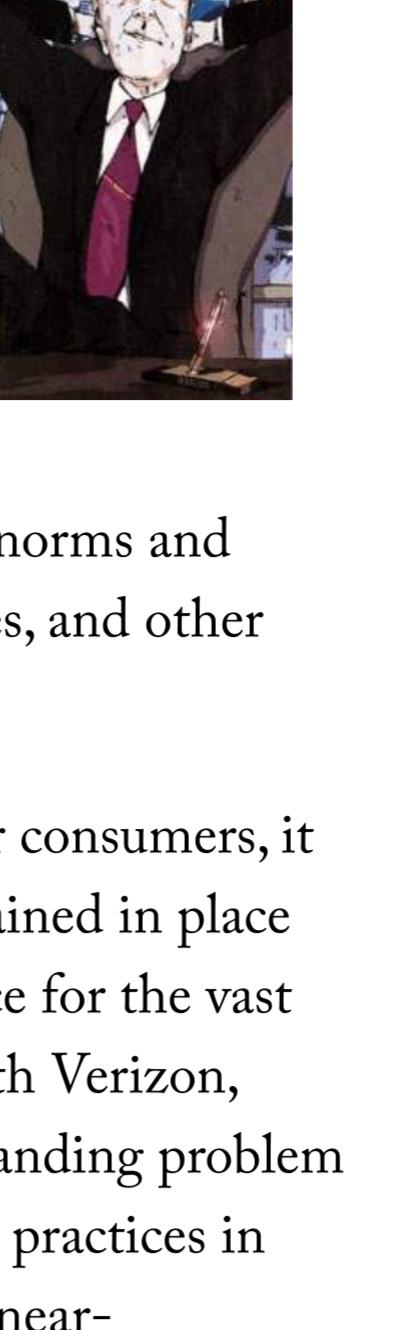
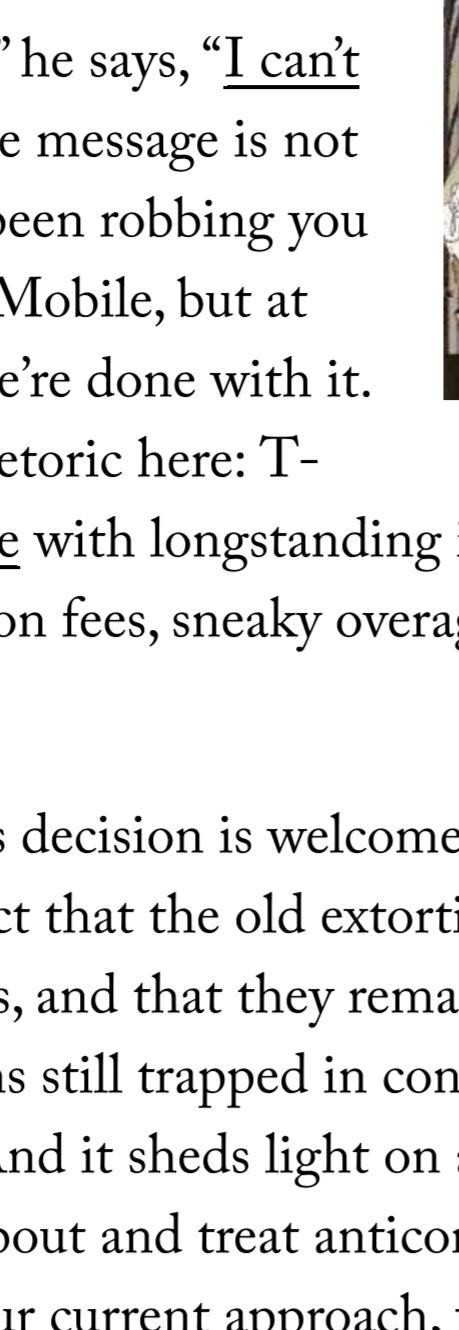
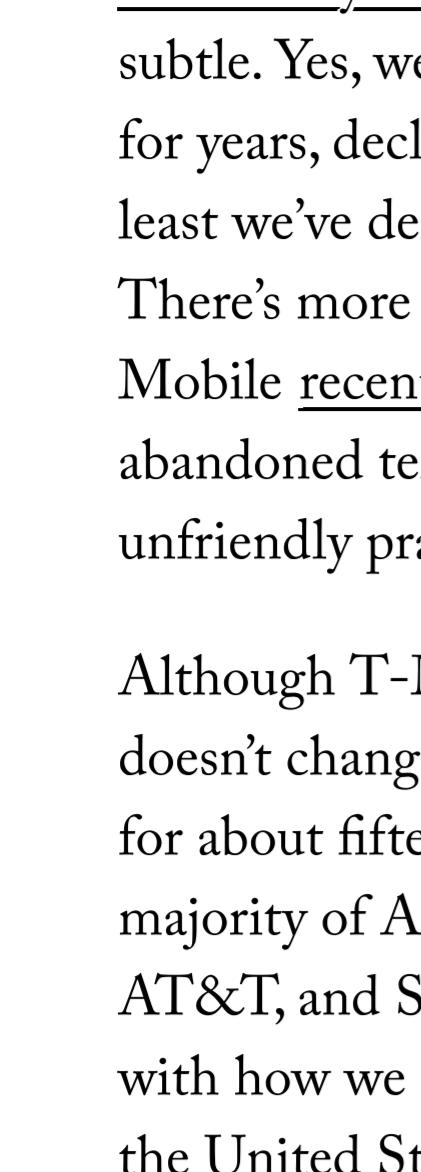


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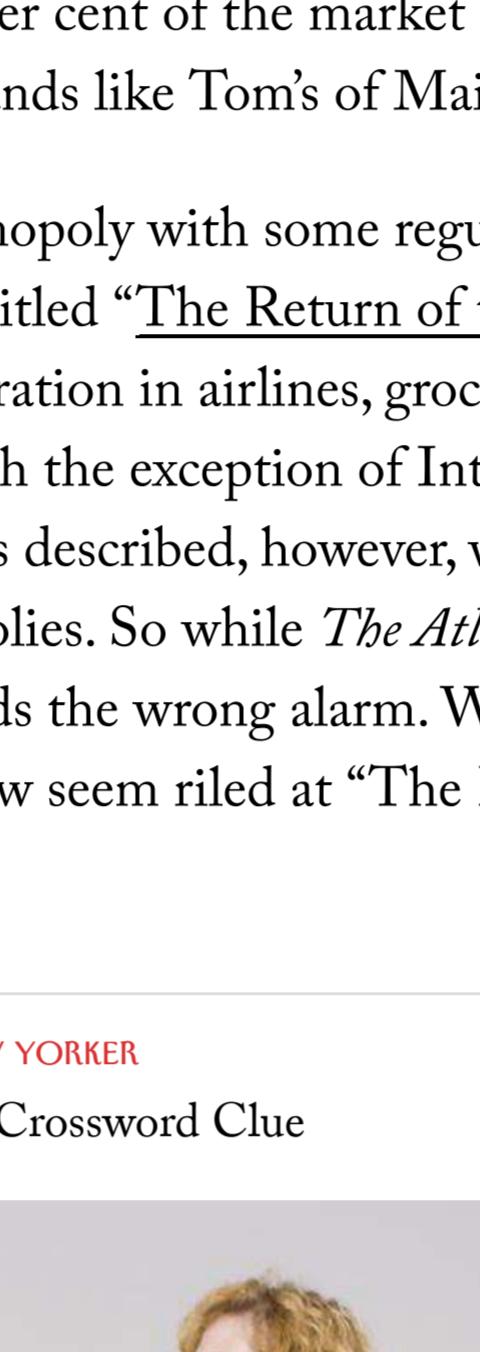
ANNALS OF TECHNOLOGY

THE OLIGOPOLY PROBLEM



By Tim Wu April 15, 2013

In a recent T-Mobile commercial, one black-hatted outlaw breaks with the rest of his gang. "Aw," he says, "I can't do this anymore." The message is not subtle. Yes, we've all been robbing you for years, declares T-Mobile, but at least we've decided we're done with it. There's more than rhetoric here: T-Mobile recently broke with longstanding industry norms and abandoned termination fees, sneaky overage charges, and other unfriendly practices.



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Although T-Mobile's decision is welcome news for consumers, it doesn't change the fact that the old extortions remained in place for about fifteen years, and that they remain in place for the vast majority of Americans still trapped in contracts with Verizon, AT&T, and Sprint. And it sheds light on a long-standing problem with how we think about and treat anticompetitive practices in the United States. Our current approach, focussed near-exclusively on monopoly, fails to address the serious problems posed by highly concentrated industries.

If a monopolist did what the wireless carriers did as a group, neither the public nor government would stand for it. For our scrutiny and regulation of monopolists is well established—just ask Microsoft or the old AT&T. But when three or four firms pursue identical practices, we say that the market is "competitive" and everything is fine. To state the obvious, when companies act in parallel, the consumer is in the same position as if he were dealing with just one big firm. There is, in short, a major blind spot in our nation's oversight of private power, one that affects both consumers and competition.

This blind spot is of particular significance during an age when oligopolies, not monopolies, rule. Consider Barry Lynn's 2011 book, "Cornered," which carefully detailed the rising concentration and consolidation of nearly every American industry since the nineteen-eighties. He found that dominance by two or three firms "is not the exception in the United States, but increasingly the rule." Consumers, easily misled by product labelling, often don't even notice that products like sunglasses, pet food, or numerous others come from just a few giants. For example, while drugstores seem to offer unlimited choices in toothpaste, just two firms, Procter & Gamble and Colgate-Palmolive, control more than eighty per cent of the market (including seemingly independent brands like Tom's of Maine).

The press confuses oligopoly and monopoly with some regularity. *The Atlantic* ran a recent infographic titled "The Return of the Monopoly," describing rising concentration in airlines, grocery sales, music, and other industries. With the exception of Intel in computer chips, none of the industries described, however, was actually a monopoly—all were oligopolies. So while *The Atlantic* is right about what's happening, it sounds the wrong alarm. We know how to fight monopolies, but few seem riled at "The Return of the Oligopoly."

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Things were not always thus. Back in the mid-century, the Justice Department went after oligopolistic cartels in the tobacco industry and Hollywood with the same vigor it chased Standard Oil, the quintessential monopoly trust. In the late nineteen-seventies, another high point of enforcement, oligopolies were investigated by the Federal Trade Commission, and during that era Richard Posner, then a professor at Stanford Law School, went as far as to argue that when firms maintain the same prices, even without a smoke-filled-room agreement, they ought to be considered members of a price-fixing conspiracy. (By this logic, the Delta and US Airways shuttles between New York and Washington, D.C., would probably be price-fixers, since their prices do vary by how far in advance you buy, but are always identical.)

Like many things from the nineteen-seventies, the treatment of oligopoly was subject to an enormous backlash in the nineteen-eighties and nineteen-nineties. (Posner actually helped lead the backlash.) And with some justification: some of the cases were quite bad, like a long-forgotten federal war on the breakfast-cereal industry. Firms shouldn't be penalized for practices that are parallel but not actually harmful, nor for mere "parallel pricing." An interpretation of law that makes nearly every gas-station owner into a felon is questionable.

But just as the nineteen-seventies went too far, the reaction to the nineteen-seventies has also gone too far. As part of a general retreat from prosecution of all but the most extreme antitrust violations, the United States has nowadays nearly abandoned scrutiny of oligopoly behavior, leaving consumers undefended. That's a problem, because oligopolies do an awful lot that's troubling.

Consider "parallel exclusion," or efforts by an entire industry to keep out would-be newcomers, a pervasive problem. Over the eighties and nineties, despite "deregulation," the established airlines like American and United managed to keep their upstart competitors out of important business routes by collectively controlling the "slots" at New York, Chicago, and Washington airports. Visa and MasterCard spent the nineties trying to stop American Express from getting into the credit-card industry, by creating parallel policies ("exclusionary rules") and blacklisting any bank that might dare deal with AmEx. It was only thanks to the happenstance that both put their exclusions in writing that the Justice Department was able to do anything about the problem.

The rise of the American oligopoly makes it an important time to re-examine how antitrust enforcers and regulators think about concentrated industries. Here's a simple proposal: when members of a concentrated industry act in parallel, their conduct should be treated like that of a hypothetical monopoly. Of course, that doesn't make anything necessarily illegal, but abusive or anticompetitive conduct shouldn't get a free pass just because there are three companies involved instead of one. (I have co-authored a detailed academic paper, with former New York antitrust bureau chief Scott Hemphill, about how this should play out.)

Meanwhile, the idea that an industry is nominally "competitive" should not provide excessive protection from regulatory oversight. Consider, again, the wireless carriers. The Federal Communications Commission is supposed to insure that the carriers, who are leaseholders on public spectrum, use that resource to serve "the public interest, convenience, and necessity." Unfortunately, the agency, for more than a decade, has let the industry get away with all nature of monkey business, from termination fees through "guess your minutes" pricing plans and subsidization schemes. All this has been allowed under the theory that the industry is "competitive" and therefore not in need of oversight. But, to quote T-Mobile, "[t]his is an industry filled with ridiculously confusing contracts, limits on how much data you can use or when you can upgrade, and monthly bills that make little sense." The F.C.C. could have done something about this years ago; the fact that it took a member of the industry to call out more than a decade's abuse of consumers amounts to a serious failure on the part of the F.C.C.

Exploitation of concentrated private power is not a problem that will ever go away. In the United States, it has been a concern since the framing: the original Tea Party was actually a protest against a state-sponsored tea monopoly. The challenge is that power constantly mutates and assumes new forms. That's why, whether overseeing private or public power, it's important not to become fixated on form, but to attend to the realities that face consumers and citizens.

Illustration by Marcos Chin.

Tim Wu is a professor at Columbia Law School and a former contributing writer for newyorker.com. [Read more »](#)

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