decline shows itself in absences—the absence of antitrust law in election law journals, the absence of political discussions in antitrust law casebooks. There have always been dissenters and critics, but the overall tendency of both disciplines—election law and antitrust—has been towards ignoring company size and concentration as a political threat.



easier to convince them that other factors of corporate law and structure were also fundamentally non-political.

When politics was taken out of economics, the study of economic structures was gradually extracted from politics. Until *Citizens United* forced corporate law scholars to consider the political responsibilities of the SEC,<sup>140</sup> most corporate law and most antitrust law doctrines assumed an internal world of markets—flawed or successful—separate from a political world. Frameworks for thinking about capture, rent, and campaign finance have limited our sense of possibility—the same players, with different sets of tools (or the same set, repackaged), return to the same sandboxes over and over again without looking out over the playground. But this is not the only sandbox. The tendency to “study markets in splendid isolation from such political acts”<sup>141</sup> can limit the imagination of the person involved in thinking through democratic design, and can lead to false conceptions of how the market and government actually work. Instead of seeing political organizations—like Congress or political parties—as the only place in which we might make political rules, we ought to also see corporations as a place to make political rules. In order to open up corporate structure rules to political conversations, we must first recognize that corporations are political organizations.

### III. TO TACKLE THE SECOND GILDED AGE, HEED LESSONS FROM THE FIRST

#### *A. Market Structure is Political Structure*

Arguably, all corporate forms are political because they owe their existence to law. When a corporation wields sufficient economic power, we should view it as a political institution outright, which means market structure implicates our democratic polity and process. This view was innate to traditional competition policy and, as our taxonomy above shows, is still pertinent today.

The political role and relevance of corporations was legitimated and elevated by the Supreme Court’s explicit conclusion that corporations are political entities. In *Citizens United*, the Court held that a law limiting uncoordinated speech that was designed to elect or defeat candidates violated the First Amendment, resting its opinion

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140. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

141. PERITZ, *supra* note 6, at 241.

on a few concerns.<sup>142</sup> For the purposes of this Article, what is most important is that the Court adopted a view that corporations should be political organizations in order to question, and check, the power of government—activities we traditionally conceive as responsibilities of citizenship. The Court called corporate independent spending “indispensable to decision-making in a democracy.”<sup>143</sup> After *Citizens United*, the official political theory of the United States is that corporations are much like—if not exactly like—political parties, labor unions, and other entities that constitute an essential part of the political architecture of the country. Its decision turned corporate involvement in elections from a loophole-seeking practice to a practice endorsed by the Supreme Court.

Many of the factors that will lead to corporate exercises of political power are a function of, or correlated with, company size or market concentration. The capacity to fund elections, achieve regulatory and information capture, influence employers, create structural dependencies, regulate markets, and tax are—to a good degree—furnished by economic dominance.

#### *B. Antitrust and Other Structural Interventions as Political Law and Tools*

Once we see the eight forms of power as integrated and market structure as political, structural interventions that would seem illegitimate as mere market interventions instead appear legitimate. Elections are political institutions and the particular design choices about them have deep political impacts. For example, the date of elections, the form of the ballot, the form of voter registration, and questions about who can appear on the ballot are deeply important questions of democratic design. Congressional districts are political institutions and over the last 200 years their size, shape, and type (single member/multimember) have been changing. In designing their size, qualifications, and rules regarding government are fundamental questions of democratic design.

In shaping political institutions, questions of size and scale are recurrent themes. Since the days of Plato, who thought the ideal size of a political community was 5040 people, these highly technical questions of size have been front and center in institutional design.<sup>144</sup>

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142. *Citizens United*, 558 U.S. at 339–41, 372.

143. *Id.* at 349 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

144. ARISTOTLE, *THE POLITICS* bk 7, pt. IV (Benjamin Jowett trans., 1885) (c. 350 BCE),

Should a state legislature have a representative for every 5000 people, or every 50,000? How should campaigns be funded and how much should individuals be allowed to contribute? How frequently should elections be held? How should district size be determined? All of these are basic questions of democratic design surrounding political institutions. Similar kinds of questions should be addressed to corporate size.

Up to now, in the public debate about money, power, and influence in politics, most structural reforms have focused on Congress and on the laws governing elections. Publicly funded elections, filibuster reform, and transparency tend to be Congress-centric. Alternatively, laws designed to increase ballot box access, reform gerrymandering, or include mail-in ballots are election-process-centric. Election law scholars debate how campaigns should work to minimize corruption, what role parties should have, and the role of the media. But in all these areas the attention is focused on one or two discrete kinds of levers.

Reformers have focused far less on corporate law itself, yet this Article argues that addressing market structure—or minimally viewing it as a site for political action—might help the left and right both achieve their stated goals. An explicit recognition that many corporations are political organizations opens up a new category of structural changes that might improve representative government and engagement. It enables one to think about incentives and disincentives for investment in lobbying, for example, not by focusing on lobbying, but by looking at how corporate size, scope, and industry concentration interact with lobbying to either encourage more or less of it. It also enables one to think about how excesses of corporate size, scope, and industry concentration undercut democratic self-governance in ways that lobbying and campaign finance reform do not address.

The corporate form is a tool that encourages a particular set of structures. It provides subsidies for certain business activities in exchange for public goods that would not be created by the government. Corporate charters can be as expansive or restrictive as we desire them to be as can corporate liability. Instead of focusing solely on Congress, the recognition of the corporation as a political organization allows for a more imaginative approach to the puzzles of

representation, as well as one more attuned to the realities of how power is exercised.

In teaching the law of politics, it is difficult to paint a fair picture of the ecosystem of influences that interplay around an election without a deeper understanding of the political organizations of corporations, yet the classic portrait painted in election law textbooks focuses on the internal structure and decision-making of one set of important political actors—those within political parties—and only pays a passing glance to the structure of other sets of important political actors, like media companies and other corporations. This leads to extensive examination of the rules governing one set of political actors and almost no examination of the rules governing another.

It is clear, however, that the market structure in which corporations act crucially shapes the polity, as well as the ability of citizens to govern themselves. If the only problem we guard against is lobbying and campaign donations, we will have a democracy protected from one exercise of private economic power—bribery—but not from other ways in which corporations wield power either to influence government or to govern us. In light of this, our goal in this Article is modest: to encourage political reformers to view market structure as a site for governance. Like other political tools and institutions, such as elections and Congress, market structure can be designed in a way that promotes democracy or that undercuts it.

#### IV. CONCLUSION

The hope in this Article is twofold: First, that we encourage a way of seeing corporate power; and second, that this way of seeing births a language, or at least starts the process of looking for language—both to describe this power and to identify the political tools and mechanisms for harnessing it, scaling it back, or whatever we, as citizens, decide.

Decentralization of economic power in most areas of commerce is an essential underpinning of political freedom. A society with strong voting rights, speech protections, and fair elections cannot realize democratic principles with an oligarchic economy. For law this means that antitrust and other de-concentration rules should be understood not solely as part of corporate law, but also as part of political law. In this light, a revival of antitrust policy could be one of the most effective forms of improving democratic self-government in ways that

are typically associated with campaign finance reform.

Some of this Article has been theoretical, but the issues it addresses are very current. Six banks largely control the financial industry. Steady consolidation across agriculture, retail, healthcare, and manufacturing has left a few dominant companies that each wields enormous power over their respective industries and our polity. Their size enables a form of private governance that encroaches on our rights as citizens. Existing antitrust is far too feeble for the task of unwinding this power. The public choice theorists who effectively killed it did not realize that true antitrust was actually their own intellectual father—the tool that could lead to market competitiveness and reduce the amount of concentrated money spent influencing government at the same time.

You can see the American impulse to antitrust appearing in Jonathan Macey and James P. Holdcroft Jr.'s recent article about limiting bank size,<sup>145</sup> in the business journalist Barry C. Lynn's book *Cornered*,<sup>146</sup> in Robert Reich's support for breaking up banks,<sup>147</sup> and even in Alan Greenspan's suggestion that companies too big to fail are too big to exist.<sup>148</sup> This impulse is gradually creeping out and finding its way into legislation. During the financial reform fight, Senator Sherrod Brown of Ohio and Senator Ted Kaufman of Delaware proposed a simple new law that the New York Times endorsed: They wanted to put a cap on bank size.<sup>149</sup> Brown/Kaufman would have made it illegal for any financial institution to have non-deposit liabilities (debts and obligations) larger than 2–3 percent of GDP.<sup>150</sup>

This is a good start but far too meager. The largest limited liability companies are too complex to manage, too difficult to regulate, and

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145. Jonathan R. Macey & James P. Holdcroft, Jr., *Failure is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1370 (2011) (“In our view, the only precommitment device that enables the government to make a credible promise to refrain from future massive bailouts is to act preemptively to prevent financial institutions from growing so large that they become too big to fail.”).

146. See generally LYNN, *supra* note 68.

147. Robert Reich, *Break Up the Big Banks, Says the Dallas Fed*, HUFFINGTON POST, (Mar. 29, 2012), [http://www.huffingtonpost.com/robert-reich/dallas-fed-wall-street\\_b\\_1388443.html](http://www.huffingtonpost.com/robert-reich/dallas-fed-wall-street_b_1388443.html).

148. 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=newsarchive&sid=aJ8HPmNUfchg>.

149. *The Hard Work on Financial Reform*, N.Y. TIMES, May 4, 2010, <http://prospect.org/article/new-financial-reform-bill-would-break-banks>.

150. *Id.*

are often effectively immune from criminal prosecutions. Their size allows them to operate outside of normal democratic constraints and their use of their economic power undermines our democracy. In many ways, the excesses of corporate power constitute a defining challenge of our present moment, yet we have lost the conceptual tools to fully identify and understand it. Our intent is to recover both the vision and language to interrogate this power, so that we as citizens can then decide how to structure and harness it.