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A RETROSPECTIVE ON ANTITRUST AND COMPETITION POLICY DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW, STRUCTURALIST APPROACH

Krista Brown
Matt Buck
Pat Garofalo
Lucas Kunce
Sarah Miller
Kalen Pruss
Reed Showalter
Matt Stoller
Olivia Webb

January 2021

economicliberties.us

ACKNOWLEDGEMENTS

For generously reviewing drafts and providing expert insight, Economic Liberties thanks Jeff Chester, Brandi Collins-Dexter, Eric Cramer, Joshua Davis, Jonathan Kanter, Lina Khan, John Kwoka, Hal Singer, Shaoul Sussman, Zephyr Teachout, and Tommaso Valletti. For invaluable help in drafting and editing the Agriculture section, we thank Claire Kelloway. Any mistakes are our own.

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EXECUTIVE SUMMARY

Concentrated economic power has reached extreme proportions in virtually every sector of the economy, from Big Tech to telecommunications, banking, hospitals, defense contracting, pharmaceuticals, and retail. Monopoly power is a causal factor in our most serious economic challenges, such as inequality, health care costs, farm bankruptcies, reduced entrepreneurship and productivity, the decline of the free press, and systems of racial discrimination.

To reverse America's corporate concentration crisis, we need to understand its cause. This report traces the root of the problem to a deliberate series of policy choices to under-enforce antimonopoly laws. For decades, a narrow guild of antitrust enforcers in both parties allowed waves of corporate mergers and acquisitions, as well as predatory conduct by powerful monopolies to fortify and extend their power.

While there has been ample recognition of the perils of conservative Chicago School thinkers who sought lax enforcement and deregulation under Republican administrations, less well understood is why the problem of concentrated wealth and power worsened under Democrats as well. This report tracks the cause to a specific ideological framework of antitrust and competition policy officials—the "consumer welfare" standard—that enforcers under both Republican and Democratic administrations have instrumentalized over multiple decades.

To show the power of this ideology among Democrats, this report documents the approach of Obama-era enforcers and competition policymakers, describing how enforcers carrying the consumer welfare banner subverted President Obama's public pledges to structure markets to be fairer and more stable. It also lays out a host of recommendations to reject the consumer welfare standard and reverse America's concentration crisis.

These recommendations include expanding existing antitrust actions against Google and Facebook as a signal to the business community, endorsing congressional recommendations to strengthen antitrust laws, undoing problematic mergers, reviving dormant regulatory and enforcement tools, and engaging in a sustained legislative and executive branch campaign to break up and regulate dominant corporations across the economy.

There is increased recognition on both sides of the aisle that corporate consolidation is a political and economic threat to democracy itself, as well as a growing constellation of efforts at the local, state, and federal level to address it. Now, President-elect Biden and a new Congress have an opportunity to lead the way. This report shows in detail how they can do so.

INTRODUCTION

Five years ago, antitrust and competition policy was a niche policy area dominated by a narrow set of technical experts. Today, the problem of corporate concentration is widely acknowledged. Over the last few months, the federal government and state attorneys general have launched a series of antitrusts suits seeking structural remedies against Google and Facebook, two of the largest corporations in the world, and monopolists such as Mark Zuckerberg are routinely brought before Congress to testify in high-profile hearings. Policymakers increasingly understand that the concentration of private economic power has reached extreme proportions in virtually every sector of the economy, from Big Tech to pharmaceuticals to telecommunications to agriculture.

A growing body of journalism and research has shown corporate concentration causes or worsens a broad range of social problems.[1] Labor economists have used new sources of evidence to show that most labor markets are highly concentrated, and that this concentration has significant impacts on both the availability of jobs and the level of wages.[2] One study showed that corporate consolidation costs the average American household $5,000 a year in lost purchasing power; another found that median annual compensation would be $10,000 higher if employers were less concentrated.[3]

1 "Confronting America's Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All," American Economic Liberties Project, July 2020, https://www.economicliberties.us/wp-content/uploads/2020/08/Ledger-of-Harms-R41.pdf; "Benefits of Competition and Indicators of Market Power," Council of Economic Advisers, Issue Brief, May 2016, https://obamawhitehouse.archives.gov/sites/default/ files/page/files/20160502_competition_issue_ brief_updated_cea.pdf; Jan De Loecker, Jan Eeckhout, Gabriel Unger, "The Rise of Market Power and the Macroeconomic Implications," *The Quarterly Journal of Economics* 135, no. 2 (May 2020): 561-644, https://academic.oup.com/qje/article/135/2/561/5714769; Germán Gutiérrez and Thomas Philippon, "Investmentless Growth: An Empirical Investigation," *Brookings Papers on Economic Activity*, Fall 2017, 95-97, https://www.brookings.edu/bpea-articles/investment-less-growth-an-empirical-investigation/; Germán Gutiérrez and Thomas Philippon, "Ownership, Concentration, and Investment," *AEA Papers and Proceedings*, May 2018, 432, https://doi.org/10.1257/pandp.20181010; Germán Gutiérrez and Thomas Philippon, "Declining Competition and Investment in the U.S.," NBER Working Paper no. 23583, July 2017, 2, https://www.nber.org/papers/w23583; José Azar, Ioana Marinescu, and Marshall Steinbaum, "Labor Market Concentration," *Journal of Human Resources* (May 12, 2020), http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9914R1.short?ssource=mfr&rss=1; José A. Azar, Ioana Marinescu, Marshall I. Steinbaum, and Bledi Taska, "Concentration in US Labor Markets: Evidence from Online Vacancy Data," NBER Working Paper no. 24395, February 2019, 13, https://www.nber.org/papers/w24395; Simcha Barkai, "Declining Labor and Capital Shares," *The Journal of Finance* 75, no. 5 (October 2020): 2444-2451, https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12909; Ian Hathaway and Robert E. Litan, "What's Driving the Decline in the Firm Formation Rate? A Partial Explanation," Economic Studies at Brookings, November 2014, https://www.brookings.edu/wp-content/uploads/2016/06/driving_decline_firm_ formation_rate_ hathaway_litan.pdf [https://perma.cc/D4RS-8CC5]; Joshua Gans, Andrew Leigh, Martin Schmalz, and Adam Triggs, "When Shareholding is More Skewed than Consumption," NBER Working Paper no. 25395, December 2018, https://www.nber.org/papers/w25395; "Dynamism in Retreat: Consequences for Regions, Markets, and Workers," Economic Innovation Group, February 2017, https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf; "The New Map of Economic Growth and Recovery," Economic Innovation Group, May 2016, https://eig.org/wp-content/uploads/2016/05/recoverygrowthreport.pdf.

2 Azar, Marinescu, Steinbaum, and Taska, "Labor Market Concentration"; Suresh Naidu, Eric A. Posner, and Eric Glen Weyl, "Antitrust Remedies for Labor Market Power," *Harvard Law Review* 132, no. 2 (2018): 536-601, https://harvardlawreview.org/2018/12/antitrust-remedies-for-labor-market-power/.

3 Naidu, Posner, and Weyl, "Antitrust Remedies for Labor Market Power." For the $10,000 figure, see Suresh Naidu, Eric Posner, and Glen Weyl, "More and More Companies Have Monopoly Power over Workers' Wages. That's Killing the Economy," *Vox*, April 6, 2018 ("For the labor market as a whole, the median annual compensation is $30,500. If markets were competitive, we estimate that this amount could rise to $41,000, and possibly to as much as $92,000."), https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality; Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets* (Belknap Press, 2019).

Mergers present a special problem for labor, with layoffs often accompanying corporate combinations, especially during financial crises. The executives engineering the transactions and firings often receive multimillion-dollar bonuses.[4]

Monopolization hurts small and independent businesses and disproportionately impacts communities of color, stripping black and brown communities of control over their own media, farms, banks, businesses, and health.[5] It also leads to shortages of critical medical or other supplies when sole source producers are overwhelmed by demand during pandemics or other emergencies.[6]

Because of this growing body of research, as well as advocacy from workers, business leaders, and economic and social justice advocates, policymakers in both parties are increasingly recognizing that concentrated private power is not only an economic challenge but, in its extreme form, a threat to democracy itself.[7]

Accurately diagnosing the causes of America's current monopoly crisis is critical to successfully addressing it. The crisis did not emerge in the Trump years, though President Trump's tax, regulatory, and antitrust decisions have worsened it. Indeed, the recently filed Federal Trade Commission antitrust suit against Facebook, which is specifically designed to undo mergers approved by Obama-era enforcers, illustrates that the problem stems from decisions by policymakers from both parties spanning multiple administrations.* The crisis is the result of a specific ideology that both Republican and Democratic antitrust enforcers have instrumentalized over multiple decades.

During the Obama administration, corporate consolidation elevated profit margins of the biggest corporations and held back wages and job growth, with significant impacts across most sectors.[8] For example, from 2009 to 2017, medical monopolies increased medical costs by more than $10,000 a year for an average insured family of four, big agribusinesses squeezed farmers by raising seed prices and paying them less to purchase their chickens, and mega-airlines boosted

4 Letter from American Economic Liberties Project et al. to Federal Reserve Chairman Jay Powell and Treasury Secretary Steven Mnuchin, May 7, 2020, https://www.economicliberties.us/wp-content/uploads/2020/05/FINAL-Federal-Reserve-Merger-Letter-5.7.pdf; see https://www.economicliberties.us/merger-wave-2016-2020/ for a short-list of major mergers; Sarah Miller and Matt Stoller, "No More Payoffs For Layoffs," *Buzzfeed*, May 3, 2019, https://www.buzzfeednews.com/article/mattstoller1/no-more-payoffs-for-layoffs.

5 Brian Feldman, "The Decline of Black Business," *Washington Monthly*, March/April/May 2017, https://washingtonmonthly.com/magazine/marchaprilmay-2017/the-decline-of-black-business/; Isaac Arnsdorf, "How a Top Chicken Company Cut Off Black Farmers, One by One," *ProPublica*, June 26, 2019, https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one.

6 "Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States," Interagency Task Force in Fulfillment of Executive Order 13806, September 2018, https://media.defense.gov/2018/Oct/05/2002048904/-1/-1/1/ASSESSING-AND-STRENGTHENING-THE-MANUFACTURING-AND%20DEFENSE-INDUSTRIAL-BASE-AND-SUPPLY-CHAIN-RESILIENCY.PDF; Nicholas Kulish, Sarah Kliff, and Jessica Silver-Greenberg, "The U.S. Tried to Build a New Fleet of Ventilators. The Mission Failed," *The New York Times*, April 20, 2020, https://www.nytimes.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html.

7 Matt Stoller, "A Chinese-Style Digital Dystopia Isn't As Far Away As We Think," *Buzzfeed*, June 27, 2018, https://www.buzzfeednews.com/article/mattstoller2/as-democracy-suffers-digital-dictators-are-seizing-power.

8 Naidu, Posner, and Weyl, "More and more companies have monopoly power over workers' wages."

fees while cutting back on customer service.[9] Meanwhile the use of employee non-compete clauses increased, preventing both high- and low-wage workers from earning higher pay by moving to a rival corporation.[10]

This record is not unique to Obama's administration; wealth and power concentrated under the Reagan, George H.W. Bush, Clinton, and George W. Bush administrations as well.[11] Ultimately, today's crisis of concentrated power is the culmination of 40 years of a specific interpretation of antitrust and competition doctrine.

Understanding the original purpose of the antitrust laws is necessary to understand how to address the challenge we face today. When giant industrial corporations first emerged in the 1880s, lawmakers recognized that the centralization of economic power threatened American democracy.[12] In response, Congress passed the Sherman Antitrust Act in 1890 as a means of checking and dispersing private power in favor of small business and labor, or as one Supreme Court Justice put it in 1897, to serve the "interests of small dealers and worthy men."[13] This law represented an ideological commitment to republicanism, and enforcers promoted these ends by adopting the methodology of structuralism, or linking the size and power of corporations to the likelihood of anticompetitive activity.[14] According to Judge Learned Hand, Congress did so not merely with economic goals in mind, but democratic ones as well.

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9 "2009 Milliman Medical Index," Milliman Inc., May 2009; Christopher S. Girod, Susan K. Hart, and Scott A. Weitz, "2017 Milliman Medical Index," May 16, 2017; Paul S. Hewitt and Phillip Longman, "The Case for Single-Price Health Care," *Washington Monthly*, April/May/June 2018; Robert Holly, "Weeding Out Competition: Farmers Left Paying Steep Prices as Seed Firms Merge," *The Midwest Center for Investigative Reporting*, October 27, 2016, https://investigatemidwest.org/2016/10/27/weeding-out-competition-farmers-left-paying-steep-prices-as-seed-firms-merge/; Lina Khan, "Obama's Game of Chicken," *Washington Monthly*, November/December 2012, https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/; Christopher Leonard, *The Meat Racket: The Secret Takeover of America's Food Business* (Simon & Schuster, 2014); Kali Holloway, "10 Ways Monopoly Airlines are Actively Trying to Make Your Life Miserable," Salon, September 30, 2015, https://www.salon.com/2015/09/30/10_ways_monopoly_airlines_are_actively_trying_to_make_your_life_miserable_partner/; Tim Wu, "Why Airlines Want to Make You Suffer," *The New Yorker*, December 26, 2014, https://www.newyorker.com/business/currency/airlines-want-you-to-suffer?intcid=mod-most-popular; Jack Nicas, "Airline Consolidation Hits Smaller Cities Hardest," *The Wall Street Journal*, September 10, 2015, https://www.wsj.com/articles/airline-consolidation-hits-smaller-cities-hardest-1441912457; Comment of Airlines for America, "Part One: Proposals for Fundamental Reform of DOT Economic Regulation and Enforcement," Notification of Regulatory Review, DOT-OST-2017-0069, December 1, 2017, 6, 34 of Appendix A: "U.S. Airline Industry Review: Allocating Capital to Benefit Customers, Employees and Investors."

10 Sophie Quinton, "These Days, Even Janitors are Being Required to Sign Non-compete Clauses," *USA Today*, May 27, 2017, https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/; Petition for Rulemaking to Prohibit Worker Non-Compete Clauses Before the Federal Trade Commission, Open Markets Institute et al., March 20, 2019, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.

11 Peter Behr, "Wave of Mergers, Takeovers is a Part of Reagan Legacy," *The Washington Post*, October 30, 1988, https://www.washingtonpost.com/archive/business/1988/10/30/wave-of-mergers-takeovers-is-a-part-of-reagan-legacy/e90598c2-628d-40fe-b9c6-a621e298671d/; Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018); Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (John Wiley & Sons, 2010).

12 Henry Demarest Lloyd, "The Lords of Industry," *North American Review* 331 (June 1884); Richard R. John, "Proprietary Interest: Merchants, Journalists, and Antimonopoly in the 1880s," in *Media Nation: The Political History of News in Modern America*, eds. Bruce J. Schulman and Julian E. Zelizer (University of Pennsylvania Press, 2017), 10–35.

13 United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897). Peckham was specifically talking about price cuts by monopolists: "It is true, the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations, they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital." 166 U.S. at 322-323.

14 Joe S. Bain, *Industrial Organization*, 2nd ed. (Wiley, 1968).

"Great industrial consolidations," he wrote in 1945, "are inherently undesirable, regardless of their economic results."[15]

Antitrust enforcers drew upon a rich set of democratic antimonopoly goals, such as preserving small business and worker rights, offering equal access to the marketplace, preventing political corruption, and even securing freedom from fear of the monopolist. As Congressman Emanuel Celler, the author of a landmark merger statute, put it in 1950, "Under our ancient common law your neighbor must not point a gun at you, even though he has never shot anyone. Similarly, our antitrust laws were intended to protect businessmen not only from violence but from fear of violence."[16]

Congress passed significant updates to antitrust and other competition laws multiple times over the 20th century, reiterating and reinforcing the goal of a democratic free enterprise system.[17] Judges and enforcers oriented cases around structuralism, meaning they saw the correlation between high profits and concentrated markets as evidence that concentrated markets are less competitive and that concentration facilitates anticompetitive conduct. This system was not without its flaws, but along with labor, tax, and regulatory policy, it led to an economy with a vibrant small business sector, high and rising wages, and greater economic liberty.

Starting in 1981, Ronald Reagan, backed by a community of law and economics scholars from the "Chicago School," led by Robert Bork, overthrew this system. Enforcers shrank antitrust from its traditional goal of checking private power to a much narrower question of promoting economic efficiency. This was an ideological change: Whereas antitrust enforcers had previously focused on dispersing *power*, the Chicago School approach led enforcers to focus on promoting *welfare*, measured through price and output.

Chicago scholars put this "consumer welfare" standard into practice through price theory, a methodological toolkit that drew from neoclassical economics. While enforcers and scholars had previously treated extreme economic concentration as a proxy for monopolistic conduct, Chicago academics instead argued that economic concentration could produce efficiencies that antitrust should protect. Reagan-era enforcers put these ideas into practice, ushering in a drastic rollback of merger law and monopolization enforcement and inducing one of the great merger waves of the 20th century. The change in policy signaled, as antitrust scholar Milton Handler wrote in 1990, that the antitrust agencies would go "from an anti-concentration to a pro-efficiency measure, and the public was given the feeling that anything goes."[18]

15 United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945).

16 Emanuel Celler, "Big Business Is Dangerous," *Reader's Digest*, June 1950.

17 See for instance the Clayton Act, Robinson-Patman Act, Celler-Kefauver Act.

18 Milton Handler, "Introduction," *The Antitrust Bulletin* 35, no. 1 (March 1990): 21.

The particular story of the Chicago School conservatives and their goal of unleashing corporate power is well understood. Less well known, however, is the story of the liberals and centrists who accepted key tenets of Bork's ideology, most notably the consumer welfare standard, while disputing the methodology of how to calculate it. The members of that group, who called themselves the post-Chicago School, saw themselves as critics of Bork. These thinkers, while considering themselves to be opponents of Bork, ultimately furthered Bork's ideological project, advancing its welfare-based goals while eschewing the democratic roots and aims of antitrust.[19]

Specifically, these post-Chicago scholars accepted the Chicago School's ideological premise that the purpose of antitrust is to promote consumer welfare, while also accepting their descriptive claim that economic concentration could produce efficiencies that antitrust should protect. Though post-Chicago scholars attenuated Chicago's claims by stating that the effects of concentration should be assessed on a case-by-case basis, rather than assumed as efficient across the board, their contributions mostly served to soften the Chicago School's most extreme ideas, while legitimizing Chicago's broader ideological project.

Both sets of thinkers, though they disagree on methodology and modeling, share fundamental ideological assumptions that kneecap the government's ability to prevent dangerous concentrations of private power. Top antitrust economist Carl Shapiro, who worked in both the Clinton and Obama administrations, reflected this ideological consensus at a conference in 2017 when he dismissed rising concern over corporate concentration levels, saying that "the press, politicians, and some policymakers are mistaken to claim the data show a worrisome increase in industrial concentration in America." Shapiro characterized how his fellow experts saw the problem by noting, "the antitrust economists, we shrug our shoulders."[20]

The dominance of Chicago School enforcers under Republicans and post-Chicago School enforcers under Democrats is why corporate concentration and market power rose under every administration, regardless of the party in control.

There is growing evidence that the "consumer welfare" standard has hardly delivered for consumers, who face high prices charged by monopolistic firms across markets, from cable to airlines to pharmaceuticals.[21] This failure is policy driven; since the 1980s, the FTC and DOJ—even under the "consumer welfare" standard—have systematically allowed mergers that increase

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19 William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix," *Columbia Business Law Review*, no. 1 (2007): 1-80; William E. Kovacic, "The Chicago Obsession in the Interpretation of US Antitrust History," *The University of Chicago Law Review* 87, no. 2 (March 2020): 459-494; Lina Khan, "The End of Antitrust History Revisited," *Harvard Law Review* 133, no. 5 (March 2020): 1655-1682; Einer R. Elhauge, "Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?" *Competition Policy International* 3, no. 2 (Autumn 2007): 59-77.

20 "What Do the Data Tell Us?" in "Is there a Concentration Problem in America?" Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business, 2018, 7, https://promarket.org/wp-content/uploads/2018/04/Is-There-a-Concentration-Problem-in-America.pdf; Asher Schechter, "Economists: 'Totality of Evidence' Underscores Concentration Problem in the U.S." Pro Market, March 31, 2017, https://promarket.org/2017/03/31/economists-totality-evidence-underscores-concentration-problem-u-s/. For a definition of structuralist versus price theory adherents, see Khan, "The End of Antitrust History Revisited." See also Carl Shapiro, "Antitrust in a Time of Populism," *International Journal of Industrial Organization* 61 (2018): 714-748.

21 For a good overview of the problem of high consumer prices as a result of failed antitrust policy in the United States, see Philippon, *The Great Reversal*.

consumer prices.[22] That the consumer welfare standard fails to deliver even by the stated goals of its proponents underscores the broader costs of the approach; not only did its purported benefits fail to materialize, but it also led to high concentration across the economy, resulting in a host of harms that consumer welfare ideologues ignore as outside the scope of antitrust.

To show the risks inherent in reprising the consumer welfare model, this report documents the approach of Obama-era enforcers and competition policymakers and its consequences. It reviews the Obama-era antitrust and competition policy record and describes how enforcers carrying the consumer welfare banner subverted President Obama's public pledges to reorder the economy into a fairer and more stable framework. Although in recent years some Obama-era enforcers have begun to argue for the need for stronger antitrust enforcement, their ideas primarily ratify the consumer welfare framework and offer proposals for strengthening enforcement within the current paradigm.[23] As scholarship has shown, however, the welfare-based framework significantly handicaps antitrust enforcement from its inception, and merely tweaking antitrust within this framework is likely to prove inadequate.[24]

Part I focuses on the Federal Trade Commission ("FTC") and Department of Justice Antitrust Division ("DOJ"), assessing the use of a range of available authorities to address monopolization and anticompetitive mergers, including how antitrust was wielded against working people. Part II provides brief sector-by-sector analyses of enforcement actions and competition policy choices in agriculture, defense, health care, and technology, among others, widening the scope to include other agencies with competition policy authority. In Part III, we outline actions that both the Biden-Harris administration and Congress must take to begin reversing corporate concentration to protect workers, small businesses, communities, and democracy itself from monopoly power.

As the incoming Biden administration considers its policy choices, it is critical that top policymakers recognize that the reason our economy has become increasingly monopolized is because of the ideology of both the Chicago School and the post-Chicago School. If they seek to create a more competitive, fairer, and more vibrant economy and protect democracy from monopoly power, the next administration will have to seek a genuine shift in ideological approach, breaking not only from Donald Trump and Republicans but also enforcers under the Clinton and Obama administrations.

22 John Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press, 2014).

23 Lina M. Khan, "The Ideological Roots of America's Market Power Problem," *Yale Law Journal Forum* 127 (2018): 979 (noting that recommendations from Obama-era enforcers "neglect to grapple with the current framework, ratifying an orientation and set of assumptions that ultimately undermine their project."); Sandeep Vaheesan, "The Twilight of the Technocrats' Monopoly on Antitrust?," *Yale Law Journal Forum* 127 (2018): 980-981 (stating that reform proposals from Obama-era enforcers "seek only to renovate the consumer welfare edifice of antitrust law and show little interest in critically examining the foundations of this model. Indeed, the silence on the issue of whether consumer welfare is the appropriate goal for antitrust law is deafening in light of the growing discontent with antitrust today.").

24 Khan, "The Ideological Roots of America's Market Power Problem"; Vaheesan, "The Twilight of the Technocrats' Monopoly on Antitrust?"

What Is the Consumer Welfare Standard and Why Does It Matter?

The consumer welfare standard, though portrayed as a clear standard in antitrust, is better understood as an ideological lens through which to organize antitrust law. As Robert Bork wrote in 1978, antitrust is a "subcategory of ideology," and his broader goal was to reorient the ideological foundations of American society.[25] To do this, he told a now-discredited historical narrative, describing the original intent of the Sherman Act as purely about maximizing output, rather than a law encompassing a rich set of political concerns over private power.[26]

Prior to Bork, the best explanation of the Sherman Act was from Judge Learned Hand, who described the point of antitrust laws in explicitly political terms, writing in a key case against Alcoa that "among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[27] In Hand's day and up until the 1960s, antitrust enforcers were structuralists, with a presumption that a few big companies with high margins dominating a market suggests anticompetitive conduct.

Bork attacked this view of the law. In Bork's framework, judges should decide cases solely based on whether the presumed anticompetitive practice or merger would reduce output, with no consideration for the competitive process itself. The methodological shift accompanying and operationalizing Bork's ideological framework was replacing a specific model of analyzing markets known as the structure-conduct-performance paradigm for neoclassical price theory.

In the 1970s, Chicago School economists such as Harold Demsetz and Yale Bronzen attacked structuralism, arguing that big business in concentrated sectors had high profits because large size, scale, and sustained profits were evidence of efficiency. They sought to promote price theory, a methodology that assumes rational actors, perfect information, and no barriers to entry in any market so long as capital can flow. As Alan Greenspan put it, "The ultimate regulator of competition in a free economy is the capital market."[28]

Core to their strategy was to persuade judges to take practices that had been ruled illegal per se, such as restrictions by manufacturers on distributors, dealers, or other customers ("vertical restraints"), or had strong presumptions of illegality, such as pricing below cost ("predatory pricing") or buying companies that are not direct competitors but are in the same supply chain ("vertical mergers"), and make them per se legal. Their rhetorical strategy was to make the case that under the consumer welfare standard, the only important value was efficiency. Since these practices, according to price theory, do not in theory reduce output, they must be pro-competitive and thus legal.

Key to instrumentalizing the Chicago School model was the error-cost framework, a mode of analysis in which the cost of a mistaken antitrust enforcement action far outweighs under-enforcement because, as Frank Easterbrook argued, "judicial errors that tolerate

25 Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (Free Press, 1978), 3.

26 See, for example, Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," Hastings Law Journal 50, no. 4 (April 1999): 871-95; Christopher Grandy, "Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis," *The Journal of Economic History* 53, no. 2 (1993): 359-376. Even allies of Bork, such as George Priest, disagree with him. George L. Priest, "Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law," *The Journal of Law & Economics* 57, no. 4 (August 2014): S14n62 ("I have engaged in some historical work on this subject and am not yet convinced by Bork's argument.").

27 Alcoa, 148 F.2d at 428.

28 Alan Greenspan, "Antitrust," paper presented at the Antitrust Seminar of the National Association of Business Economists, September 25, 1961, reprinted in Mark J. Perry, "Alan Greenspan on Monopoly and Antitrust Policy in 1961," American Enterprise Institute, February 15, 2018, https://www.aei.org/carpe-diem/alan-greenspan-on-monopoly-and-antitrust-policy-in-1961/#:~:text=The%20ultimate%20regulator%20of%20competition,the%20maximum%20rate%20of%20return.&text=The%20capital%20market%20acts%20as,prices%2C%20not%20necessarily%20of%20profits.

baleful practices are self-correcting, while erroneous condemnations are not."[29] Lina Khan observed how the assumption of the self-correcting nature of markets and the consumer welfare standard radically ratcheted back enforcement. "Because Chicago's application of price theory blurred the line between pro-competitive and anticompetitive conduct," she wrote, "almost every enforcement opportunity now raised the risk not just of erroneously condemning conduct that did not rise to an antitrust violation but also of erroneously condemning *beneficial* behavior."[30]

Price theory removed the ability to see abusive power arrangements. To Chicago School adherents, corporate concentration, far from problematic, was a sign of efficiency. The far more serious risk, they argued, was the government prohibiting business conduct that corporations might wish to pursue.

Liberal scholars criticized the Chicago School, but in a narrow way that led them to accept and ratify the corporate concentration that Reagan had initiated. Known as the post-Chicago School and largely grouping within the Democratic Party (as Bork had in the GOP), these critics of the Chicago School attacked the specific economic models used by Reagan's antitrust enforcers but accepted the ideological narrowing of antitrust Bork had imposed by agreeing to tether the purpose of antitrust to economic efficiency. As one liberal critic of the Chicago School, Jonathan Baker, put it in 1989, "economics has become the essence of antitrust" and the center-left "challenges to Chicago arise from within the efficiency paradigm."[31] Consumer welfare adherents on the left agreed with Bork that larger political goals so core to the traditional antimonopoly tradition, such as protecting democratic access to markets, were irrelevant.

Where post-Chicago scholars differed with the Chicago School orthodoxy was on the kinds of math and economics they used, adding game theory and other complex models to market analysis. Chicago School scholars had theories that were simple and unrealistic; post-Chicago School scholars, by contrast, used models that were complex and speculative.[32] Neither group grounded their thinking in an empirical understanding of the modern economy, preferring theoretical, math-heavy exercises guessing, often wrongly, about the future.[33] In other words, while Chicago School thinkers would argue that corporate concentration was good, post-Chicago scholars argued that, as Lina Khan notes, "it depends."[34]

The interplay between Chicago School and post-Chicago School enforcers played out in the judiciary. Chicago School thinkers asked the judiciary to make clear that nearly all business conduct is legal, while post-Chicago School enforcers sought to have judges avoid bright-line prohibitions on certain types of conduct.[35]

29 Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review* 63, no. 1 (August 1984): 3.

30 Khan, "The End of Antitrust History Revisited," 1669 (emphasis in original).

31 Jonathan B. Baker, "Recent Developments in Economics that Challenge Chicago School Views," *Antitrust Law Journal* 58, no. 2 (August 1989): 646, www.jstor.org/stable/40841261.

32 Malcolm B. Coate and Jeffrey H. Fischer, "Can Post-Chicago Economics Survive Daubert?," *Akron Law Review* 34, no. 4 (2001): 813; John Kwoka, "You Say You Want an Antitrust Revolution? The Paradox of Modern Merger Control," *The Antitrust Bulletin* 65, no. 4 (December 2020): 568-578. In 2019, three of the most important post-Chicago School thinkers, Steven Berry, Martin Gaynor, and Fiona Scott Morton, attacked the idea that corporate concentration had consistent effects on profit margins. Steven Berry, Martin Gaynor, and Fiona Scott Morton, "Do Increasing Markups Matter? Lessons From Empirical Industrial Organization," *Journal of Economic Perspectives* 33, no. 3 (Summer 2019): 44-68, https://www.aeaweb.org/articles?id=10.1257/jep.33.3.44.

33 See, by way of contrast, Kwoka, *Mergers, Merger Control, and Remedies*, in which Kwoka shows systemic errors in both Chicago and post-Chicago style merger enforcement.

34 Khan, "The End of Antitrust History Revisited," 1669.

35 Herbert Hovenkamp, "The Rule of Reason," *Florida Law Review* 70, no. 1 (2018): 136-37.

Because post-Chicago scholars believe corporate concentration can be efficient, and efficiency is the point of antitrust laws, they favor what is known as the rule of reason, in which every potential action must be reviewed on case-by-case basis, with harms and benefits aggregated and weighed against each other. Post-Chicago scholars have won much of the argument over how to organize antitrust law. As a result, antitrust cases have turned into a judge presiding over extremely expensive litigation to determine which economic model to believe, or as one judge put it helplessly when ruling to allow Sprint and T-Mobile to merge, "competing crystal balls."[36]

The post-Chicago School thinkers have been in many ways more successful than Bork in propagating the consumer welfare ideology and elevating the importance of economists in interpreting the law. Supreme Court Justice Stephen Breyer once praised post-Chicago thinker Herbert Hovenkamp, noting advocates would prefer to have "two paragraphs of [Hovenkamp's] treatise on their side than three Courts of Appeals or four Supreme Court Justices."[37] And yet, in shifting the judiciary to adopt the rule of reason and ratifying Bork's consumer welfare ideology, post-Chicago thinkers set themselves up to lose case after case. Carl Shapiro, the key witness for the government in the AT&T-Time Warner case, conceded that the merger would produce efficiencies, and so the discussion became focused on the extent of the benefits of the merger.[38] Shapiro centered his analysis on consumer harm from the merger, alleging that consumers would pay 45 cents a month more if it went through, instead of focusing on showing that AT&T and Time Warner would gain significant power over the marketplace; unsurprisingly, the government lost.[39]

Today, post-Chicago School thinkers defend themselves by asserting that the consumer welfare standard is flexible enough to handle a host of factors beyond price, such as choice, quality, and innovation. In practice, however, considerations other than consumer price are rarely incorporated into a consumer welfare framework. Cases brought purely on innovation harms are almost nonexistent, and agencies appear to have rarely, if ever, stopped a merger based on labor monopsony power. This cuts to Bork's intent in designing this ideological framework around economically determined welfare-maximization as measured by consumer pricing changes. The relevant economic models right now simply do not measure much beyond consumer price. Without breaking the ideological boundaries of the consumer welfare frame and moving towards a richer structuralist methodology focused on the competitive process instead of output, weak enforcement will continue.

Today, the Chicago and post-Chicago School experts are a small but powerful clique, guarding the citadel of policymaking and enforcement. A key intellectual patron of the post-Chicago School is Herbert Hovenkamp, a historian and law professor who published the canonical antitrust treatise, which has been cited more than 1,200 times by the federal judiciary as an antitrust authority, more than any Supreme Court antitrust case.[40] Hovenkamp, like Bork, drew his intellectual influence by

36 New York v. Deutsche Telekom AG, 439 F.Supp.3d 179, 187 (S.D.N.Y. 2020).

37 Rebecca Haw Allensworth, "The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust," *Iowa Law Review* 100, no. 5 (May 2015): 1920.

38 United States v. AT&T Inc., 310 F.Supp.3d 161, 197-98 ("Conceded Consumer Benefits of Proposed Merger").

39 Ted Johnson, "AT&T-Time Warner Trial: Judge Queries DOJ Expert Witness on Prediction of Merger Behavior," *Variety*, April 11, 2018, https://variety.com/2018/politics/news/att-time-warner-carl-shapiro-merger-predictions-1202750523/. Indeed, Shapiro's speculative and unwieldy analysis rooted in irrelevant theorizing seemed to anger the judge. 310 F.Supp.3d at 222 ("One was left to wonder why Professor Shapiro turned a blind eye to such extensive real-world experience?"). On appeal, the circuit court upheld the government's loss but suggested that a different legal theory, one focused on something other than short-term consumer prices upheld by dubious quantitative evidence, might have prevailed. United States v. AT&T, Inc., 916 F.3d 1029, 1045-1047 (D.C. Cir. 2019); "D.C. Circuit Signals Openness to Vertical Merger Challenges, Cites Open Markets," *The Corner*, March 7, 2019, https://www.openmarketsinstitute.org/publications/corner-newsletter-march-7-2019-challenge-vertical-mergers.

40 Allensworth, "The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts," 1921-1922.

articulating a now-discredited view that the American antimonopoly tradition was tethered to efficiency instead of broader republican concerns.[41]

Beyond Hovenkamp, consumer welfare adherents are divided into economists and lawyers. The particular version of economics focusing on market power is known as "industrial organization economics" (IO), and industrial organization scholars rely on a highly mathematical set of both theoretical and empirical models. Unsurprisingly, IO economists have largely missed the recent rise in concentration, and much of the empirical work on the effects of concentration has come from outside the IO field (with few exceptions), instead coming from subfields such as labor economics, public finance economics, and monetary economics.[42] The scholars in IO economics who still hold sway as the "orthodoxy" include an "old guard" of Robert Porter, Ariel Pakes, Michael Whinston, Steven Berry, William Rogerson, and Michael Katz, closely followed by a "new generation" including the likes of Liran Einav, Philip Haile, Ali Hortaçsu, Aviv Nevo, and several others.

These scholars largely control access to journals and, ultimately, faculty appointments because they, like-minded peers, and their students are on key editorial boards and make up the ranks of powerful referees. This "establishment" has concluded one can study market power only one industry at a time, producing little of relevance to broader questions of market power in the economy. Junior economists who seek promotions or a faculty appointment at a top department narrow their research agenda to fit with this academic oligarchy: no agenda with broader policy relevance does much for your chance to get to a tenured position.[43]

A significant portion of the academic oligarchy also offers consulting services, selling their services to corporations as expert witnesses. There is a hierarchy here as well, which overlaps somewhat with the gatekeeper academics above. Some of the Chicago and post-Chicago academics in this area include Jonathan Baker, Dennis Carlton, David Evans, Fiona Scott Morton, Kevin Murphy, Aviv Nevo, Nancy Rose, Michael Salinger, Steven Salop, Katja Seim, Carl Shapiro, Catherine Tucker, Michael Whinston, and a few others.[44] These

41 Herbert Hovenkamp, "The First Great Law & Economics Movement," *Stanford Law Review* 42, no. 4 (April 1990): 993-1058. For a different perspective, see Richard R. John, *Network Nation: Inventing American Telecommunications* (Belknap Press, 2014); Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890-1940* (Cambridge University Press, 2018); Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900-1932* (Cambridge University Press, 2009); Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (W.W. Norton & Company, 2011); Sanjukta Paul, *Solidarity in the Shadow of Antitrust: Labor and the Legal Idea of Competition* (Cambridge University Press, 2021).

42 See n1. Khan, "The End of Antitrust History Revisited," 1673; Azar, Marinescu, Steinbaum, and Taska, "Concentration in US Labor Markets"; Barkai, "Declining Labor and Capital Shares."

43 By no means did all economists subscribe to all tenets of the Chicago School or post-Chicago School. Those who opposed parts of this orthodoxy, such as F.M. Scherer, William Comanor, and John Kwoka, faced withering critiques from within the profession, and even from recalcitrant government economists (Economic Liberties industry interviews). Michael Vita and F. David Osinski, "John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review," *Antitrust Law Journal* 82, no. 1 (2018); John Kwoka, "Mergers, Merger Control, and Remedies: A Response to the FTC Critique," March 31, 2017, https://ssrn.com/abstract=2947814 or http://dx.doi.org/10.2139/ssrn.2947814.

44 "Jonathan B. Baker: Senior Consultant," Compass Lexecon, https://www.compasslexecon.com/professionals/jonathan-b-baker/; "Kevin M. Murphy: Senior Consultant to CRA," Charles River Associates, http://www.crai.com/expert/kevin-m-murphy; "Aviv Nevo," Cornerstone Research, https://www.cornerstone.com/Experts/Aviv-Nevo; "Nancy L. Rose Steps Down from Charles River Associates Board of Directors," press release, Charles River Associates, August 1, 2014 ("Professor Rose Has Been Named Deputy Assistant Attorney General for Economic Analysis at the Department of Justice"), https://www.businesswire.com/news/home/20140801005351/en/Nancy-L.-Rose-Steps-Down-from-Charles-River-Associates-Board-of-Directors; "Steven C. Salop: Senior Consultant to CRA," Charles River Associates, http://www.crai.com/expert/steven-c-salop; Carl Shapiro: Senior Consultant to CRA," Charles River Associates, http://www.crai.com/expert/carl-shapiro; "Michael Whinston, PHD: Partner," Bates White, https://www.bateswhite.com/people-Michael-Whinston.html. For the rest of the economists listed, see Matt Stoller and Austin Frerick, "Should We Break Up the Tech Giants? Not If You Ask the Economists Who Take Money From Them," *Fast Company*, October 19, 2018, https://www.fastcompany.com/90253465/should-we-break-up-the-tech-giants-not-if-you-ask-the-economists-who-take-money-from-them; David McLaughlin, "Star Critic of Big Tech Has Side Gig Working for Amazon, Apple," *Bloomberg*, July 17, 2020, https://www.bloomberg.com/news/articles/2020-07-17/amazon-apple-hire-one-of-big-tech-s-most-prominent-u-s-critics. All professional sites accessed December 3, 2020. See also "About the Authors" in Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro, and Tim Wu, "Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress," Washington Center for Equitable Growth, November 2020, 43-45, https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true.

economists work at consulting firms like Compass Lexecon and Charles River Associates and are selected over and over because they deliver promised models mostly to powerful corporate defendants that help them win antitrust cases. It is a lucrative business, with Carlton, for instance, making $100 million over the course of his career.[45]

The last group is antitrust attorneys, most of whom built their careers at the defense bar and have adopted and propagated while in private practice an aggressive version of the economic orthodoxy that vertical integration is beneficial, mergers are mostly pro-competitive, and the consumer welfare standard is the essential fulcrum for antitrust law. This group tends to circle in and out of government to powerful law firms, often representing clients they oversaw while in public office. It includes former federal enforcers Bill Baer and Debbie Feinstein at Arnold & Porter, David I. Gelfand at Cleary Gottlieb, Renata Hesse at Sullivan & Cromwell, Jonathan Jacobson at Wilson Sonsini, Jon Leibowitz at Davis Polk, Kristen C. Limarzi at Gibson Dunn, Terrell McSweeny at Covington & Burling, Maureen Ohlhausen at Baker Botts, Edith Ramirez at Hogan Lovells, Howard Shelanski at Davis Polk, Steve Sunshine at Skadden Arps, and Christine Varney at Cravath.[46]

There is nothing inherently wrong with representing clients as an antitrust attorney, or in pursuing a particular subfield of economics. Indeed, Thurman Arnold, perhaps the most important Department of Justice Antitrust Division leader in American history, went on to found Arnold and Porter and represent a host of clients. The purpose of this section is simply to describe the institutional home for those who subscribe to an antitrust framework tethered to the consumer welfare ideology and complex economic models, instead of a more administrable structuralist perspective based on a richer set of democratic concerns about protecting open markets from private concentrations of power. And of course, every institutional actor, whether antitrust attorney or economist, can at any point change their minds, as most did in the 1970s at the behest of Robert Bork.

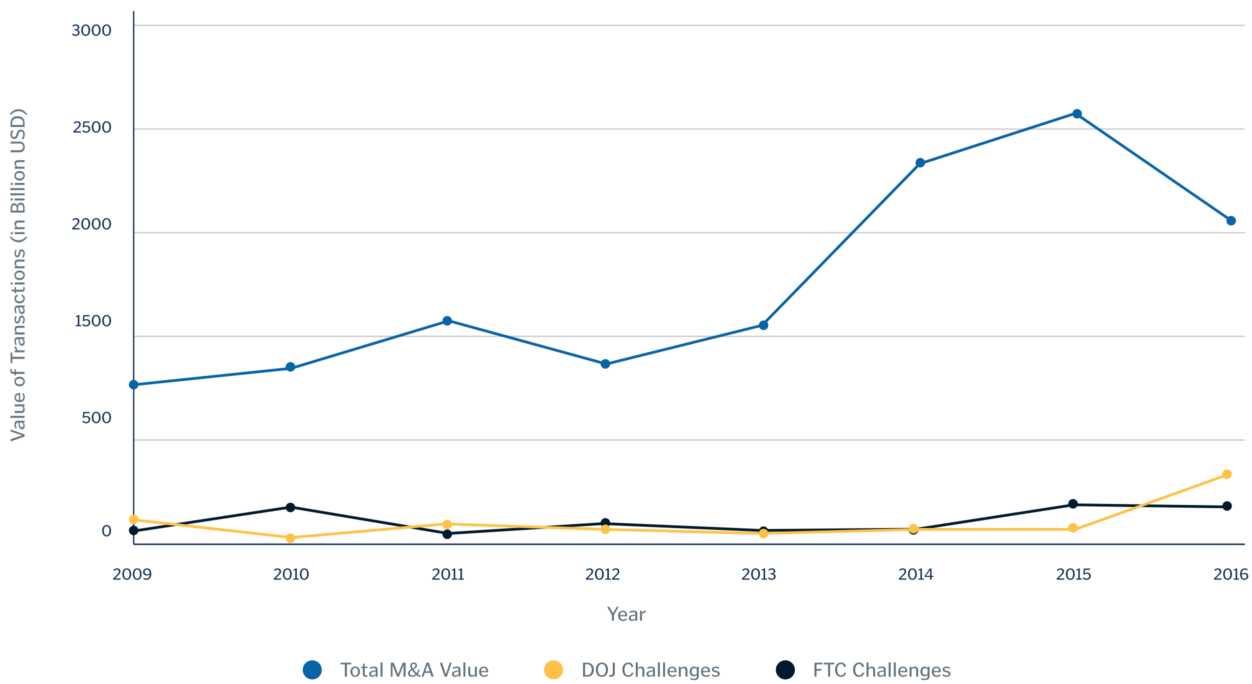
45 Jesse Eisinger and Justin Elliott, "These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers," *ProPublica*, November 16, 2016, https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

46 "Bill Baer, DOJ's Former Antitrust Head and Acting Associate Attorney General, to Rejoin Arnold & Porter Kaye Scholer," press release, Arnold & Porter, May 10, 2017, https://www.arnoldporter.com/en/perspectives/news/2017/05/bill-baer-to-rejoin-arnold-porter-kaye-scholer; "Debbie Feinstein: Partner," Arnold & Porter, https://www.arnoldporter.com/en/people/f/feinstein-debbie; "David I. Gelfand: Partner," Cleary Gottlieb, https://www.clearygottlieb.com/professionals/david-i-gelfand; "Renata B. Hesse," Sullivan & Cromwell, https://www.sullcrom.com/lawyers/renata-b-hesse; "Jonathan M. Jacobson: Partner," https://www.wsgr.com/en/people/jonathan-m-jacobson.html; "Jon Leibowitz: Counsel," Davis Polk, "Terrell McSweeny: Partner," Covington, https://www.cov.com/en/professionals/m/terrell-mcsweeny; "Kristen C. Limarzi: Partner," Gibson Dunn, https://www.gibsondunn.com/lawyer/limarzi-kristen-c/; "Maureen K. Ohlhausen: Section Chair – Antitrust & Competition Law (Firmwide) Partner," Baker Botts, https://www.bakerbotts.com/people/o/ohlhausen-maureen; "Edith Ramirez: Partner," Hogan Lovells, https://www.hoganlovells.com/en/ramirez-edith; "Howard Shelanski: Partner," Davis Polk, https://www.davispolk.com/professionals/howard-shelanski; "Steven C. Sunshine: Partner," Skadden, https://www.skadden.com/professionals/s/sunshine-steven-c; "Christine A. Varney: Partner," Cravath, Swaine & Moore, https://www.cravath.com/people/christine-a-varney.html.

WHY DID ENFORCERS FAIL UNDER THE OBAMA ADMINISTRATION?

Over the last few years, enforcers and policymakers who participated in the Obama-era antitrust regime have acknowledged that market power has reached dangerous levels and that enforcement has been too limited.

CHART 1: TOTAL VALUE OF M&A TRANSACTIONS IN THE UNITED STATES BETWEEN 2009-2016



In 2019, leading antitrust enforcers—including high-level officials who served in the Obama Department of Justice and the Federal Trade Commission—argued in a letter to the House Antitrust Subcommittee, which had recently embarked on the first investigation of monopoly power in 50 years, that America has a serious market power problem that limits competition and innovation across multiple sectors, including online platforms, hospitals, and airlines.[47] "Direct victims," said the letter, "include consumers and other exploited buyers, and workers, farmers, and other exploited suppliers."[48] They also lamented the record of the past several decades, noting "antitrust enforcement has become too lax, in large part because of the courts."[49]

47 "Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets," April 30, 2020, https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf.

48 "Joint Response to the House Judiciary Committee," 2.

49 "Joint Response to the House Judiciary Committee," 2.

Logistical hurdles, they argued, most notably courts and limited resources, undermined efforts at more aggressive attempts to organize market structure.

It is certainly true that courts have successively narrowed the scope for antitrust activity, starting as early as *Continental Television v. GTE Sylvania* in 1977.[50] One might expect, then, to see an Obama-era record that includes creative merger and monopolization challenges, both successful and unsuccessful, or to find enforcers who attempted new ways to test antitrust theories, followed by testimony in Congress on the need to strengthen antitrust statutes and overturn harmful Supreme Court decisions. At the very least, one would see consistent attacks on corporate concentration as a policy problem, as well as multiple studies from the Federal Trade Commission examining concentrated industries and recommending new statutes.

But their record on this score is thin. In fact, these same policymakers mostly said the opposite regarding their attempts to challenge corporate consolidation both during and immediately after their time in power. In 2011, Christine Varney, then-Assistant Attorney General for the Antitrust Division at the Department of Justice, spoke proudly of her track record, telling the U.S. Chamber of Commerce that her division "has been steadfast in ensuring vigorous enforcement of the antitrust law." She had "fulfilled my promise and more."[51] In 2016, her successor Bill Baer told the American Antitrust Institute that the division had served as the "cop on the merger beat," challenging a significant number of mergers. "We have done our job," he said.[52] And when asked in a 2016 Senate oversight hearing about whether Congress should update antitrust laws, both Baer and FTC Chair Edith Ramirez said no.[53]

Before this self-proclaimed assertiveness by Obama-era antitrust enforcers was ultimately contradicted by the enforcers themselves, it was challenged by critics and external observers, who saw little to no difference between administrations. For instance, in 2016, the editorial chair of *Antitrust* magazine reflected on the Obama administration's merger enforcement policy and said that "the fact remains that most mergers still are not challenged and most that are get through with consent decrees."[54] Perhaps, he added, "one of the reasons why this

50 Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

51 Christine Varney, "Assistant Attorney General Christine Varney Speaks at the U.S. Chamber of Commerce," June 24, 2011, https://www.justice.gov/opa/speech/assistant-attorney-general-christine-varney-speaks-us-chamber-commerce.

52 Bill Baer, "Acting Associate Attorney General Bill Baer Delivers Remarks at American Antitrust Institute's 17th Annual Conference," speech, June 16, 2016, https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute. Baer in 2020 told the House Antitrust Subcommittee that the DOJ did not advocate for stronger antitrust laws during his tenure, saying "while I was there that debate was just beginning." "Proposals to Strengthen the Antitrust Laws and Restore Competition Online," Subcommittee on Antitrust, Commercial, and Administrative Law, 1:18:58-1:19:37, https://www.youtube.com/watch?v=--jXAdjieTo&feature=youtu.be&t=4738.

53 Baer said the laws were "flexible enough for us to do more," while Ramirez said as a "general matter, we are well equipped to tackle the problems that impact competition" but asked Congress to grant the FTC the authority to address both common carriers and nonprofits. "Oversight of the Enforcement of the Antitrust Laws," Subcommittee on Antitrust, Competition Policy and Consumer Rights, 2:00:39-2:09:53, https://www.judiciary.senate.gov/meetings/oversight-of-the-enforcement-of-the-antitrust-laws-2016. However, scholars were already sounding the alarm in 2013 about how intellectually unsupportable the FTC's work had been. Frank Pasquale, "Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias," *Harvard Journal of Law & Technology Occasional Paper Series* (July 2013), https://jolt.law.harvard.edu/assets/misc/Pasquale.pdf. See also the discussion of high technology antitrust in Pasquale's widely cited 2015 book, Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press, 2015).

54 James J. O'Connell, "Editor's Note: Seven Years On: Antitrust Enforcement During the Obama Administration," *Antitrust* 30, no. 2 (Spring 2016): 12. https://www.cov.com/-/media/files/corporate/publications/2016/03/seven_years_on_antitrust_enforcement_during_the_obama_administration.pdf.

administration is seen as being tougher [than the Bush administration] is because it has taken more opportunities to say that it is."[55]

During the transition to the Trump administration, Obama-era enforcers, far from decrying the courts or limited enforcement, looked back with pride at their bipartisan commitment to competition policymaking norms that had existed since the Reagan era. A post-administration bipartisan evaluation of the competition policy framework during the Obama years, included in the American Bar Association Section of Antitrust Law's Presidential Transition Task Force Report of 2016, commended Obama enforcers for rejecting stronger calls for enforcement and praised the Obama enforcement record as consistent with multiple previous administrations in eschewing more assertive challenges to corporate power.[56] The report was written by a bipartisan group of antitrust experts, including several Obama-era enforcers, such as FTC Chair Jon Leibowitz and Deputy Assistant Attorney General for Economics Fiona Scott Morton.[57]

Our findings in this report are consistent with the ABA Task Force Report, and not with the current narrative of foiled attempts at stronger enforcement. Despite initial rhetoric and promise, the track record of the Obama administration was best characterized by antitrust scholar Daniel Crane, who wrote at the time, "With only a few exceptions, current enforcement looks much like enforcement under the Bush Administration."[58]

"CONSUMER WELFARE" AND THE CREATION OF AMERICA'S CONCENTRATION CRISIS

While policymakers under Obama supported more aggressive antitrust actions than their Republican counterparts in specific instances, they share an ideological assumption with conservative law and economics scholars that competition policy should be tethered to consumer welfare. Post-Chicago scholars do not see broader increases in corporate concentration and its link to higher profit levels as inherently related to the rise of monopoly or market power, instead considering the possibility that fewer corporations with higher market shares might also reflect superior efficiency.[59]

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55 O'Connell, "Editor's Note," 11.

56 American Bar Association Section of Antitrust Law, "Presidential Transition Report: The State of Antitrust Enforcement," January 2017, 2 ("[T]he Section's view is that the Nation's system of competition enforcement has been in good hands, that an arc of continuous improvement and advancement can be discerned that stretches back over many years and multiple administrations, and that enforcement policy should remain firmly tethered to its statutory basis."). See also ABA Section of Antitrust Law, "Presidential Transition Report," 35 ("The Section does not support the aggressive view, espoused recently by certain politicians and administration economists, that competition has declined in the United States as a result of the increasing concentration in key industries, which itself is attributed to the reluctance of the Agencies to challenge and the failure of courts to block more mergers.").

57 ABA Section of Antitrust Law, "Presidential Transition Report," 1.

58 Daniel A. Crane, "Has the Obama Justice Department Reinvigorated Antitrust Enforcement?" *Stanford Law Review Online* 65 (2012): 13.

59 Berry, Gaynor, and Scott Morton, "Do Increasing Markups Matter?," 44, 45 ("[A] number of recent studies of markups . . . employ an analytical approach that was broadly rejected by the field of industrial organization more than 30 years ago: the 'structure-conduct-performance' paradigm ... On the other hand, in some cases, higher fixed (or sunk) costs can be the endogenous outcome of improved products or of improved production technology that lowers marginal cost. In this case, observed higher markups may or may not be associated with higher prices and reduced consumer welfare.") (internal citation omitted).

Their view implies that competition law should be done by looking at each example as unique instead of adhering to clear bright-line rules, that it should prioritize efficiency as determined by theoretical economic tools above other values such as predictability and fairness, and that it should largely operate within debates among experts rather than in the public sphere. It is this ideological framework that led enforcers to imagine they were aggressive antitrust enforcers during the Obama administration while failing to perceive, and thus confront, a growing monopoly crisis in the broader political economy.

Today, the intellectual consensus is that monopoly power is a systemic problem with the American economy. Obama administration officials, such as Jason Furman and Peter Orszag, represented this shifting consensus when they began to examine market power as a causal driver of inequality.[60] Thinkers such as Paul Krugman, and former high-ranking officials like Gene Sperling, have accepted and explored this narrative.[61] Joe Biden has critiqued market concentration, as have multiple senators and members of Congress, who began focusing on the problem in the latter half of the Obama administration. President Obama, out of office, has also called on policymakers to address monopoly power.[62]

Over the last 18 months, they have begun to do so. The House Antitrust Subcommittee, led by Chairman David Cicilline, undertook a 16-month investigation into competition in digital markets—the first congressional investigation into monopoly power in 50 years—resulting in a definitive assessment of the Big Tech giants' monopoly power and a broad range of remedies to revitalize antitrust.[63] The federal government and state attorneys general have filed three separate suits against Google and two similar suits against Facebook.[64] States, led by New York, are seeking to strengthen antitrust laws.[65] And increasingly, businesses are taking on monopolies directly through an uptick in private antitrust enforcement.[66]

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60 Jason Furman and Peter Orszag, "Slower Productivity and Higher Inequality: Are They Related?," Peterson Institute for International Economics, Working Paper 18-4, June 2018, https://www.piie.com/system/files/documents/wp18-4.pdf.

61 Paul Krugman, "Paul Krugman: Monopoly Capitalism is Killing US Economy," *The Irish Times*, April 19, 2016, https://www.irishtimes.com/business/economy/paul-krugman-monopoly-capitalism-is-killing-us-economy-1.2615956; Gene B. Sperling, "Punching Stephen Curry," *The Atlantic*, May 10, 2020, https://www.theatlantic.com/ideas/archive/2020/05/punching-steph-curry/611410/.

62 Alix Langone, "'We Now Stand at a Crossroads.' Here's What Barack Obama Said During His First Big Speech Since He Left Office," *Time*, July 17, 2018 (quoting President Obama saying, "[W]hen economic power is concentrated in the hands of the few, history also shows that political power is sure to follow – and that dynamic eats away at democracy. Sometimes it may be straight-out corruption, but sometimes it may not involve the exchange of money; it's just folks who are that wealthy get what they want, and it undermines human freedom."), https://time.com/5341180/barack-obama-south-africa-speech-transcript/.

63 "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations," US House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

64 Brent Kendall and Rob Copeland, "Justice Department Hits Google With Antitrust Lawsuit," *The Wall Street Journal*, October 20, 2020, https://www.wsj.com/articles/justice-department-to-file-long-awaited-antitrust-suit-against-google-11603195203; Leah Nylen, "Late Complication Tangles FTC's Decision on Suing Facebook," *Politico*, November 25, 2020, https://www.politico.com/news/2020/11/25/facebook-ftc-lawsuit-440645.

65 "New York State Antitrust: Senate, Assembly Bills Seen Having Good Chance to Pass in 2021; Policymakers and Big Businesses Across the Country are Watching," *The Capitol Forum*, September 2, 2020, https://www.nysenate.gov/newsroom/in-the-news/michael-gianaris/capitol-forum-new-york-state-antitrust-senate-assembly-bills.

66 Jack Nicas, Kellen Browning, and Erin Griffith, "Fortnite Creator Sues Apple and Google After Ban From Apple Stores," *The New York Times*, August 13, 2020, https://www.nytimes.com/2020/08/13/technology/apple-fortnite-ban.html.

Rebuilding a post-COVID economy that is structured to empower working people, entrepreneurs, small businesses, and communities will require President-elect Biden to build on this momentum and aggressively implement and expand on President Obama's intentions, champion congressional action, and, critically, build political will for confronting monopoly power as a key component of building back better. As Ted Kaufman, Biden's transition co-chair, wrote for *Delaware Online* in 2018 in a piece decrying today's "economic royalists" and extolling the wisdom of FDR's "Rendezvous with Destiny" speech, "The United States behind FDR's leadership brought us back into economic balance. There is no reason through dedication and hard work we cannot do the same."[67]

***This case was filed as this report was being finalized. For more information see: Cecilia Kang and Mike Isaac, "U.S. and States Say Facebook Illegally Crushed Competition," *The New York Times*, December 9, 2020 https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html**

67 Ted Kaufman, "Roosevelt's 'Rendezvous with Destiny' Speech Warned Us About 'Economic Royalists,'" *Delaware Online*, September 5, 2018, https://www.delawareonline.com/story/opinion/contributors/2018/09/05/fdrs-warning-concentrated-wealth-and-power-resonates-today/1200811002/.

PART I

THE ANTITRUST AGENCIES DURING THE OBAMA ADMINISTRATION

THE 2008 OPPORTUNITY

The Obama era represented a potential pivot point in the federal government's relationship to corporate power, beginning as it did during the financial crisis. In his campaign, candidate Obama's call for reform was broad. "I will direct my administration to reinvigorate antitrust enforcement," he told the American Antitrust Institute in 2007.[68] As the financial crisis enveloped the presidential campaign, Obama embraced the role of historical trustbusters. He lauded Teddy Roosevelt, who as president sought to, in Obama's words, "bust trusts, break up monopolies, and do his best to give the American people a shot at the dream once more."[69]

Roosevelt sought a stark break from the previous weak enforcement regime, and Obama pledged to do the same. He suggested antitrust review in several industries, such as health insurance, energy, and pharmaceuticals.[70] In agriculture policy, his campaign literature included a pledge to "strengthen antimonopoly laws," help "family farmers, as opposed to large, vertically integrated corporate agribusiness," and ban the ownership of livestock by meatpackers.[71]

After the election, the administration continued to set out aggressive goals for antimonopoly work. The new president nominated Christine Varney, an experienced antitrust attorney who had served at the Federal Trade Commission, to lead DOJ's Antitrust Division. Varney's private-sector experience was notable; she had represented Netscape in its fight with Microsoft in the late 1990s. In 2008, prior to her appointment, Varney made it clear that she saw a different corporation as the key problem in the technology sector. "For me, Microsoft is so last century," Varney said. "They are not the problem. I think we are going to continually see a problem, potentially, with Google."[72]

When she was appointed, she continued her aggressive rhetoric. "There is no doubt that the challenges we face in our current economic crisis are great," she said at her confirmation hearing, "but I believe it is important to remember that robust antitrust enforcement is essential for the free market to function properly."[73]

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68 Stacey Anne Mahoney, "To Day 100 and Beyond: Antitrust Enforcement in the Obama Administration," *Antitrust Counselor*, March 2009, https://www.gibsondunn.com/wp-content/uploads/documents/publications/Mahoney-Day100andBeyondAntitrustEnforcementObamaAdmin.pdf.

69 Barack Obama, "Remarks of Senator Barack Obama," June 22, 2007, reprinted in *The New York Times*, https://www.nytimes.com/2007/06/22/us/politics/22text-obama.html.

70 Obama, "Remarks."

71 "Real Leadership for Rural America," Obama-Biden campaign literature, http://nobull.mikecallicrate.com/wp-content/uploads/2011/08/obamaruralplanfactsheet.pdf.

72 *Wired* Staff, "Why Is Obama's Top Antitrust Cop Gunning for Google?," *Wired*, July 20, 2009, https://www.wired.com/2009/07/mf-googlopoly/.

73 "Testimony of Christine Varney before the U.S. Senate Committee on the Judiciary," March 10, 2009, https://www.judiciary.senate.gov/imo/media/doc/varney_testimony_03_10_09.pdf.

Varney also sought to broaden the division's role to match the scope of the financial crisis, saying, "Antitrust must be among the frontline issues in the Government's broader response to the distressed economy."[74] The division launched the Antitrust Division Recovery Initiative, "a program developed in response to the enactment of the American Recovery and Reinvestment Act," Varney explained, and "pledged broader reforms across numerous industries, including banking, health care, energy, telecommunications, and transportation sectors."[75]

At the Federal Trade Commission, the administration elevated existing FTC Commissioner Jon Leibowitz to the chairmanship. In contrast to Varney, Leibowitz offered more continuity with the Bush administration, saying that he "agreed with 95 percent" of what his predecessors sought to do.[76] Leibowitz committed to continuing opposition to "collusive pay-for-delay settlements between brand and generic pharmaceutical companies—in which the brand literally pays the generic to delay entry into the market."[77] He also offered a creative approach to addressing restrictive court precedent on mergers and single-firm conduct, promising to revive the use of Section 5 of the FTC Act to exercise the FTC's broad power to address unfair methods of competition.[78] Leibowitz also pledged elevated activity for the FTC in structuring privacy rules, acknowledging that the current model for regulating behavioral advertising "is not working."[79]

Varney said she would spearhead a new and aggressive pattern of enforcement. She set out a host of goals for the Antitrust Division. First, she pledged to prioritize cases against single-firm monopoly conduct; no case had been brought since *U.S. v. Microsoft* in the late 1990s. The Bush administration had issued a report in September 2008 that, according to three FTC commissioners, would have "radically weakened" Section 2 enforcement.[80] On May 11, 2009, Varney withdrew this guidance because it "raised too many hurdles to government antitrust enforcement and favored extreme caution" for such cases.[81] Doing so was an implicit pledge that the Obama administration, unlike its predecessor, would pursue monopolization cases.[82]

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74 Christine Varney, "Vigorous Antitrust Enforcement In This Challenging Era," remarks as prepared for the U.S. Chamber of Commerce, May 12, 2009, https://www.justice.gov/atr/speech/vigorous-antitrust-enforcement-challenging-era.

75 Varney, "Vigorous Antitrust Enforcement."

76 Jon Leibowitz, "Remarks for CDT Dinner," March 10, 2009, https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-chairman-jon-leibowitz-2009-center-democracy-and-technology-gala/090310remarksforcdtdinner.pdf.

77 Leibowitz, "Remarks for CDT Dinner."

78 Jon Leibowitz, "Tales from the Crypt," remarks as prepared for Section 5 Workshop, October 17, 2008, https://www.ftc.gov/sites/default/files/documents/public_statements/tales-crypt.episodes-08-and-09-return-section-5-unfair-methods-competition-commerce-are-hereby-declared-unlawful/081017section5.pdf.

79 Edward Wyatt and Tanzina Vega, "F.T.C. Backs Plan to Honor Privacy of Online Users," *The New York Times*, December 1, 2010, https://www.nytimes.com/2010/12/02/business/media/02privacy.html?_r=1&ref=todayspaper.

80 "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," U.S. Department of Justice, Antitrust Division, 2008, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act; "Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice," 2008, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf.

81 "Justice Department Withdraws Report on Antitrust Monopoly Law," press release, Department of Justice, May 11, 2009, https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

82 "Justice Department Withdraws Report on Antitrust Monopoly Law" (quoting Varney saying, "Withdrawing the Section 2 report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers.").

Second, Varney sought to explore new ways of addressing vertical mergers, which is when a corporation buys an upstream supplier or downstream customer. As she told the U.S. Chamber of Commerce, “In particular, it is my hope that the Antitrust Division, drawing upon the significant expertise of my new leadership team, will have the opportunity to explore vertical theories.”[83]

And third, Varney pledged to pursue antitrust cases in “other new areas of civil enforcement, such as those arising in high-tech and internet-based markets.” “In the past,” Varney said, “the Antitrust Division was a leader in its enforcement efforts in technology industries, and I believe we will take this mantle again.”[84]

An early signal of the administration’s newfound commitment came when it asked a judge to extend the court’s oversight of Microsoft’s antitrust consent decree, which was reached in 2002.[85] Industry stakeholders noticed. “It’s clear we have a new sheriff in town,” said Ed Black, president of the Computer and Communications Industry Association, who recommended firms should “do some self-correcting before they get corrected” by the government.[86] Corporations, particularly in the technology sector, followed Black’s advice. IBM and Sun Microsystems abandoned a merger attempt; Sun had “sought detailed assurances that IBM would see the deal through an antitrust review.”[87] And Google published its “six principles for competition and openness,” a clear signal the corporation expected enforcement activity.[88]

The administration seemed to gear up for antitrust suits against major corporations. *Wired* asked, “Why Is Obama’s Top Antitrust Cop Gunning for Google?” and *The Washington Post* noted that an investigation into the agrochemical corporation Monsanto was among the “highest stakes” of anything at the division.[89] Attorney General Eric Holder and Varney traveled around the country holding roundtables with the Department of Agriculture on meatpackers’ alleged abusive behavior towards farmers. In 2010, at a hearing with farmers testifying about their experiences with contract growers like Tyson, Varney told a farmer, “Mr. Staples, let me say, I fully expect you will not experience retaliation by virtue of your presence today, but if you do, you call me at this number because I want to know about it.”[90]

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83 Varney, “Vigorous Antitrust Enforcement.”

84 Varney, “Vigorous Antitrust Enforcement.”

85 Devlin Barrett, Associated Press, “Justice Plans New Antitrust Effort,” *The San Diego Union-Tribune*, May 11, 2009, https://www.sandiegouniontribune.com/sdut-us-antitrust-enforcement-051109-2009may11-story.html.

86 Devlin Barrett, *Associated Press*, “Antitrust Chief: Division Won’t ‘Sit on the Sidelines Any Longer,’” *ABC News*, May 11, 2009, https://abcnews.go.com/Business/story?id=7560657&page=1.

87 Jordan Robertson, “Tech Firms Could See Fallout from Antitrust Shift,” *The Seattle Times*, May 12, 2009, https://www.seattletimes.com/business/tech-firms-could-see-fallout-from-antitrust-shift/.

88 Adam Kovacevich, “Google’s Approach to Competition,” Google Public Policy Blog, May 8, 2009, https://publicpolicy.googleblog.com/2009/05/googles-approach-to-competition.html.

89 *Wired* Staff, “Why Is Obama’s Top Antitrust Cop Gunning for Google?”; Peter Whoriskey, “Monsanto’s Dominance Draws Antitrust Inquiry,” *The Washington Post*, November 29, 2009, https://www.washingtonpost.com/wp-dyn/content/article/2009/11/28/AR2009112802471.html.

90 United States Department of Justice and United States Department of Agriculture, “Public Workshops Exploring Competition in Agriculture: Poultry Workshop,” May 21, 2010, 136, https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf.

As reported in *ProPublica*, when Staples did indeed try to call Varney a few years later, he learned she had left the Justice Department for a partnership with Cravath, Swaine & Moore, where she represented merging parties.[91] The extensive evidence that DOJ and USDA had collected on meatpackers' abuse culminated in a 24-page report summarizing farmers' concerns and concluding that these harms tended to "fall outside the purview of the antitrust laws."[92] Neither agency took significant further action.

Though Obama laid out a vision that broke with orthodoxy, antitrust enforcers and competition policy officials in his administration remained loyal to the prevailing philosophy, offering a slight shift in enforcement priorities from the Bush era but refusing to implement the stark break Obama called for. As a result, concentration and market power in the American economy during the Obama years increased. Health care costs continued to explode, largely because of increasing consolidation in hospitals, pharmaceutical corporations, and various middlemen. Insulin prices, for instance, doubled from 2012 to 2016, despite the fact that versions of insulin have been off patent for decades.[93] Two major airline mergers allowed by the administration shrank the industry into four giants, with the average domestic airline ticket price increasing from $336 in 2010 to $399 in 2014, and the average daily number of flights from small airports shrinking every year from 2009 to 2016.[94] Private equity exploded in size and scale, while new tech giants Amazon, Google, and Facebook did not have a single merger blocked or face significant enforcement actions.[95]

By the end of the administration, lax antitrust policy was understood as an opportunity on Wall Street. As Bain Consulting put it in a report on private equity, "Exits in 2015 rode a tsunami of corporate merger and acquisition (M&A) activity as cash-rich strategic acquirers set out to buy growth."[96]

91 Isaac Arnsdorf, "Chicken Farmers Thought Trump Was Going to Help Them. Then His Administration Did the Opposite," *ProPublica*, June 5, 2019, https://www.propublica.org/article/chicken-farmers-thought-trump-was-going-to-help-them-then-his-administration-did-the-opposite.

92 "Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward," U.S. Department of Justice, May 2012, 3, https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf.

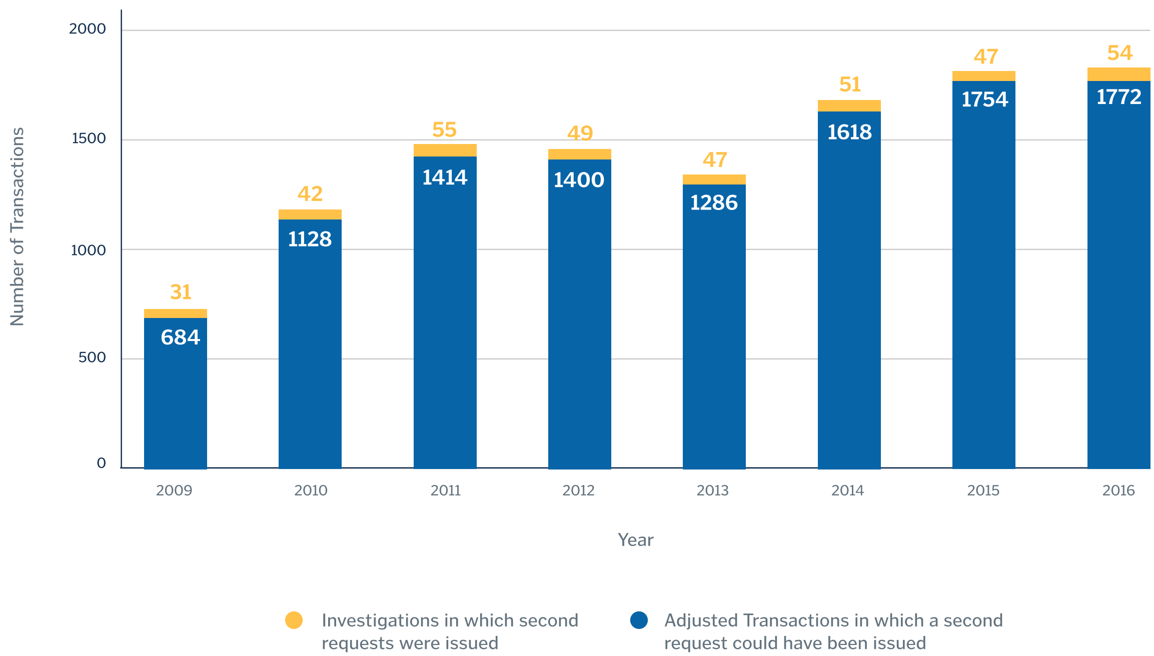
93 Robin Respaut and Chad Terhune, "U.S. Insulin Costs Per Patient Nearly Doubled from 2012 to 2016: Study," *Reuters*, January 22, 2019, https://www.reuters.com/article/us-usa-healthcare-diabetes-cost/u-s-insulin-costs-per-patient-nearly-doubled-from-2012-to-2016-study-idUSKCN1PG136.

94 Comment of Airlines for America, "Part One: Proposals for Fundamental Reform of DOT Economic Regulation and Enforcement," Notification of Regulatory Review, DOT-OST-2017-0069, December 1, 2017, 6, 34 of Appendix A: "U.S. Airline Industry Review: Allocating Capital to Benefit Customers, Employees and Investors."

95 Tim Wu and Stuart A. Thompson, "The Roots of Big Tech Run Disturbingly Deep," *The New York Times*, June 7, 2019.

96 "Global Private Equity Report 2016," Bain & Company, 2016, 1, https://psik.org.pl/images/publikacje-i-raporty---publikacje/BAIN_REPORT_Global_Private_Equity_Report_2016.pdf.

CHART 2: TOTAL NUMBER OF M&A TRANSACTIONS ABOVE THE HSR THRESHOLD VS. TOTAL IN WHICH THE DOJ AND FTC ISSUED A SECOND REQUEST



As President Obama neared the end of his time in office, and in part at the prompting of the Office of the Vice President, the administration began exploring a shift toward a different approach to competition policy. In 2015, Council of Economic Advisers' Chair Jason Furman and former Office of Management and Budget Director turned investment banker Peter Orszag noticed a divergence between highly profitable firms who tended to pay their employees lavishly and firms without significantly elevated profit margins. They called the former "superstar" firms and began asking why such a divergence existed.[97] In 2016, nearly eight years after taking office, the White House Council of Economic Advisers finally published a series of briefs on competition and market power.[98] That same year, the Federal Communications Commission (FCC) took the most aggressive step of the administration by reclassifying broadband as a

97 Jason Furman and Peter Orszag, "A Firm-Level Perspective on the Role of Rents in the Rise in Inequality," Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University, October 16, 2015, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf. Though Furman and Orszag at first seemed to indicate that market power might be a reasonable explanation of the superstar firm theory, Orszag later concluded that large technology firms were simply more efficient. Peter R. Orszag, "What If Companies Get Big Because They're Better?," *Bloomberg*, December 2, 2019, https://www.bloomberg.com/opinion/articles/2019-12-02/antitrust-zealots-beware-big-companies-are-more-productive?sref=q0qR8k34.

98 Jason Furman, "Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth," remarks for Searle Center Conference on Antitrust Economics and Competition Policy, September 16, 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf; "Benefits of Competition and Indicators of Market Power," Council of Economic Advisers Issue Brief, April 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf; "Labor Market Monopsony: Trends, Consequences, and Policy Responses," Council of Economic Advisers Issue Brief, October 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

public utility through an open internet order mandating net neutrality.[99] In April 2016, the White House issued an executive order mandating that federal agencies prioritize policies to foster competition in their sector-specific areas.

These tentative shifts took place too late to have a measurable policy impact outside of the FCC's actions, but it suggested that at a high level, stakeholders in the White House began to understand the lack of follow-through on the part of competition policymakers at the Federal Trade Commission and the Department of Justice Antitrust Division.

DOJ AND FTC ENFORCEMENT AGAINST SINGLE FIRM CONDUCT AND MONOPOLIZATION

Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce."[100] The Department of Justice Antitrust Division filed no major monopolization challenges during the Obama administration.[101] The chief economist of the division from 2009 to 2011, Carl Shapiro, explained the lack of enforcement by stating that the division "found precious few cases that warranted an enforcement action based on the facts and the case law."[102] Despite campaign promises to crack down on agricultural monopolists, the DOJ dropped its investigation of Monsanto in 2012 without even a public statement, and the government did not implement rules to address anticompetitive practices among meatpackers.[103]

The FTC had a relatively more active approach to monopolization. More activity does not mean a lot of activity. For instance, the FTC closed its investigation into Google's anticompetitive activity with a unanimous vote, arguing that Google's downgrading of its rivals in its search engine might arguably be good for consumers. It also settled with Google in what it called a series of "landmark agreements" to have Google share certain patents with rivals, allow

99 Other antimonopoly provisions at the FCC include the preemption of state prohibitions on municipal broadband, privacy rules for internet service providers, and a rule to open up the set top box market.

100 15 U.S.C. § 2.

101 The Antitrust Division did file a Section 2 case against United to block the airline's attempt to acquire 24 landing slots at Newark International Airport. United already had 73 percent of the landing slots. United States v. United Continental Holdings and Delta Air Lines, (D.N.J. 2015), https://www.justice.gov/atr/case-document/file/792471/download.

102 Carl Shapiro, "Antitrust in a Time of Populism," *International Journal of Industrial Organization* 61 (2018): 743.

103 Lina Khan, "How Monsanto Outfoxed the Obama Administration," *Salon*, March 15, 2013, https://www.salon.com/2013/03/15/how_did_monsanto_outfox_the_obama_administration/; Lina Khan, "Obama's Game of Chicken," *Washington Monthly*, November/December 2012, https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/.

advertisers to use rival ad platforms, and to "refrain from misappropriating online content from" vertical search competitors.[104] And in at least one case, the FTC used its substantial resources to aid Google in its keyword advertising business.[105]

The FTC brought 16 non-merger violations of Section 5 of the FTC Act, a statute that empowers the agency to police collusion and attempts to create or maintain a monopoly. All but five were in the health care industry. Of these five, the FTC's case against Qualcomm has encountered a hostile appeals court.[106] In another case, *McWane, Inc.*, the commission successfully challenged an exclusionary arrangement by a maker of domestically produced iron pipe fittings used for government procurement. In the three others, the FTC settled with no admission of wrongdoing from the defendant and created no case law or precedents for businesses to follow or Congress to examine. In none of the settled non-health care cases was there clear evidence of increased output or more competition as a result of the settlement.

Finally, with the exception of Intel, all four cases attacked contractual arrangements, meaning the FTC left non-contractual harms, such as predatory product design, anticompetitive integration, leveraging, self-preferencing, and discrimination, unaddressed in the law.

The four non-health care cases that reached settlement or a litigated victory for the FTC were as follows:

SETTLEMENTS

IDEXX

In 2012, the FTC brought a case against IDEXX, a supplier of diagnostic testing products used by small-animal veterinarians, for violating Section 5 of the FTC Act by engaging in exclusive dealing to maintain its monopoly. The commission settled with the company in 2013, with the company admitting no wrongdoing.[107] Available evidence suggests little overall changed. As one stock analyst noted in 2019 when reviewing the antitrust settlement, some "expected IDEXX to

104 "Statement of the Federal Trade Commission Regarding Google's Search Practices In the Matter of Google Inc.," Federal Trade Commission, FTC File Number 111-0163, January 3, 2013, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf; "Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search," press release, Federal Trade Commission, January 3, 2013 ("Landmark Agreements Will Give Competitors Access to Standard-Essential Patents; Advertisers Will Get More Flexibility to Use Rival Search Engines"), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc.

105 Frank Pasquale, "When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy," *CPI Antitrust Chronicle*, May 2017, 2, https://ssrn.com/abstract=3020163; Eric Goldman, "FTC Explains Why It Thinks 1-800 Contacts' Keyword Ad Settlements Were Anti-Competitive—FTC v. 1-800 Contacts," *Technology & Marketing Law Blog*, April 18, 2017 (discussing the FTC's filing and adding, "If I were Google, I'd be quoting this language in all of my marketing copy."), http://blog.ericgoldman.org/archives/2017/04/ftc-explains-why-it-thinks-1-800-contacts-keyword-ad-settlements-wereanti-competitive-ftc-v-1-800-contacts.html.

106 Federal Trade Commission v. Qualcomm Incorporated, 969 F.3d 974 (9th Cir. 2020).

107 Decision and Order, In the Matter of IDEXX Laboratories, Inc., February 12, 2013, 1; Open Markets Institute, American Economic Liberties Project, et al., "Petition for Rulemaking to Prohibit Exclusionary Contracts Before the Federal Trade Commission," July 21, 2020, 27-28, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf.

subsequently lose substantial market share. Only, that didn't happen. Since that settlement, the stock's jumped more than 450 percent."[108]

Intel

In 2009, the FTC alleged that Intel Corporation violated Section 5 of the FTC Act, charging that the microchip corporation engaged in unfair methods of competition by illegally keeping its competitors out of the market for desktop and server central processing units (CPUs) to maintain its monopoly.[109] The FTC argued that Intel had kept a market share of between 75-85 percent since 1999 due to a variety of anticompetitive activities. The FTC settled the following year.[110] As CNN reported, "analysts expect the agreement will do little to change the microchip marketplace," and Intel "did not acknowledge any wrongdoing or even admit that the facts alleged by the regulator were true, and it settled without paying a fine."[111] The effects of the case are unclear. Six years after the settlement, Intel's market share remained at 82 percent, and security flaws in its chips reflected quality problems, perhaps masked by residual market power.[112]

Pool Corp

In 2011, the FTC alleged that Pool Corp violated Section 5 of the FTC Act, accusing the pool supply distributor of illegally keeping its competitors out of the market to maintain its monopoly.[113] The FTC settled with the corporation the following year.[114] The suit apparently had little effect on the market. Pool Corp's 2020 investor presentation cited "exclusive products" as one of the distributor's competitive advantages enabling "margin leverage," and its operating margin increased every year from 2014 to 2020.[115]

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108 Jared McKiernan, "You Love Your Dog More Than Humans—And This Company's Reaping the Benefits," ***The Motley Fool***, November 21, 2019, https://www.fool.com/investing/2019/11/21/you-love-your-dog-more-than-humans-and-this-compan.aspx.

109 Complaint, In the Matter of Intel Corporation, Federal Trade Commission, December 16, 2009, https://www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter.

110 Complaint, In the Matter of Intel Corporation, 2. According to an AELP interview with an industry participant, White House advisor Larry Summers spoke with the FTC chair in a successful attempt to dissuade the commission from more aggressive action. In Jeff Connaughton's book, ***The Payoff***, Connaughton cites two sources reporting that White House Chief of Staff Rahm Emanuel pressured DOJ Antitrust Division chief Christine Varney to soften antitrust enforcement. Jeff Connaughton, ***The Payoff: Why Wall Street Always Wins*** (Prospecta Press, 2012), 36-37.

111 David Goldman, "Intel Settles Antitrust Suit with Wrist Slap," ***CNN Money***, August 4, 2010, https://money.cnn.com/2010/08/04/technology/intel_ftc_settlement/index.htm.

112 Trefis Team, Great Speculations, "AMD vs Intel: A Detailed Comparison of Revenue And Key Operating Metrics," ***Forbes***, September 24, 2019, https://www.forbes.com/sites/greatspeculations/2019/09/24/amd-vs-intel-a-detailed-comparison-of-revenue-and-key-operating-metrics/?sh=3aac4d8d4af4; Tom Warren, "A Major New Intel Processor Flaw Could Defeat Encryption and DRM Protections," ***The Verge***, March 6, 2020, https://www.theverge.com/2020/3/6/21167782/intel-processor-flaw-root-of-trust-csme-security-vulnerability.

113 Open Markets, Economic Liberties, et al., "Petition for Rulemaking to Prohibit Exclusionary Contracts," 26-27.

114 "FTC Establishes Streamlined Procedures to Help Maintain the Confidentiality of its Ongoing Investigations; FTC Approves Final Order Settling Charges that PoolCorp Acted Anticompetitively to Stop Manufacturers From Selling Products to Competitors," press release, Federal Trade Commission, January 13, 2012, https://www.ftc.gov/news-events/press-releases/2012/01/ftc-establishes-streamlined-procedures-help-maintain.

115 Pool Corp presentation, William Blair 40th Annual Growth Stock Conference, June 10, 2020, 6, https://s3.amazonaws.com/b2icontent.irpass.cc/603/181440.pdf.

LITIGATED VICTORY

McWane

In 2012, the FTC filed a complaint against McWane, Inc., a producer of ductile iron pipe fittings used in municipal water systems. The American Recovery and Reinvestment Act requirement to spend public resources only on domestically made inputs had created demand, and McWane was the only domestic producer. The FTC alleged that McWane maintained its monopoly of domestically produced pipe fittings by excluding competitors from the market with a series of predatory rebates. In 2013, the FTC won its complaint before an administrative law judge and in 2014, issued an order barring McWane from exclusive dealing arrangements with customers. In 2015, the Eleventh Circuit upheld the FTC case.[116] The next year, a competitor of McWane, Star Pipe Products, bought a foundry in Oklahoma and invested over $40 million in expanded domestic production, creating 260 jobs.[117]

DOJ AND FTC ENFORCEMENT AGAINST ANTICOMPETITIVE MERGERS

Merger waves are a recurrent feature in American history, beginning with the first major consolidation of corporate America in the 1890s. Such waves are contingent upon financial conditions enabling the consolidation of corporate assets, as well as policymakers choosing to organize either permissive or strict antitrust and regulatory strictures. From the 1990s to the 2000s, loose financing, deregulation, new trading arrangements, and lax merger enforcement enabled substantial and progressively larger merger activity, punctuated by a series of worsening financial crises. This pattern continued into the Obama and Trump eras.[118]

At first, the Obama administration presided over a financial crisis, which limited financing opportunities for mergers and acquisitions. During the recovery, merger activity resumed, building to a record $5 trillion in global mergers and acquisitions activity in 2015, with 10 deals

116 "Case Summary" in "McWane, Inc. and Star Pipe Products, Ltd., In the Matter of," Federal Trade Commission, https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter; Open Markets, Economic Liberties, et al., "Petition for Rulemaking to Prohibit Exclusionary Contracts," 20-21.

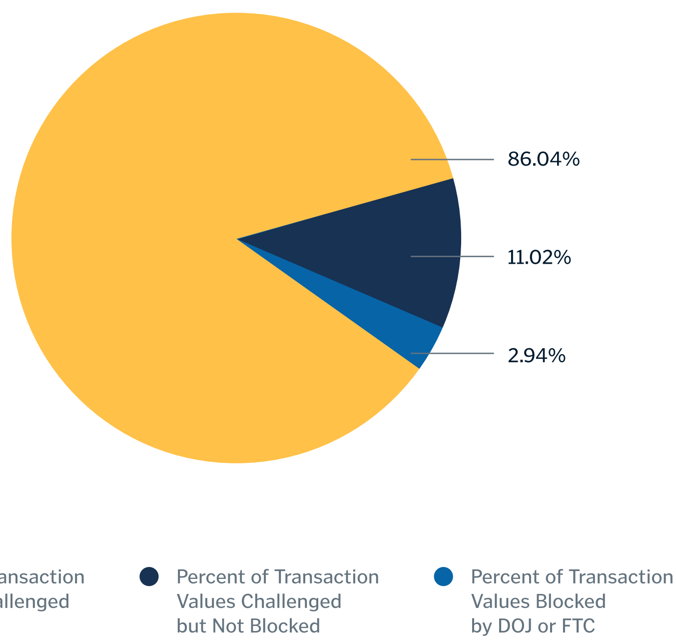
117 "Star Pipe Products acquires Jensen International," WaterWorld, September 15, 2016, https://www.waterworld.com/technologies/pipes/article/16204902/star-pipe-products-acquires-jensen-international.

118 Gabriele Lattanzio, William L. Megginson, and Ali Sanati, "Listing Gaps, Merger Waves, and the Privatization of U.S. Equity Finance," The CLS Blue Sky Blog, March 11, 2019, https://clsbluesky.law.columbia.edu/2019/03/11/listing-gaps-merger-waves-and-the-privatization-of-u-s-equity-finance/; "Matching Strengths: A New Wave of Corporate Alliances May be on the Horizon," Deloitte, June 21, 2017, https://www2.deloitte.com/uk/en/insights/economy/behind-the-numbers/new-wave-of-corporate-alliances-mergers-acquisitions.html; Leslie Wayne, "Wave of Mergers Is Recasting Face of Business in U.S.," *The New York Times*, January 19, 1998, https://www.nytimes.com/1998/01/19/us/wave-of-mergers-is-recasting-face-of-business-in-us.html.

surpassing $50 billion, another record.[119] Rather than investing in productive assets, business leaders took advantage of low-cost financing to engage in mergers and acquisitions activity.[120]

In total during the Obama administration, there was an aggregate of $11.67 trillion of merger activity, or 90,297 mergers. This included 11,056 mergers that were large enough to be reported to the antitrust agencies. Of these, the administration initiated 376 investigations, and took action on 313 mergers, in which taking action means blocking a merger outright or reaching a settlement to allow the merger to proceed with either a conduct remedy or divestment of overlapping assets. In total, the administration challenged $1.6 trillion of merging assets and blocked $342.65 billion worth of transactions, or roughly 3 percent of the total value of all mergers in that period.

CHART 3: PERCENT OF OVERALL M&A DEAL VALUE CHALLENGED AND BLOCKED BY DEPT. OF JUSTICE AND FTC BETWEEN 2009-2016



119 Emily Liner, "What's Behind the All-Time High in M&A?" Harvard Law School Forum on Corporate Governance, March 16, 2016, https://corpgov.law.harvard.edu/2016/03/16/whats-behind-the-all-time-high-in-ma/.

120 Liner, "What's Behind the All-Time High in M&A?"

The Obama administration's approach to merger challenges can be divided into two periods. From 2009 to 2010, as overall mergers and acquisitions declined as a result of the financial crisis, the administration challenged 4 percent of merger attempts that met the threshold required to file with the agencies. After 2011, the administration's challenge rate dropped to 2.6 percent.[121]

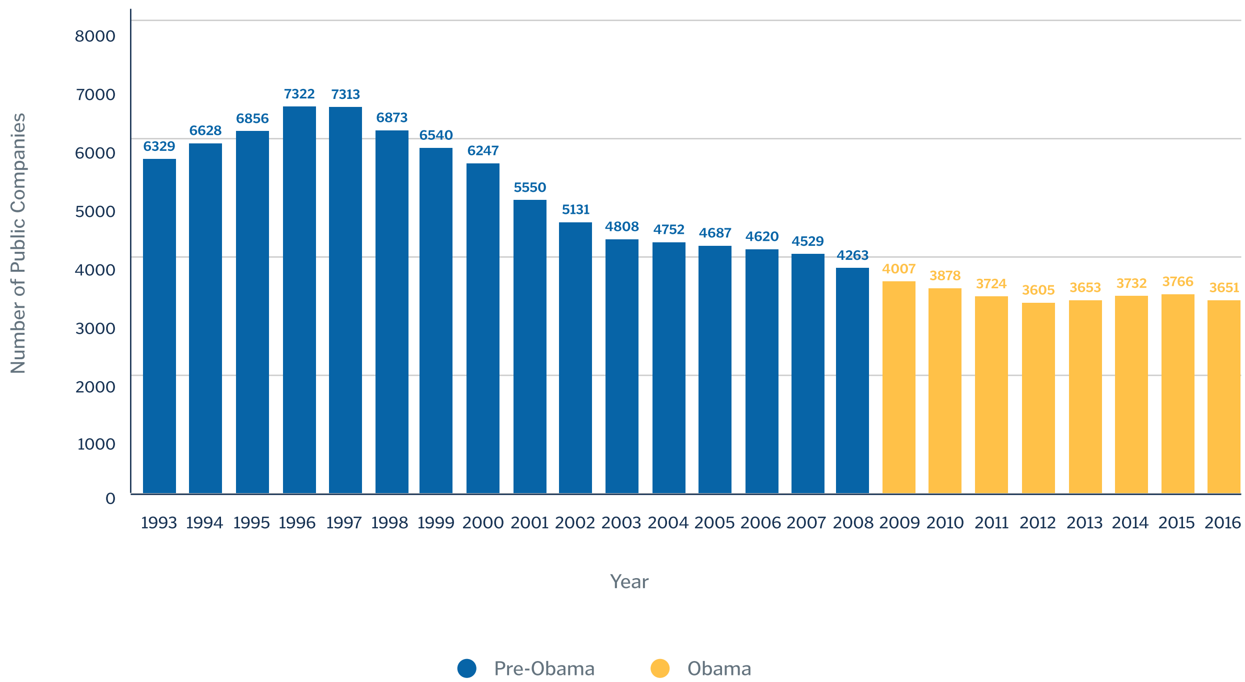
While the merger-challenge rate of the Obama administration is slightly higher than the Bush administration, this does not suggest a more aggressive posture. That's because all merger challenges are not created equal. If markets are relatively decentralized, challenging mergers is harder. If markets are already concentrated, any additional merger causes significantly more harm. By the time the Obama administration took office, markets had become so concentrated that every additional merger became more significant and therefore easier to challenge.

Since 1996, the number of public companies in America had been on a rapid decline, primarily due to mergers, but also caused by a decline in initial public offerings.[122] During the Obama administration, this decline slowed but continued, and the number of public companies at the end of his term had dropped by a little less than 10 percent.

121 See: Table 1 in Appendix.

122 Michael J. Mauboussin, Dan Callahan, and Darius Majd, "The Incredible Shrinking Universe of Stocks: The Causes and Consequences of Fewer U.S. Equities," Credit Suisse Global Financial Strategies, March 22, 2017, 22 (noting that there were 4,007 publicly listed firms in 2009 and 3,671 in 2016), https://www.cmgwealth.com/wp-content/uploads/2017/03/document_1072753661.pdf; Xiaohui Gao, Jay R. Ritter, and Zhongyan Zhu, "Where Have All the IPOs Gone?," *The Journal of Financial and Quantitative Analysis* 48, no. 6 (December 2013): 1663-1692.

CHART 4: NUMBER OF PUBLIC COMPANIES IN THE U.S. BETWEEN 1993-2016



Note: The counts include U.S. common stocks and firms listed on AMEX, NASDAQ, or NYSE. Investment funds and trusts are excluded.

Source: Michael J. Mauboussin, Dan Callahan, and Darius Majd, "The Incredible Shrinking Universe of Stocks," Credit Suisse Global Financial Strategies, March 22, 2017, https://www.cmgwealth.com/wp-content/uploads/2017/03/document_1072753661.pdf

CHART 5: ENFORCEMENT ACTION PER HSR FILED MERGER, 1993-2016

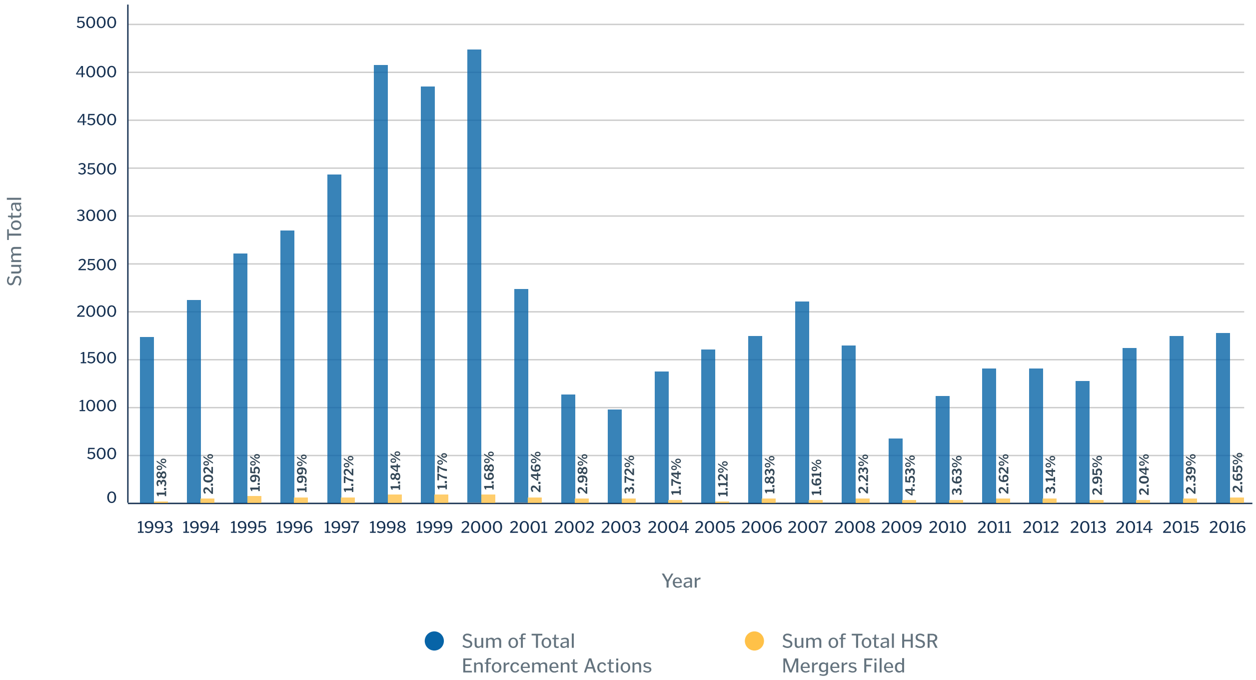
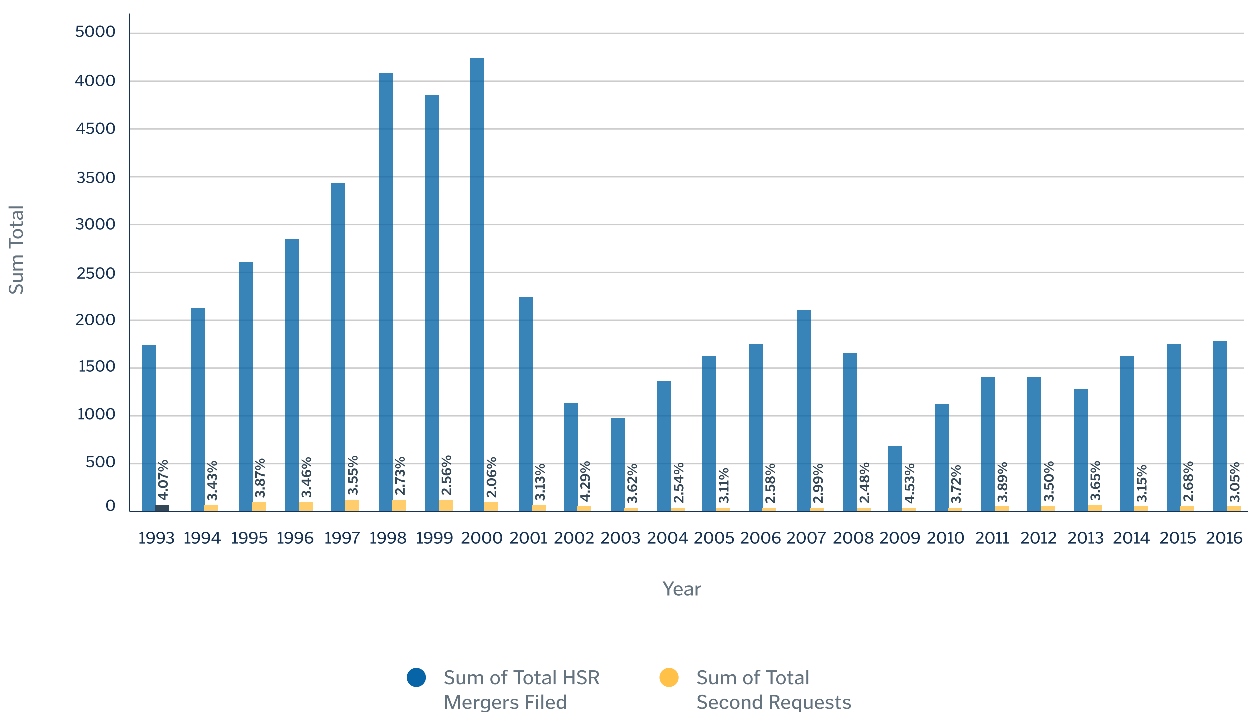


CHART 6: SECOND REQUESTS ISSUED PER HSR FILED MERGER, 1993-2016



UPDATED HORIZONTAL MERGER GUIDELINES CODIFY LAX ENFORCEMENT

In its first year, the Obama administration began a potentially transformative effort to update the FTC and DOJ's horizontal merger guidelines. These merger guidelines lay out the antitrust agencies' approach and policy toward mergers to reflect their interpretation of the law and help businesses plan. The guidelines are more than mere articulation; courts often cite them as persuasive authorities on what antitrust law says.[124] However, this effort ultimately resulted in the issuance of guidance that was more permissive of mergers than the previous thresholds under the Reagan and first Bush administrations had been.

The first version, issued in 1968, announced market share cutoffs for when agencies would challenge a merger. For example, in "highly concentrated markets," defined as markets in which the four largest firms controlled 75 percent or more, a company with 15 percent or more of a market could only acquire a company with 1 percent or less of it.[125] But the Reagan administration issued radically more permissive standards in 1982. Without changing the law, the Reagan-era guidelines amounted to a policy of, to simplify enormously, blessing almost all mergers, except for those of direct competitors in highly concentrated markets.[126]

The broader legal framework under which merger policy takes place comes from the Clayton Act of 1914, the Celler-Kefauver Act of 1950, and the Supreme Court's decisions in *Brown Shoe, Von's Grocery,* and *Philadelphia National Bank*.[127] The three cases established some touchstones of merger enforcement, including that market shares would be used as proxies for predicting harms from corporate concentration, that potential "efficiencies" from consolidation would not save an illegal merger, and that purported merger-related benefits to a customer group distinct from the injured customer group could not constitute an efficiency.[128] Those 1960s opinions are still binding precedent, and antitrust law would likely benefit from following their clear delineation between legal and illegal mergers. On efficiencies, the 1968 and even the 1982 guidelines generally warned companies that illegal mergers would not be deemed acceptable if they

124 Christine A. Varney, "An Update on the Review of the Horizontal Merger Guidelines," remarks as prepared for the Horizontal Merger Guidelines Review Project's Final Workshop, January 26, 2010 ("Courts also rely on the Guidelines, in the words of the Fifth Circuit Court of Appeals, as providing 'persuasive authority when deciding if a particular acquisition violates anti-trust laws,'" quoting Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 431 n.11 (5th Cir. 2008)).

125 Department of Justice, "1968 Merger Guidelines," 6.

126 Department of Justice, "1982 Merger Guidelines," 13-15.

127 Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); United States v. Von's Grocery Co., 384 U.S. 270 (1966).

128 On the last claim – on offsetting benefits to different customer groups – see United States v. Topco Associates, Inc., 405 U.S. 596, 610-611, 611-612 (1972) (writing that the freedom coming from the antitrust laws "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.") (citing Philadelphia National Bank 374 U.S. at 371 (1963)).

promised greater productivity.[129] But statements from both the George H.W. Bush and Clinton eras gave potential "efficiencies" a larger role in merger review.[130]

After more than a year of comment periods and workshops, the final DOJ horizontal merger guidelines announced higher market concentration thresholds for challenging mergers than the 1982 or 1992 versions. Under the updated guidelines, the DOJ and FTC implied that they would generally refrain from challenging mergers unless a market would shift from four major competitors to three.[131] They also gave greater room for efficiencies to justify a merger, opening the way for expensive economists to bog down merger litigation and investigations in unwieldy, bloated, and speculative quantitative exercises.[132] The 2010 merger guideline revisions codified a more permissive approach to merger enforcement.

Officials emphasized continuity from Republican and Democratic administrations, noting that the guidelines reflected agency practices more than they changed them. As Varney said in a speech while drafting the guidelines, "I said at the outset of this project that I did not envision radical revision of the Guidelines."[133] Moreover, the lead architect of the 2010 guidelines, economist and Antitrust Division Deputy Assistant Attorney General for Economics Carl Shapiro, praised the 1982 Reagan-era guidelines as a "revolution," a "dramatic step forward in merger enforcement policy," and emphasized the 2010 guidelines' continuity with Reagan's.[134]

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129 "1968 Merger Guidelines," 8, ("Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e., improvements in efficiency)."); "1982 Merger Guidelines," 29, ("Except in extraordinary cases, the Department will not consider a claim of specific efficiencies as a mitigating factor for a merger that would otherwise be challenged. Plausible efficiencies are far easier to allege than to prove.").

130 Department of Justice and Federal Trade Commission, "1992 Merger Guidelines," 28, ("The Agency may also consider claimed efficiencies … The expected net efficiencies must be greater the more significant are the competitive risks."); Department of Justice and Federal Trade Commission, "1997 Merger Guidelines," 27-29 (Revising the 1992 guidelines and announcing that "The Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."); "2010 Horizontal Merger Guidelines," 30-31, ("[T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market.").

131 More precisely, the agencies announced that they would have greater "competitive concerns" with mergers that concentrated markets to greater degrees – as measured in higher levels of HHI and changes in HHI – than previous guidelines. "2010 Horizontal Merger Guidelines," 19. See also John Kwoka, "Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice," American Antitrust Institute, October 9, 2018, 23 ("Remarkably, therefore, rather than reiterating the prior standards and committing to their enforcement, the 2010 revision of the guidelines actually raised these thresholds so that a presumptively problematic merger is not one with an HHI of 2,500 and a change of 300."). HHI refers to the Herfindahl-Hirschman Index, which measures market concentration by adding the squares of the market shares of individual competitors. For example, a market with only four competitors, each with 25 percent of the market, would have an HHI of 2,500, making it "highly concentrated" and thus more susceptible to agency challenge. "2010 Horizontal Merger Guidelines," 18-19. Northeastern economist John Kwoka has shown that the antitrust agencies by 2008 had mostly challenged only those mergers resulting in four or fewer significant firms. See John E. Kwoka, "U.S. Antitrust and Competition Policy Amid the New Merger Wave," Washington Center for Equitable Growth, July 2017, 12 ("The Department of Justice's antitrust policy decision first permitted a merger reducing the number of significant competitors from seven to six, followed by a six-to-five merger, then another reducing the number to four."). Antitrust defense lawyers also generally share this heuristic. See Jonathan Jacobson, "The Merger Review Process: What Actually Happens," 19, https://www.wsgr.com/images/content/1/8/182/jacobson-0419.pdf.

132 "2010 Horizontal Merger Guidelines," 29-31; John Kwoka, "You Say You Want an Antitrust Revolution? The Paradox of Modern Merger Control," *The Antitrust Bulletin* 65, no. 4 (December 2020): 568-578.

133 Christine A. Varney, "An Update on the Review of the Horizontal Merger Guidelines"; Jon Leibowitz, "Statement of Chairman Leibowitz on the Release of the 2010 Horizontal Merger Guidelines," August 19, 2010, https://www.ftc.gov/system/files/documents/public_statements/804301/100819hmgleibowitz.pdf.

134 Carl Shapiro, "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years," *Antitrust Law Journal* 77, no. 1 (2010): 49, 52, 53.

Despite the Supreme Court's binding precedents disavowing "efficiencies" to offset anticompetitive harm in merger review, Shapiro accepted it as a settled fact.[135] He celebrated the antitrust agencies' twisting of merger policy to fixate on efficiencies and accept greater concentration, despite the text and Supreme Court precedents remaining constant: "One cannot help but marvel at how far merger enforcement has moved over the past forty years, with no change in the substantive provisions of the Clayton Act and very little new guidance on horizontal mergers from the Supreme Court."[136]

SIGNIFICANT MERGER CHALLENGES

Obama administration competition policy officials did challenge certain mergers, particularly those in highly concentrated industries. As Antitrust Division head Bill Baer noted, the division successfully challenged "merger-to-monopoly" transactions in the appliance business, the cinema ad network business, and ratings and review software suppliers, as well as mergers in exceptionally concentrated industries like oilfield service providers and semiconductor manufacturing equipment.[137] When the administration blocked a merger, it often led to a market that remained as competitive as it had been prior to the merger challenge.

Yet these merger challenges and the high-profile headlines they brought obscured that the fundamental nature of merger policy had changed in a way reflective of an enforcement regime ideologically wedded to a weak framework. First, previous merger waves and fewer new public companies had already made the American economy far more concentrated, meaning that fewer yet larger competitors were left to merge in concentrated markets, and each merger became ever more significant and problematic.[138] And second, as economist John Kwoka noted in his analysis of merger trends, FTC enforcers stopped challenging mergers in markets with anything but extremely high concentration levels, only trying to block those that would result in two to four firms remaining in the market. For mergers that left five to eight competitors in a market, a medium-to-high concentration level, the challenge rate dropped dramatically. From 1996 to 2003, the FTC challenged 36 percent of these mergers. Under Bush, from 2004 to 2007, it dropped to 16 percent. From 2008 to 2011, Kwoka explained, that rate dropped to "literally zero.

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135 Shapiro, "The 2010 Horizontal Merger Guidelines," 51, 54-55. Brown Shoe, 370 U.S. at 344 ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."); FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economics cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economics, but it struck the balance in favor of protecting competition.") citing Brown Shoe, 370 U.S. at 344; U.S. v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963) ("We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and, in any event, has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.").

136 Shapiro, "The 2010 Horizontal Merger Guidelines," 51.

137 Bill Baer, "Assistant Attorney General Bill Baer of the Antitrust Division Testifies Before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights," March 9, 2016, https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-antitrust-division-testifies-senate-judiciary; "Statement on the Departure from the Justice Department of Principal Deputy Associate Attorney General Bill Baer," press release, Department of Justice, January 18, 2017, https://www.justice.gov/opa/pr/statement-departure-justice-department-principal-deputy-associate-attorney-general-bill-baer.

138 Mauboussin, Callahan, and Majd, "The Incredible Shrinking Universe of Stocks;" Gao, Ritter, and Zhua "Where Have All the IPOs Gone?"

That is, in those years the FTC did not challenge a single merger that resulted in five, six, seven, or eight firms."[139]

In other words, when taking existing market concentration and legal strategy into account, the Obama administration, rather than restoring Clinton-era standards on merger challenges, both weakened existing standards and codified these weak standards in guidelines and practice. Antitrust Assistant Attorney General Bill Baer unwittingly admitted the business community understood antitrust enforcement as weak, publicly saying that there were "some deals that are so antitrust-risky that they never ought to make it out of the executive suite or the corporate boardroom."[140] He criticized this "merger overreach" by firms, without necessarily recognizing that such overreach was a result of signaling by the division that it would only challenge the most extreme mergers.[141]

Anheuser-Busch InBev and Grupo Modelo

In 2013, the Department of Justice sued to block the merger of global beer giant Anheuser-Busch InBev SA/NV (ABI) with Grupo Modelo S.A.B. de C.V. (Modelo).[142] The industry was already oligopolistic, with two firms, AB InBev and MillerCoors, comprising 65 percent of all domestic sales.[143] Modelo was the third-largest player, with 7 percent of the market, followed by Heineken at 6 percent.[144] Prior to this combination, a series of mergers had already reduced the number of major breweries from 48 companies in 1980 to two by 2008, when InBev bought Anheuser-Busch to form Anheuser-Busch InBev (ABI).[145] ABI began attempting to exclude rival beers from wholesalers, raising beer prices, and seeking to dominate craft beer by acquiring power in beer distribution.[146]

The DOJ blocked the ABI-Modelo merger in the United States, forcing ABI to sell the Modelo business domestically to Constellation Brands, which invested in and expanded its competitive line of business.[147] Beer shipments from beers Constellation acquired as a result of the merger challenge increased by 13 percent from 2015 to 2016.[148]

139 John E. Kwoka, testimony prepared for the U.S. Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights Hearing on "Does America Have a Monopoly Problem? Examining Concentration and Competition in the US Economy," March 5, 2019, 5-6, https://www.judiciary.senate.gov/imo/media/doc/Kwoka%20Testimony.pdf.

140 Michael J. de la Merced and Leslie Picker, "Megamergers Face Deterrents in the United States," *The New York Times*, April 6, 2016, https://www.nytimes.com/2016/04/07/business/dealbook/megamergers-face-deterrents-in-the-united-states.html.

141 Baer, "Testifies," March 9, 2016 ("I said at the time, and I believe to this day, that this is representative of an anticompetitive transaction that never should have made it out of the boardroom. That is not the only example of merger overreach we have seen in recent years.").

142 Complaint, United States v. Anheuser-Busch InBev SA/NV (D.D.C. 2013), https://online.wsj.com/public/resources/documents/DOJsuitABinbev.pdf.

143 Complaint, United States v. ABI, 2.

144 Complaint, United States v. ABI, 2.

145 "A King of Beers? Concentration of Power Over America's Alcohol Markets is Bad for Consumers. It also Imperils Constitutional and Moral Balances," Markets, Enterprise, and Resiliency Initiative, New America Foundation, December 2012, 11.

146 Open Markets, Economic Liberties, et al., "Petition for Rulemaking to Prohibit Exclusionary Contracts," 49-50.

147 Austen Hufford, "Constellation Brands Buys Brewery from Modelo," *The Wall Street Journal*, October 31, 2016, https://www.wsj.com/articles/constellation-brands-buys-brewery-from-modelo-1477922499?st=5ov232piwkmbnqe.

148 Hufford, "Constellation Brands Buys Brewery from Modelo."

Anheuser-Busch InBev and MillerCoors

In 2016, ABI bought SABMiller, the parent company of MillerCoors. Instead of blocking the merger outright, the DOJ forced ABI to spin off MillerCoors domestically and change distribution practices.[149]

The merger challenges slowed further concentration in the domestic beer market but did not limit the power that ABI already had domestically over beer distribution. It also did not mean that smaller but important mergers were blocked, including purchases of at least 10 craft brewers and key companies in the homebrew supply chain.[150] For instance, in December 2016, the DOJ allowed ABI to buy Karbach, one of the biggest craft brewers in Texas.[151]

In 2017, ABI began denying certain sought-after hops, the key input into beer, to craft brewing rivals, a kind of anticompetitive activity known as foreclosure, common to large vertical mergers.[152] ABI was able to do this because it gained control of a significant hops production business with the purchase of SABMiller.[153] As one hops dealer put it, "[T]hey refuse to let U.S. craft brewers buy any CY 2017 hops believing this will afford them a competitive advantage."[154] In 2017, the founder of Samuel Adams, one of the pioneering craft brew companies, said that lax antitrust policy was leading to the death of the craft industry.[155] As he wrote, "Get some craft brewers really talking, and they'll tell you we are headed for a time when independent breweries can't afford to compete, can't afford the best ingredients, can't get wholesalers to support them, and can't get shelf space and draft lines."[156]

Anthem and Cigna

In July 2015, Anthem and Cigna, two of the largest health insurers, announced a deal to merge. The deal, announced variously to be $48 billion and $52.4 billion, was the largest ever in the

149 "Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition," press release, U.S. Department of Justice, July 20, 2016, https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer.

150 Jason Notte, "Anheuser-Busch InBev Shuts Out Craft Beer Brewers by Hoarding Hops," *MarketWatch*, May 12, 2017, https://www.marketwatch.com/story/anheuser-busch-inbev-shuts-out-craft-beer-brewers-by-hoarding-hops-2017-05-11.

151 Jason Notte, "Everything is Bigger in Texas, Including Craft Beer Buyouts," *MarketWatch*, December 1, 2016, https://www.marketwatch.com/story/everything-is-bigger-in-texas-including-craft-beer-buyouts-2016-12-01.

152 Mike Pomranz, "AB InBev Cuts Off South African Hops From Craft Brewers," *Food & Wine*, May 24, 2017, https://www.foodandwine.com/news/ab-inbev-cuts-south-african-hops-craft-brewers.

153 "AB InBev Strategically Guards South African Hops After 'Low Crop Yield,'" *Sightlines*, May 11, 2017, https://www.goodbeerhunting.com/sightlines/2017/5/11/ab-inbev-cuts-access-to-south-african-hops.

154 Pomranz, "AB InBev Cuts Off South African Hops."

155 Jim Koch, "Is It Last Call for Craft Beer?," *The New York Times*, April 7, 2017, https://www.nytimes.com/2017/04/07/opinion/is-it-last-call-for-craft-beer.html.

156 Koch, "Is It Last Call for Craft Beer?"; ABI already exhibited "price leadership" in the industry, gradually increasing prices with MillerCoors tacitly following. Modelo, however, served as a maverick in the industry, reducing price differences in response to ABI's strategic hikes. Complaint, United States v. Anheuser-Busch InBev SA/NV, 13-18.

industry.[157] The merger had the potential to increase Anthem's market share to nearly half of the health insurance market in 14 states.[158]

In July 2016, the Department of Justice, joined by attorneys general of several states including New York and Connecticut, filed to stop the merger.[159] DOJ argued that allowing the merger to proceed would reduce competition and result in higher consumer prices. The case was helped along by internal fighting between executives of Anthem and Cigna; Cigna repeatedly tried to exit the deal, while Anthem executives insisted on taking the DOJ antitrust case to court. A judge eventually blocked the merger.[160]

Aetna and Humana

In July 2015, Aetna announced that it would acquire Humana in a merger that would dramatically consolidate the health insurance industry. The merger was valued at approximately $37 billion.[161] The Justice Department and attorneys general from several states and D.C. sued to block the merger, focusing on how it would substantially reduce competition for Medicare Advantage plans in 21 states and inhibit competition for plans offered on public exchanges, which would affect more than 700,000 people.[162]

In January 2017, a federal judge ruled in favor of the Justice Department's lawsuit.[163] A month later, on the same day that Cigna called off its deal with Anthem, Aetna and Humana announced that their merger would not be proceeding. "[T]he current environment makes it too challenging to continue pursuing the transaction," the CEO of Aetna said in a statement. Aetna paid Humana a $1 billion breakup fee.[164]

AT&T and T-Mobile

In 2011, the largest mobile phone corporation in the country, AT&T, agreed to purchase the then-fourth largest, T-Mobile. The DOJ filed a complaint to block the merger, joined by seven

157 Brent Kendall and Anna Wilde Mathews, "Insurer Anthem to Defend Cigna Deal in Court," *The Wall Street Journal*, November 20, 2016, https://www.wsj.com/articles/insurer-anthem-to-defend-cigna-deal-in-court-1479643206.

158 Complaint, United States v. Anthem, 12, (D.D.C. 2016), https://www.justice.gov/atr/file/903111/download.

159 Complaint, United States v. Anthem, 12.

160 "U.S. District Court Blocks Anthem's Acquisition of Cigna," Department of Justice, February 8, 2017, https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna.

161 Chad Bray and Reed Abelson, "Aetna Agrees to Acquire Humana for $37 Billion in Cash and Stock," *The New York Times*, July 3, 2015, https://www.nytimes.com/2015/07/04/business/dealbook/aetna-agrees-to-acquire-humana-for-37-billion-in-cash-and-stock.html.

162 "Justice Department and State Attorneys General Sue to Block Anthem's Acquisition of Cigna, Aetna's Acquisition of Humana," Department of Justice, July 21, 2016, https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s.

163 "U.S. District Court Blocks Aetna's Acquisition of Humana," Department of Justice, January 23, 2017, https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana#:~:text=Judge%20John%20D.,of%20rival%20insurer%20Humana%20Inc.

164 Aaron Smith and Jackie Wattles, "Aetna-Humana & Anthem-Cigna: Two Mergers Die in One Day," *CNN Money*, February 14, 2017, https://money.cnn.com/2017/02/14/investing/aetna-humana/index.html; Shelby Livingston, "Aetna's Expensive Breakup with Humana," *Modern Healthcare*, February 14, 2017, https://www.modernhealthcare.com/article/20170214/NEWS/170219952/aetna-s-expensive-breakup-with-humana.

states and eventually the Federal Communications Commission.[165] DOJ enforcers made two basic arguments. The merger would have reduced the number of nationally competitive mobile carriers from four to three, further concentrating an already concentrated market. In addition, T-Mobile was a "challenger brand" whose low-cost model helped structure the market and reduce prices in a manner disproportionate with its share of the market.[166] Sprint, the third-largest carrier, also opposed the merger, alleging that it would in effect create a national duopoly.[167]

Both parties prepared for trial until AT&T called off the merger in December 2011. Subsequently, T-Mobile hired a new CEO, John Legere, who pursued a much more aggressive price-cutting strategy.[168] Despite doomsday claims that without the merger neither AT&T nor T-Mobile would have the technical capability to serve customers, and that T-Mobile would effectively cease to be a meaningful competitor in the wireless space, the result of this successful merger challenge was a rejuvenated T-Mobile, lower prices for consumers, and reduced profit margins for telecommunications operators.[169]

Comcast and Time Warner

In February 2014, Comcast agreed to purchase Time Warner Cable, a major competitor, for $45.2 billion.[170] The largest cable and broadband internet provider, Comcast had recently purchased NBC Universal in 2010. The planned merger followed Comcast's successful acquisition of NBC Universal, which was cleared by the administration in 2011.[171]

A merger between Comcast and Time Warner would have expanded Comcast's U.S. video and broadband internet footprint to approximately 30 million homes. After the merger, Comcast would have controlled the cable and internet connections to 30 percent of all pay-TV households —including the majority of households in the largest cities most important to advertisers—and nearly 60 percent of U.S. high-speed broadband subscribers.[172]

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165 Second Amended Complaint, United States v. AT&T (D.D.C. September 30, 2011), https://www.justice.gov/atr/case-document/file/487726/download; see Memorandum Opinion and Order Denying Application for Review filed by Diogenes Telecommunications Project, May 14, 2012, WT Docket 11-65.

166 Second Amended Complaint, United States v. AT&T, 4.

167 Mike Isaac, "AT&T Drops Its T-Mobile Merger Bid in $4B Fail," *Wired*, December 19, 2011, https://www.wired.com/2011/12/att-tmobile-merger-ends/.

168 Marguerite Reardon, "T-Mobile Adds 4.4 Million New Subscribers in 2013," *CNET*, January 8, 2014, https://www.cnet.com/news/t-mobile-adds-4-4-million-new-subscribers-in-2013/.

169 Alice Truong, "Blocking AT&T's Merger with T-Mobile Has Been Great for US Consumers, but Bad News for Operators," *Quartz*, December 15, 2014, https://qz.com/312907/blocking-atts-merger-with-t-mobile-has-been-great-for-us-consumers-but-bad-news-for-operators/; Jesse Eisinger and Justin Elliott, "These Professors Make More Than a Thousand Bucks Peddling Mega-Mergers," *ProPublica*, November 16, 2016, https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

170 "Division Update Spring 2016," U.S. Department of Justice Antitrust Division, 2016, https://www.justice.gov/atr/division-operations/division-update-2016/protecting-pocketbook-antitrust-division-saves-consumers-millions.

171 "Comcast Completes NBC Universal Merger," *Reuters*, January 29, 2011, https://www.reuters.com/article/us-comcast-nbc/comcast-completes-nbc-universal-merger-idUSTRE70S2WZ20110129.

172 "Division Update Spring 2016," Department of Justice.

In 2015, Comcast called off the merger after significant public opposition and reporting that the Department of Justice was planning to file an antitrust suit.[173] This victory by the Department of Justice was short-lived in terms of preventing concentration in the industry. In 2016, Charter purchased Time Warner Cable and Bright House Networks. The FCC approved the merger but imposed requirements on the combined company to ensure competition in the pay-TV market and build out broadband access.[174] The DOJ also approved the merger, but required the combined entity to allow programmers to use rival online video distributors.[175] In 2017, Trump FCC Chair Ajit Pai removed the broadband conditions, and in 2018, New York state regulators nearly kicked Time Warner Cable, now named Spectrum, out of the state for failing to uphold its commitments.[176]

H&R Block and TaxACT

In October 2010, tax preparation software maker H&R Block agreed to buy 2SS Holdings for $287.5 million.[177] Along with Intuit and H&R Block, 2SS Holdings sells digital "do-it-yourself" tax preparation software. Their product is called TaxACT.

In the early and mid-2000s, Intuit lobbied Congress against developing free, public tax preparation software.[178] The Bush administration negotiated a compromise. In exchange for the IRS refraining from developing its own free tax return service, which could undermine Intuit's business, Intuit and other tax prep services agreed to form the Free File Alliance, whose members had to offer free federal tax return filings to 60 percent of all taxpayers. Companies could still, however, charge for other services such as state returns and "audit defense," and Intuit and H&R Block became adept at inducing customers to purchase add-ons to their free return. TaxACT challenged the essentially duopolistic market structure by heavily advertising its service as truly free for everyone.[179]

DOJ sued to stop the merger in May 2011.[180] In its complaint, DOJ found that Intuit, H&R Block, and TaxACT together made up approximately 90 percent of all digital do-it-yourself tax returns

173 Jonathan Mahler, "Once Comcast's Deal Shifted to a Focus on Broadband, Its Ambitions Were Sunk," *The New York Times*, April 23, 2015, https://www.nytimes.com/2015/04/24/business/media/once-comcasts-deal-shifted-to-a-focus-on-broadband-its-ambitions-were-sunk.html.

174 Statement of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Networks, April 25, 2016, https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0425/DOC-339028A1.pdf.

175 "Justice Department Allows Charter's Acquisition of Time Warner Cable and Bright House Networks to Proceed with Conditions," Department of Justice, April 25, 2016, https://www.justice.gov/opa/pr/justice-department-allows-charter-s-acquisition-time-warner-cable-and-bright-house-networks.

176 John Eggerton, "FCC Votes to Reverse Charter Overbuild Condition," *Broadcasting + Cable*, April 3, 2017, https://www.nexttv.com/news/fcc-votes-reverse-charter-overbuild-condition-164581; Chaim Gartenberg, "Charter gets to stay in New York, reaches new deal with state to roll out internet service," *The Verge*, July 12, 2019, https://www.theverge.com/2019/7/12/20691853/charter-spectrum-new-york-deal-roll-out-internet-service.

177 "H&R Block to Buy TaxACT Maker 2SS Holdings for $288 Million," *Reuters*, October 13, 2010, https://www.reuters.com/article/us-hrblock/hr-block-to-buy-taxact-maker-2ss-holdings-for-288-million-idUSTRE69C68U20101013.

178 Justin Elliott and Paul Kiel, "Inside TurboTax's 20-Year Fight to Stop Americans From Filing Their Taxes for Free," *ProPublica*, October 17, 2019, https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free.

179 Elliott and Kiel, "Inside TurboTax's 20-Year Fight to Stop Americans From Filing Their Taxes for Free."

180 "Justice Department Files Antitrust Lawsuit to Stop H&R Block Inc. From Buying TaxACT," press release, U.S. Department of Justice, May 23, 2011, https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-hr-block-inc-buying-taxact.

in 2010, with Intuit far surpassing the rest with a 62 percent share of the market.[181] In contrast, TaxACT was, in DOJ's words, "a particularly aggressive competitor in offering consumers high quality and high functionality Digital DIY Tax Preparation products for low prices."[182] As a result, DOJ argued, quoting internal documents, H&R Block wanted to acquire TaxACT to eliminate a competitor and that in acquiring TaxACT, H&R Block would try to "eliminate the brand to regain control of industry pricing and avoid further price erosion."[183]

DOJ ultimately won its lawsuit in late 2011, successfully stopping H&R Block from acquiring TaxACT.[184] Though its lawsuit maintained three major competitors in the tax preparation software market, a *ProPublica* analysis estimated that Intuit and H&R Block's market share had, by 2019, risen slightly to 81 percent.[185]

Office Depot and Staples

In February 2015, office supplier Staples announced that it was acquiring rival Office Depot for $6.3 billion. The office supply sector had been concentrated for years, if not decades.[186] At the time, Staples and Office Depot were the two major vendors of office supplies to large business customers, reportedly possessing 79 percent of this market.[187] Their combination would have created a dominant $37 billion office supplier with 3,500 stores across the country.[188] Less than two years earlier, the FTC unanimously decided not to challenge Office Depot's $1.2 billion merger with OfficeMax, concluding that big-box office supply retailers like Office Depot and OfficeMax "today face significant competition."[189]

By the end of 2015, the FTC officially challenged Staples' purchase of Office Depot. The FTC, joined by the state of Pennsylvania and the District of Columbia, argued that not only were Staples and Office Depot each other's primary competitors, but also that the "next-largest competitor would possess less than 5 percent of the relevant market."[190] And, enforcers said, online competitors or other retailers, like Amazon Business or Walmart, would not be able to replace Office Depot, in part because Staples, Office Depot, and other office supply vendors offer specialized—and often higher—levels of service that other retailers and distributors do not.[191]

181 Complaint, United States v. H&R Block, 15 (D.D.C. May 23, 2011), https://www.justice.gov/atr/case-document/file/498231/download.

182 Complaint, United States v. H&R Block, 16.

183 Complaint, United States v. H&R Block, 17.

184 United States v. H & R Block, Inc., 833 F.Supp.2d 36 (D.D.C. 2011).

185 Elliott and Kiel, "Inside TurboTax's 20-Year Fight."

186 John M. Broder, "Office Depot and Staples Merger Halted," *The New York Times*, July 1, 1997, https://www.nytimes.com/1997/07/01/business/office-depot-and-staples-merger-halted.html.

187 Federal Trade Commission v. Staples, 190 F.Supp.3d 100, 128 (D.D.C. 2016).

188 Michael J. de la Merced and Rachel Abrams, "Office Depot and Staples Call Off Merger After Judge Blocks It," *The New York Times*, May 10, 2016, https://www.nytimes.com/2016/05/11/business/dealbook/staples-office-depot-merger.html.

189 "FTC Closes Seven-month Investigation of Proposed Office Depot/OfficeMax Merger," press release, Federal Trade Commission, November 1, 2013, https://www.ftc.gov/news-events/press-releases/2013/11/ftc-closes-seven-month-investigation-proposed-office.

190 Complaint, In the Matter of Staples, Inc. and Office Depot, Inc., 3, https://www.ftc.gov/system/files/documents/cases/051016staplesopinion.pdf.

191 Complaint, In the Matter of Staples, Inc. and Office Depot, Inc., 4, 12.

Six months later, in May 2016, a federal judge sided with the FTC. Agreeing that the large business office supply market was a duopoly between Staples and Office Depot, Judge Emmet Sullivan halted Staples and Office Depot's merger, the customary first step in an FTC-led challenge to a merger.[192] After the decision, Staples and Office Depot called off their merger.[193]

By the first few months of the Trump administration in 2017, Staples and Office Depot remained the market leaders, with their combined market share in the office supply market rising slightly to 81 percent.[194]

Sysco and US Foods

In 2013, the food distributor Sysco attempted to purchase private equity-owned US Foods. In 2015, the FTC—along with California, Illinois, Iowa, Maryland, Minnesota, Nebraska, Ohio, Virginia, Pennsylvania, Tennessee, and the District of Columbia—filed in federal court to oppose the merger.[195] The FTC claimed that the combined entity would have a monopoly or near monopoly in many markets, including 75 percent of the national market for broadline distribution services and monopolies in a host of local markets.[196] After a court granted the FTC's preliminary injunction on the merger, the parties abandoned their transaction.[197] Though the market did not concentrate into a monopoly, the American food supply chain is still intensely concentrated.[198]

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192 Staples, 190 F.Supp.3d 100.

193 "Staples and Office Depot to Terminate Merger Agreement," press release, Staples, May 10, 2016, https://www.businesswire.com/news/home/20160510007030/en/Staples-Office-Depot-Terminate-Merger-Agreement; "Office Depot Responds to District Court's Ruling on Merger with Staples," press release, Office Depot, May 10, 2016, https://www.businesswire.com/news/home/20160510007026/en/Office-Depot-Responds-District-Court%E2%80%99s-Ruling-Merger.

194 Rich Duprey, "Staples is Going Private – Good News for Office Depot?" *The Motley Fool*, July 12, 2017, https://www.fool.com/investing/2017/07/12/staples-is-going-private-good-news-for-office-depo.aspx.

195 "Sysco/USF Holding/US Foods, In the Matter of," Federal Trade Commission, https://www.ftc.gov/enforcement/cases-proceedings/141-0067/syscousf-holdingus-foods-matter.

196 Complaint, In the Matter of Sysco Corporation, 3, 4, February 19, 2015, https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf.

197 Federal Trade Commission v. Sysco Corporation, 113 F.Supp.3d 1 (D.D.C. 2015).

198 Claire Fitch and Raychel Santo, "Instituting Change: An Overview of Institutional Food Procurement and Recommendations for Improvement," Johns Hopkins Center for a Livable Future, February 1, 2016, https://clf.jhsph.edu/publications/instituting-change-overview-institutional-food-procurement-and-recommendations.

THE FAILURE OF SETTLEMENT STRATEGIES FOR MERGERS

For ideological and administrative reasons, instead of seeking to block illegal mergers, Obama-era antitrust enforcers often entered into negotiations with merging parties to find a way to help facilitate the transaction. Doing so usually involved creating a special regulatory arrangement or requiring a spinoff of part of the merged business.

Top FTC official Deborah Feinstein argued that not only did this settlement approach save resources, the commission believed it to be a superior model of enforcing antitrust law. As she put it, "settlement negotiations can yield a remedy that is as good as or better than what could be achieved from litigation, because it allows all sides to fine-tune the specifics to maintain as much of the legitimate efficiencies as possible."[199] Feinstein marshalled no evidence to support her claim, but her approach effectively situated antitrust officials as dealmakers, aiding merging parties rather than enforcing the law. Allowing corporations to consummate mergers was seen as an affirmatively positive outcome, enhancing the efficiency of corporate assets.

In contrast to the original intent of the antitrust laws, which was to discipline corporations through dispersed market structure instead of government micro-management, this settlement strategy turned enforcers into central planners or regulators overseeing complex industries rather than law enforcers mandating simple rules. Feinstein touted the benefits of remedy settlements as opposed to blocking a merger outright, saying that "a consent order allows us to be surgical in our approach—to eliminate the anticompetitive aspects of a transaction or conduct with the detailed information needed to do so while not adversely affecting procompetitive aspects of an arrangement."[200]

Feinstein used the Obama administration's track record of structuring mergers through conduct remedies or divestments to explain the FTC investigating mergers at low rates. She rejected the idea that the administration was insufficiently assertive against merger activity. "Clearly," she argued, "the vast majority of mergers do not present competitive problems, and do not require any form of remediation."[201] After leaving the administration, Feinstein went back to practicing

199 Deborah L. Feinstein, "The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts," remarks before GCR Live, September 17, 2013, https://www.ftc.gov/sites/default/files/documents/public_statements/significance-consent-orders-federal-trade-commission%E2%80%99s-competition-enforcement-efforts-gcr-live/130917gcrspeech.pdf.

200 Feinstein, "The Significance of Consent Orders."

201 Feinstein, "The Significance of Consent Orders."

antitrust at Arnold & Porter, assisting clients with obtaining FTC clearance on several mergers in the pharmaceutical and high-tech industries.

In her Spring 2011 "Division Update," then-Assistant Attorney General for Antitrust Christine Varney similarly emphasized DOJ was open to "tailored resolutions of competitive concerns that permit parties to proceed with parts of their transaction that do not threaten competition" and "is committed to quickly closing investigations of mergers that do not threaten consumer harm so as to avoid unnecessarily impeding business operations."[202] This approach contravened the plain reading of the Clayton Act, which forbids any acquisition "where in *any* line of commerce or in *any* activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[203] In other words, if a merger or acquisition results in markets that are too concentrated, it is illegal.

The Obama administration's reliance on behavioral remedies was also novel. DOJ revised its position on merger remedies in 2011 to expand the types of behavioral remedies it would consider.[204] The revision represented a significant policy shift and "expansive new approach" for DOJ, according to John Kwoka and Diana Moss, who analyzed the revisions in an American Antitrust Institute report.[205] Prior to the Obama administration, behavioral remedies "were generally limited in scope and ancillary to other provisions of consent orders," they wrote.[206] By contrast, the Obama DOJ employed numerous, substantial behavioral remedies at once, using licensing requirements, firewalls, anti-retaliation provisions, monitoring and reporting, and other requirements to facilitate large mergers. Evaluating this experiment after the end of the Obama administration, the American Antitrust Institute concluded that it was largely a failure—providing little in the way of deterrence and actually encouraging corporations to circumvent the remedy and creating a situation that precluded realistic oversight and enforcement of the remedy.[207]

The "settlement first" strategy had a number of significant downsides. First, these settlements tended not to deliver on preventing anticompetitive harm. Second, the failure to enforce the laws against illegal mergers in favor of conduct remedies later allowed Trump officials to lift those remedies with the stroke of a pen, as FCC Chair Ajit Pai did with requirements in the Charter-Time Warner-Bright House Networks merger.[208] And third, the pursuit of settlements over

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202 Christine Varney, "Division Update Spring 2011," U.S. Department of Justice, 2011, https://www.justice.gov/atr/public-documents/division-update-spring-2011.

203 15 U.S.C. § 18 (emphasis added).

204 "Antitrust Division Policy Guide to Merger Remedies," U.S. Department of Justice Antitrust Division, June 2011, https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

205 John E. Kwoka and Diana L. Moss, "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," American Antitrust Institute, 1, https://www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf.

206 Kwoka and Moss, "Behavioral Merger Remedies," 1.

207 "Public Comments of the American Antitrust Institute," prepared for the Antitrust Division Roundtable Examining Antitrust Consent Decrees, American Antitrust Institute, April 26, 2018, 2-3, https://www.justice.gov/atr/page/file/1057126/download.

208 David Shepardson, "FCC Limits Order on Charter Extending Broadband Service," *Reuters*, April 3, 2017, https://www.reuters.com/article/us-usa-charter/fcc-limits-order-on-charter-extending-broadband-service-idUSKBN1751LQ.

litigation meant that there was no new case law or precedent for judges or businesses to follow, or for Congress to examine and address. The failure to litigate NBC-Comcast in favor of conduct remedies, for instance, meant that the judge in the subsequent vertical merger case of AT&T-Time Warner had little guidance and wide discretion, and that private litigants had no ability to build upon the case.

The most aggressive form of settlement is a divestiture. If the Antitrust Division or FTC simply could not find a way to let the combined party control all combined assets, they could force the sale of some business lines that economists guessed might overlap. In 2012, the FTC noted its view that illegal mergers "are most often remedied by a divestiture," meaning a sale of a part of a company's business, rather than litigation.[209] Yet even executive branch structured divestitures tended to fail at maintaining competition, even by the framework set by the consumer welfare standard.

In a self-evaluation, the FTC found that roughly 20 to 25 percent of divestitures it ordered failed to achieve an independently viable competitive business.[210] Independent research is much less charitable. When Northeastern University economist John Kwoka studied mergers that resulted in divestitures specifically, he found that prices went up by an average of 6.7 percent, "little different" than the 7.4 percent price increase when enforcers simply let the merger through with no conditions. Kwoka concluded that the "remedies imposed—divestiture and conduct or conditions remedies—are not generally adequate to the task of preserving competition."[211]

Three acquisitions—Hertz-Thrifty, Albertsons-Safeway, and Live Nation-Ticketmaster—demonstrate particularly clearly some of the shortcomings of settlements and other merger remedies short of simply barring illegal mergers. In two of them, a company to which the merging companies divested parts of their business quickly failed, and the merging companies ended up buying back their assets, sometimes for fractions of their sale price. In the third, the divestment and behavioral conditions did nothing to block the acquisition of monopoly power by the merged party.

Hertz and Dollar Thrifty

In November 2012, the FTC approved rental car company Hertz's $2.3 billion acquisition of competitor Dollar Thrifty. In exchange for allowing the second-largest rental car company at the time to acquire the fourth largest, the FTC made Hertz sell its Advantage Rent-a-Car brand

209 Richard Feinstein, "Negotiating Merger Remedies," Statement of the Bureau of Competition of the Federal Trade Commission, January 2012, 4, https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

210 "The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics," January 2017, 22, 29, 31, https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

211 John E. Kwoka, Jr., "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," *Antitrust Law Journal* 78, no. 3 (2013): 640.

to a company outside of Enterprise, Avis, Hertz, and Dollar Thrifty—the four-firm rental-car oligopoly. According to the FTC, these four companies controlled roughly 98 percent of the airport rental car market at the time.[212]

When he announced the divestiture in November 2012, FTC Chairman Jon Leibowitz promised that the FTC's "bipartisan action ... will ensure that consumers are not forced to pay higher prices for rental cars when they travel."[213] Four months after the FTC finalized the divestiture in July 2013, the spunoff company filed for bankruptcy.[214] Over the next year, the remaining three rental car companies raised prices at the fastest pace since the 2008 recession.[215] And at the bankruptcy auction for Advantage's assets in 2014, Hertz eventually bought back 10 of the locations it had sold only a year earlier. For six of those locations, it was the sole bidder.[216]

A major factor in the failed divestiture was that the company that bought Advantage Rent-a-Car simply didn't have the experience to run its locations well—a fact the purchaser's CEO acknowledged. A car rental industry consultant told *The Wall Street Journal* that the remedy was "like taking a two-year-old and saying 'OK, now you've got to go to kindergarten and play Little League.'"[218]

By 2017, the three largest rental car companies had 70 percent of the U.S. market.[219] The six largest had 90 percent.[220] And in airports, the oligopoly still had 98 percent of the market—only this time, with one fewer competitor.[221]

Albertsons and Safeway

Shortly after the Hertz-Dollar Thrifty merger, the FTC investigated another merger between two competitors in highly concentrated markets: grocer Albertsons sought to acquire competitor

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212 Sharon Terlep and Brent Kendall, "FTC to Approve Hertz Acquisition," *The Wall Street Journal*, November 13, 2012, https://www.wsj.com/articles/SB10001424127887324735104578119241822913744; "FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets," press release, Federal Trade Commission, November 15, 2012, https://www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertzs-proposed-23-billion-acquisition.

213 Terlep and Kendall, "FTC to Approve Hertz Acquisition."

214 David McLaughlin and Joe Schneider, "Simply Wheelz to File for Bankruptcy on Failed Hertz Deal," *Bloomberg*, November 5, 2013, https://www.bloomberg.com/news/articles/2013-11-05/simply-wheelz-to-file-for-bankruptcy-on-failed-hertz-deal?sref=ZvMMMOkz.

215 David McLaughlin, Mark Clothier, and Sara Forden, "Hertz Fix in Dollar Thrifty Deal Fails as Insider Warned," *Bloomberg*, November 29, 2012, https://www.bloomberg.com/news/articles/2013-11-29/hertz-fix-in-dollar-thrifty-deal-fails-as-insider-warned?sref=ZvMMMOkz.

216 "FTC Approves Franchise Services of North America's Application to Sell Certain Advantage Rent a Car Locations to Hertz and Avis Budget Group," press release, Federal Trade Commission, May 30, 2014, https://www.ftc.gov/news-events/press-releases/2014/05/ftc-approves-franchise-services-north-americas-application-sell; Petition of Franchise Services of North America, Inc. for Prior Approval of the Sale of the Non-Transferred Locations, In re Hertz Global Holdings, C-4376, April 10, 2014, 2-3, 8, https://www.ftc.gov/system/files/documents/cases/140414hertzpetition.pdf.

217 McLaughlin and Schneider, "Simply Wheelz to File for Bankruptcy."

218 Brent Kendall and Jacqueline Palank, "How the FTC's Hertz Antitrust Fix Went Flat," *The Wall Street Journal*, December 8, 2013, https://www.wsj.com/articles/how-the-ftc8217s-hertz-antitrust-fix-went-flat-1386547951.

219 I. Wagner, "Car rental companies – U.S. market share 2017," Statista, February 14, 2020, https://www.statista.com/statistics/1022011/car-rental-companies-market-share-united-states/.

220 Wagner, "Car rental companies."

221 Tom Gara, "The Oligopoly Making Car Rental More Expensive," *The Wall Street Journal*, March 19, 2013, https://web.archive.org/web/20161024145454/https://blogs.wsj.com/corporate-intelligence/2013/03/19/the-oligopoly-making-car-rental-more-expensive/.

Safeway for $9.4 billion.[222] Of the more than 2,400 grocery stores that Albertsons and Safeway owned in total, the FTC required the sale of 168 of them located in eight Western states. Of those 168 stores, 146 went to a small regional grocer called Haggen Holdings, which was owned by Florida-based private equity firm Comvest.[223] Before the divestiture, Haggen had only 18 stores in Washington and Oregon.[224]

When she announced the settlement in January 2015, FTC Chairwoman Edith Ramirez said, “This settlement will ensure that consumers in those communities continue to benefit from competition among their local supermarkets.”[225] The sale was supposed to fix local market concentration; in other words, too few competing stores in any one market. One example was Baker City, Oregon, which *The Wall Street Journal* reported would have been left with only two stores, both owned by Albertsons after its combination with Safeway.[226] After the divestiture, Baker City would still have two grocery stores with different owners: one owned by Albertsons and one by Haggen.

The divestiture was a disaster; Haggen couldn’t manage the sudden expansion, and by July 2015 it began layoffs.[227] It isn’t clear if Haggen-owner Comvest was even interested in operating a grocery chain. In 2016, workers, suppliers, and leasers of Haggen stores sued Comvest for $100 million for illegally saddling Haggen stores with unnecessary rent payments. They alleged Comvest engaged in “sale-leasebacks,” or selling the property underneath Haggen stores and then leasing the property from the new owners at burdensome rates.[228]

Before the end of the year, Haggen had filed for bankruptcy and sold more than 100 of the 146 stores it bought from Albertsons and Safeway.[229] Albertsons bought back 33 of the stores for $14 million—on average, one-fifth of what it had sold them for.[230] Baker City and scores of other communities ultimately ended up with a monopoly.[231]

222 “Albertsons Owner to Buy Safeway for More Than $9 Billion,” *NBC News*, March 6, 2014, https://www.nbcnews.com/business/business-news/albertsons-owner-buy-safeway-more-9-billion-n46416.

223 “FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger,” press release, Federal Trade Commission, January 27, 2015, https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger.

224 Brent Kendall, “Haggen Struggles After Trying to Digest Albertsons Stores,” *The Wall Street Journal*, October 9, 2015, https://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.

225 “FTC Requires Albertsons and Safeway to Sell 168 Stores.”

226 Brent Kendall and Peg Brickley, “Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway,” *The Wall Street Journal*, November 24, 2015, https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193.

227 Ángel González, “Haggen’s expansion in Southwest fraught with legal problems, layoffs,” *The Seattle Times*, July 27, 2015, https://www.seattletimes.com/business/retail/haggens-expansion-in-southwest-fraught-with-legal-problems-layoffs/.

228 Dave Gallagher, “Creditors: Haggen’s former owner ‘tried to slink away’ with millions owed to them in bankruptcy,” *The Bellingham Herald*, September 20, 2016, https://www.bellinghamherald.com/news/business/article103030587.html; Eileen Appelbaum and Rosemary Batt, “Private Equity Pillage: Grocery Stores and Workers At Risk,” *The American Prospect*, October 26, 2018, https://prospect.org/power/private-equity-pillage-grocery-stores-workers-risk/. On the other hand, in 2016, Haggen claimed that Albertsons engaged in active attempts to destroy its ability to serve as viable competition, and “made false representations to both Haggen and the FTC about Albertsons’ commitment to a seamless transformation of the stores into viable competitors under the Haggen banner. Jon Talton, “Haggen: What Went Wrong?,” *The Seattle Times*, March 15, 2016, https://www.seattletimes.com/business/economy/haggen-what-went-wrong/.

229 Kendall and Brickley, “Albertsons to Buy Back 33 Stores.”

230 Kendall and Brickley, “Albertsons to Buy Back 33 Stores.”

231 Kendall and Brickley, “Albertsons to Buy Back 33 Stores.”

Live Nation and Ticketmaster

One of the clearest examples of failed merger enforcement was the Antitrust Division's clearance of the Live Nation-Ticketmaster merger in 2010. For 15 years prior to the merger, Ticketmaster was the dominant provider of ticketing services, controlling 80 percent of the market.[232] Live Nation was the largest concert promoter, controlling more than 75 concert venues in the United States, including many major amphitheaters, and had an artist management business with 200 of the top marquee artists, from Miley Cyrus to Willie Nelson.[233]

Live Nation had also been Ticketmaster's largest customer until 2007, when it announced it would build its own competitive ticketing service.[234] Just two years later, Live Nation and Ticketmaster announced a merger; Ticketmaster CEO Michael Rapino explained to *The New York Times* that his goal was to turn Ticketmaster's website into live music's answer to Amazon.[235] When the deal was announced in 2009, investors feared that antitrust enforcers under the new Obama administration would block the deal. Senator Chuck Schumer attacked the deal and stock prices for both companies dropped.[236]

But Christine Varney rejected this widespread consensus and adopted a narrow reading of her role. "I ... understand that consolidation has been going on in the industry for some time and the resultant economic pressures facing local management companies and promoters," she explained. "Those are meaningful concerns, but many of them are not *antitrust* concerns."[237] Varney approved the merger but forced some divestments of assets and behavioral remedies on the combined entity through a consent decree. She described the settlement as "vigorous antitrust enforcement—only with a scalpel rather than a sledgehammer."[238]

The settlement had two parts. In terms of divestments of assets, Ticketmaster was forced to both sell its ticketing subsidiary, Paciolan, to Comcast—a company with just 2 percent of the primary ticketing market—and license its ticketing software to Live Nation's rival, AEG.[239] The licensing agreement would last for five years in exchange for a royalty fee to the newly formed Live Nation Entertainment.[240]

232 Christine A. Varney, "The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective," remarks as prepared for South by Southwest, March 18, 2010, https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective.

233 Complaint, United States v. Ticketmaster Entertainment (D.D.C. January 25, 2010), 5, https://www.justice.gov/atr/case-document/complaint-224; David Segal, "Calling Almost Everyone's Tune," *The New York Times*, April 24, 2010, https://www.nytimes.com/2010/04/25/business/25ticket.html.

234 Complaint, Ticketmaster Entertainment, 5.

235 Segal, "Calling Almost Everyone's Tune."

236 Yinka Adegoke, "Live Nation to Buy Ticketmaster," *Reuters*, February 10, 2009, https://www.reuters.com/article/us-ticketmaster-livenation-idUSTRE5194DL20090210.

237 Varney, "The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective."

238 Varney, "The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective."

239 Sean Burns, "Sens Blumenthal, Klobuchar Urge DOJ Inquiry into Live Nation," *TicketNews*, August 28, 2019, https://www.ticketnews.com/2019/08/sens-blumenthol-klobuchar-doj-live-nation/.

240 David Segal, "Calling Almost Everyone's Tune."

There were also behavioral remedies. The new company was not allowed to bundle services or retaliate against any venue that considers or works with another primary ticketing service. Nor could the combined entity use data it received in the course of processing tickets for the purposes of concert promotion or management—a prohibition on data-sharing that is extremely difficult to oversee or enforce.[241]

Opponents of the merger testified before the Senate Judiciary Committee, laying out a series of objections. One antitrust attorney told the Senate that the combined company "will cut off the air supply for any future rival to challenge its monopoly in the ticket distribution market," as well as use its newfound reach to "diminish competition in independent concert promotion."[242] A club owner observed that the merger would put all independent concert venues at an "irreparable competitive disadvantage" so severe that they would not even think of publicly complaining, for fear of angering the new Live Nation. The owner then requested that antitrust enforcers uphold Barack Obama's rhetoric on behalf of competition.[243]

Unfortunately, the predictions of merger opponents came true. Neither the divestment nor the licensing arrangement created any substantial competition. AEG never paid royalty fees for the ticketing software,[244] and Paciolan, which covered 7 percent of the market prior to the divestment,[245] remained a niche ticketing service.[246] By 2018, Ticketmaster was still the dominant ticketing service, ticket prices were at record highs, and there were reported complaints by its chief competitor in concert venues that Live Nation "used its control over concert tours to pressure venues into contracting with its subsidiary, Ticketmaster."[247] Fear in the industry of Live Nation was rampant.[248] In 2019, the Trump administration found that Live Nation repeatedly violated the consent decree. The DOJ had to go back to court to modify its settlement decree, allowing the companies free rein for nearly a decade.[249]

Investment news commentators reported on the business model of Live Nation as if the consent decree did not exist. "Ticketmaster typically has an upper hand in negotiating with venues, as

241 Final Judgment, United States v. Ticketmaster Entertainment (D.D.C. July 30, 2010), 19-21, https://www.justice.gov/atr/case-document/file/513321/download.

242 David A. Balto, testimony prepared for Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, "The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business?," February 24, 2009, 11, http://www.dcantitrustlaw.com/assets/content/documents/CAP/The%20Ticketmaster-Live%20Nation%20Merger.pdf.

243 Seth Hurwitz, testimony before Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, "The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business?," February 24, 2009 ("Someone famous recently said, 'Competition is a win-win situation because it is great for consumers.' Antitrust, he continued, 'helps to keep that system in force. It addresses the temptation that some businesses will sometimes experience, to merge with key rivals instead of outperforming them, to agree not to compete too hard, or to sabotage rivals' efforts to serve consumers instead of redoubling their own.' That someone was Barack Obama. I hope he backs it up, and I hope you do, too."), https://www.govinfo.gov/content/pkg/CHRG-111shrg54048/html/CHRG-111shrg54048.htm.

244 Ben Sisario and Graham Bowley, "Live Nation Rules Music Ticketing, Some Say With Threats," *The New York Times*, April 1, 2018, https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

245 Sisario and Bowley, "Live Nation Rules."

246 Ben Sisario and Graham Bowley, "Live Nation Rules Music Ticketing, Some Say With Threats."

247 Sisario and Bowley, "Live Nation Rules."

248 Sisario and Bowley, "Live Nation Rules"; Ben Sisario and Cecilia Kang, "Citing Violations, U.S. to Toughen Live Nation Accord on Ticketing," *The New York Times*, December 19, 2019, https://www.nytimes.com/2019/12/19/arts/music/live-nation-ticketmaster-settlement-justice-department.html.

249 Sisario and Kang, "Citing Violations."

it also controls access to the talent," noted one writer at *Barron's*. "If the firm declines to use Ticketmaster, then LYV (Live Nation Entertainment) can elect to take its talent to an alternative venue. This contractual moat is compounded by Live Nation's frequent practice of installing its own hardware at the venue, using proprietary software to process tickets."[250]

By April 2020, in the midst of a pandemic devastating the live music industry, investors still recommended investing in Live Nation's stock. Why? "The company," said one fund manager, "operates an impenetrable moat that has a monopoly-like structure."[251]

WIELDING ANTITRUST AGAINST WORKING PEOPLE

Another way in which enforcers during the Obama era continued the approach of previous administrations was by frequently wielding antitrust laws against working people. Obama administration enforcers undermined collective action among workers in three key ways. First, antitrust enforcers failed to address harms to labor that resulted from anticompetitive mergers. Second, they investigated and indicted workers' and professionals' attempts to organize and build community and collective power. Third, antitrust enforcers and White House economists discouraged states and cities from structuring their markets to empower and raise the wages of independent contractors and small producers. These actions both diverted agency resources from addressing corporate misbehavior and served as a deregulatory agenda at the city and state level.

The antimonopoly tradition in America seeks to check and safeguard against concentrated private power for the purpose of protecting multiple stakeholders, a key one being labor. One of Senator John Sherman's arguments for the antitrust law bearing his name was that a monopoly "commands the price of labor without fear of strikes, for in its field it allows no competitors."[252]

Antitrust law strictly forbids coordinating price or output among competitors. Traditionally, this is understood to be a restraint against corporations. Congress reinforced that the law is intended to be used against corporations by granting a "labor exemption" in the Clayton Act; this exemption allows workers who are employees of a business to collectively bargain and coordinate their price—their wages—and other conditions.

250 Christine Jurzenski, "Live Nation Stock Can More Than Double in 3 Years, Analyst Says," *Barron's*, April 8, 2020, https://www.barrons.com/articles/live-nation-stock-can-more-than-double-in-three-years-analyst-51586380765.

251 Jurzenski, "Live Nation Stock Can More Than Double in 3 Years."

252 John Sherman, "Trusts," speech delivered in the Senate of the United States, March 21, 1890 (Library of the University of Wisconsin), 7.

This labor exemption does not include independent contractors, who are often treated as employees but legally constituted as independent businesses.[253] The use of antitrust law against such independent actors can conceptually serve the same purpose as eliminating unions. While the Obama administration did take several steps to bolster traditional union organizing through rules at the Department of Labor, during Obama's second term, the Federal Trade Commission worked in a bipartisan manner to focus limited resources on using antitrust law against worker collaboration.

FAILURE TO STOP ANTICOMPETITIVE MERGERS THAT HARM LABOR

Labor economists have recently noted that most labor markets in the United States are highly concentrated, leading to less aggregate compensation to labor overall.[254] The DOJ and FTC brought no merger challenges that were purely based on the ability of an employer to drive down wages, an anticompetitive harm that fits within the orbit of the antitrust laws.[255] The failure of enforcers to look at the effects of mergers on labor bargaining power is a potentially significant factor in the decline of aggregate labor share.

A good example of the problem of labor suppression and antitrust is the wave of mergers engineered by Zuffa, the owner of the Ultimate Fighting Championship, to suppress the compensation of its fighters.[256] In 2011, the FTC allowed Zuffa to buy Strikeforce, its largest mixed martial arts platform rival, thus making it impossible for fighters to negotiate higher compensation by playing the two companies off one another.[257] Fighters, who had received 45 to 63 percent of Strikeforce revenue prior to the merger, now reportedly receive roughly 20 percent.[258]

USING ANTITRUST TO ATTACK LABOR ORGANIZING

During President Obama's second term, the FTC worked in a bipartisan manner to engage in action against attempts by workers and professionals to organize, particularly in low-wage professions, without clear evidence of abuse. For instance, the FTC took action against the American Guild of Organists (AGO), a professional association for organists and choral musicians. To ensure high-quality players, the AGO requires its members to have a college degree in music.

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253 The independent contractor model has become a common way for dominant firms to maintain control while shedding risk and responsibility, a "fissuring" of the economy. David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

254 See above, notes 1 and 2.

255 Ioana Marinescu and Herbert Hovenkamp, "Anticompetitive Mergers in Labor Markets," *Indiana Law Journal* 94, no. 3 (Summer 2019): 1031-1063.

256 In 2008, the president of UFC actually listed the names of competitors and proclaimed, "I'm the grim reaper, motherf*ers." Antitrust Class Action Complaint, Demand for Jury Trial, Cung Le v. Zuffa, LLC, (N.D. Cal December 16, 2014), 6, https://bergermontague.com/wp-content/uploads/2018/03/0001-2014-12-16-complaint.pdf.**

257 Antitrust Class Action Complaint, Demand for Jury Trial, Cung Le v. Zuffa, 45-47.

258 Michael McCann, "UFC Fighters' Pay Lawsuit Nears Class Action Stage With Long Road Ahead," October 27, 2020, *Sportico*, https://sports.yahoo.com/ufc-fighters-pay-lawsuit-nears-172759021.html.

But being a church organist also means living on a salary of roughly $20,000 a year.[259] So when the AGO took steps to encourage churches to pay their members living wages, including publishing a recommended salary schedule and encouraging rules of etiquette toward fellow members, the FTC saw this as illegal collusion and filed suit to stop the "restrictions on competition."[260]

Similarly, in 2014, the FTC took action against the Music Teachers National Association.[261] In that case, the FTC took issue with the teachers' inclusion of a nonbinding ethical guideline that teachers respect each other's practices and not poach students. A writer from *The Wall Street Journal* called the FTC's case "an abuse of power," and noted that that was a common ethic among professionals. The FTC's theory, she argued, was "patently absurd."[262]

The FTC filed similar suits against workers in a wide range of industries, including animal breeders,[263] electricians,[264] ice-skating teachers,[265] and managers of commercial and residential properties.[266] All of these actions asserted that workers and professionals should compete fiercely over price regardless of the profession and pressed associations to change their rules over how they defined fair competition.

In 2018, an FTC attorney explained the FTC's actions. "The idea," he said, "is that there would be a deterrent effect that other trade associations, perhaps trade associations that affect a larger amount of economic commerce in the United States, might be deterred by engaging in similar conduct."[267] In other words, music teachers and ice-skating coaches were weak and could not fight back against federal enforcers, so the FTC did not have to use resources to target bigger players, using those workers to send a warning to others that efforts to organize would be challenged.

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259 Phillip Longman, "The Case For Small-Business Cooperation," *Washington Monthly*, November/December 2018, https://washingtonmonthly.com/magazine/november-december-2018/the-case-for-small-business-collusion/.

260 Complaint, In the Matter of American Guild of Organists, Federal Trade Commission, May 26, 2017, 2, https://www.ftc.gov/system/files/documents/cases/american_guild_of_organists_complaint_c4617.pdf. One example that the FTC saw as improper were association rules that included a provision that if an organist is going to play at a church where they are not the regular organist, then they should ask that church's organist for permission. One commenter to the FTC explained that the quality of the service is one consideration: Organs "are complex and often very expensive instruments; it is rare that a church will permit anyone who wanders into the building access to the instrument." The commenter also argued that since churches are themselves frequently cash-strapped, they sometimes supplement their pecuniary compensation to organists with this right of first refusal. William Peek, In the Matter the American Guild of Organists; File No. 151-0159, https://www.ftc.gov/system/files/documents/public_comments/2017/05/00013-140686.pdf.

261 In the Matter of Music Teachers National Association, Inc., No. C-4448, 2014 F.T.C. LEXIS 68 (April 3, 2014); In the Matter of National Association of Teachers of Singing, Inc., No. C-4491, 2014 F.T.C. LEXIS 218 (October 1, 2014).

262 Kimberley A. Strassel, "Strassel: Piano Sonata in FTC Minor," *The Wall Street Journal*, November 28, 2013, https://www.wsj.com/articles/the-ftc-strings-up-the-piano-teachersthe-ftc-strings-up-the-piano-teachers-1385586044?tesla=y.

263 In the Matter of National Association of Animal Breeders, Inc., No. C-4558, 2015 F.T.C. LEXIS 267 (November 2, 2015).

264 In the Matter of Professional Lighting & Sign Management Cos., Inc., 159 F.T.C. 261 (2015).

265 In the Matter of Professional Skaters Association, 159 F.T.C. 758 (2015).

266 In the Matter of National Association of Residential Property Managers, Inc., No. C-4490, 2014 F.T.C. LEXIS 217 (October 1, 2014).

267 Competition and Consumer Protection in the 21st Century, Federal Trade Commission, November 1, 2018, 327, https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf.

UNDERMINING STATE AND LOCAL EFFORTS TO PROMOTE COLLECTIVE BARGAINING

One path to strengthen labor rights is for cities and states to establish market standards that promote safety and raise wages. Such a public role for cities and states was especially important in the early 2010s, as Uber, Lyft, and other "gig economy" companies sought to undermine public rules using aggressive tactics to acquire market power and underpay drivers. The FTC, led by Republican FTC Commissioner Maureen Ohlhausen with support from her Democratic colleagues and staff, sought to aid these corporations in their efforts to avoid city and state rules under the rhetoric of preventing excessive regulation.

In a 2016 speech, Ohlhausen praised Uber and Lyft, which she lauded as part of the "sharing economy," and expressed hostility to state action to regulate them.[268] Ohlhausen highlighted the FTC's advocacy work to aid Uber and Lyft, citing letters to the Anchorage, Colorado, Chicago, and D.C. governments in 2013 and 2014.[269] In testimony before the House that same year, FTC official Andrew Gavil lamented state rules that "likely impede competition," while acknowledging that such rules "can protect consumers from actual health and safety risks and support other valuable public policy goals."[270]

What happened after the Obama administration perhaps illustrates the bipartisan continuity of this hostility to goals other than consumer prices. Ohlhausen, then FTC acting chairwoman under the Trump administration, and Commissioner Terrell McSweeny, an Obama-appointed Democrat, joined the Trump Justice Department in filing a legal brief explicitly backing the U.S. Chamber of Commerce in opposing a Seattle law that empowered Uber and Lyft drivers to bargain collectively for higher wages. McSweeny's position is especially notable, since hers was the deciding vote on an FTC that had only two commissioners at the time.[271]

Another way in which the Obama administration prevented workers from organizing for better wages and working conditions was through its opposition to occupational licensing, which is

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268 Maureen Ohlhausen, "From Hammurabi to Hair Braiding: The Ongoing Struggle for Economic Liberty," remarks prepared for Institute for Justice's National Economic Liberty Forum, April 28, 2016, 8, https://www.ftc.gov/system/files/documents/public_statements/946853/160428instituteforjustice.pdf.

269 The letters were signed by staff controlled by the chair of the FTC, including Policy Planning Director Andrew Gavil, Bureau of Competition Directors Richard Feinstein and Deborah Feinstein, Acting Director of the Bureau of Consumer Protection Charles Harwood, and Director of the Bureau of Economics Howard Shelanski. Each of those letters warned public officials of the purported dangers of limiting competition for for-hire transportation. Those dangers appeared limited to higher prices. When Chicago considered laws for ride-hailing corporations in 2014, the FTC's letter called on any rules to be "narrowly crafted to minimize any potential anticompetitive impact." Letter from Andrew I. Gavil, Deborah L. Feinstein, and Martin S. Gaynor to Alderman Brendan Reilly, Re: Proposed Ordinance O2014-1367, 4, https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf.

270 Andrew Gavil, "Competition and the Potential Costs and Benefits of Professional Licensure," testimony prepared for the U.S. House of Representatives Committee on Small Business on "Competition and the Potential Costs and Benefits of Professional Licensure," July 16, 2014, 1, https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf.

271 Matthew Buck and Sandeep Vaheesan, "Trump's Big Tech Bluster," *The New York Times*, March 6, 2019, https://www.nytimes.com/2019/03/06/opinion/trump-antitrust-laws.html.; "FTC Files Amicus Brief in Appeals Court Case Involving for-Hire Drivers in Seattle," press release, Federal Trade Commission, November 6, 2017, https://www.ftc.gov/news-events/press-releases/2017/11/ftc-files-amicus-brief-appeals-court-case-involving-hire-drivers; Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, Chamber of Commerce v. City of Seattle, no. 17-35640 (9th Cir. 2017), https://www.ftc.gov/system/files/documents/amicus_briefs/chamber-commerce-united-states-america-rasier-llc-v-city-seattle-et-al/seattle_17-35640_-_ftcdoj_amicus_11317.pdf.

the crafting of requirements that workers achieve a certain level of education or sector-specific training before entering a profession. Much like barriers in other professional industries, these requirements support higher incomes for their members.

As the FTC filed a series of complaints against worker organizing and occupational licensing rules in 2015, Obama Council of Economic Advisers Chairman Jason Furman gave a speech warning about licensing's ostensible dangers.[272] The White House also issued a report studying licensing. Announcing the report's release, National Economic Council Director Jeffrey Zients and Council of Economic Advisers member Betsey Stevenson cautioned that higher wages for workers might raise prices for consumers.[273]

Occupational licensing rules are important tools for local communities to ensure a living wage to workers, high-quality services to consumers, and a decent overall community to their citizens. By excluding easy entry into some work, occupational licensing rules might increase consumer prices, but low consumer prices are not the sole goal of policy. There are health and safety mandates, or even mandates against indentured servitude, all of which might increase consumer prices—but policymakers do not argue for OSHA deregulation or reimplementation of forced labor. Indeed, occupational licensing requirements also help ensure that consumers benefit from new workers committing to the field. Those workers should arguably also be encouraged to invest in skills, or what economists call "human capital."[274]

Licensing also provides other benefits. One study noted that it can help mitigate racial and gender wage gaps.[275] Another finds evidence that licensure can facilitate more egalitarian entry into jobs.[276] Another study found that—contrary to frequently asserted speculation that licensing can restrict entry into occupations—licensing can "ease access into occupations for immigrants, particularly for vulnerable immigrant labor groups."[277] As unionization rates decline, occupational licensing serves as a counterbalance to provide workers with economic stability.[278] And ultimately, local communities should be able to shape their local economies by crafting rules that aim to create baseline conditions for workers.

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272 Jason Furman, "Occupational Licensing and Economic Rents," remarks prepared for the Brookings Institution, November 2, 2015, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151102_occupational_licensing_and_economic_rents.pdf.

273 This argument reinforces the case against the consumer welfare standard, whose proponents frequently praise lower prices even at the cost of reduced wages. There is simply no reading of the legislative history of any antitrust law passed by Congress in which Congress articulated as a goal such a trade-off.

274 See generally Sandeep Vaheesan and Frank A. Pasquale, "The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy," *Annual Review of Law and Social Science*, 14 (2018): 309-327.

275 Peter Q. Blair and Bobby W. Chung, "Occupational Licensing Reduces Racial and Gender Wage Gaps: Evidence from the Survey of Income and Program Participation," NBER working paper, October 17, 2017, http://conference.nber.org/conf_papers/f101636.pdf.

276 Beth Redbird, "The New Closed Shop? The Economic and Structural Effects of Occupational Licensure," *American Sociological Review* 82, no. 3 (June 2017): 600-624.

277 Beth Redbird and Angel Alfonso Escamilla-García, "Borders within Borders: The Impact of Occupational Licensing on Immigrant Incorporation," *Sociology of Race and Ethnicity*, April 2, 2019, https://doi.org/10.1177%2F2332649219833708.

278 Maury Gittleman and Morris M. Kleiner, "Wage Effects of Unionization and Occupational Licensing Coverage in the United States," *Industrial and Labor Relations Review* 69, no. 1 (2013), DOI: 10.1177/0019793915601632.

Myriad other changes in law and policy also contributed to weakened worker power and wage stagnation. But the ultimate consequence of the FTC's initiatives was to weaken collective worker action and legitimize the rise of more exploitative business models.

UNUSED TOOLS: SECTION 5 REGULATORY AUTHORITY, SECTION 6(B), AND THE ROBINSON-PATMAN ACT

Obama-era enforcers maintained the status quo in three additional, consequential ways. First, FTC officials declined to use their wide-ranging authority to set rules articulating fair and unfair methods of competition under Section 5 of the FTC Act, which empowers them to do so. Second, FTC officials declined to use their Section 6(b) authority to study burgeoning monopolies, dominant companies, or important industrial sectors, and did not consider reinvigorating lines of business studies, which documented market structures among top firms. And third, antitrust officials did not attempt to exercise their authority under the Robinson-Patman Act.

SECTION 5

The Obama administration's continuity with its predecessors might be seen most clearly in 2015, when FTC Chairwoman Edith Ramirez announced "Enforcement Principles" for using the regulatory tools embedded in Section 5 of the FTC Act, the section prohibiting "unfair methods of competition."[279] In this policy statement, Ramirez, with praise from Republican Commissioner Joshua Wright, announced a policy that the FTC would not use certain key antimonopoly tools granted to the agency by Congress.[280]

To understand the importance of the Obama administration's choices around this policy area, it helps to understand the original intent of the Federal Trade Commission authority in this realm, which was intended to go beyond the four corners of the Sherman and Clayton Acts. Indeed, Congress passed this language in 1914 as an explicit rebuke to narrow judicial interpretation of

279 "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," Federal Trade Commission, August 13, 2015, https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

280 Joshua D. Wright, "Statement of Commissioner Joshua D. Wright Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," June 19, 2013, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf.

the Sherman Act under the rule of reason. The congressional report on the FTC's authorizing statute noted that Congress intended a "general declaration condemning unfair practices," but to "leave it to the commission to determine what practices were unfair."[281]

The Supreme Court has recognized the FTC's power under Section 5 to go beyond specific antitrust precedents. In decisions in the 1970s and 1980s, the Court affirmed that Congress wanted to give the FTC the flexibility to adapt to business practices and designate them as unfair based on their expert knowledge of an industry.[282] In 1986, the Court wrote, "The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons."[283] Moreover, the Supreme Court's landmark *Chevron* ruling, which established a deferential standard of review for how a federal agency interprets the laws it enforces, opens the door to rule-writing by the FTC.[284] Because "unfair methods of competition" are open-ended, Sandeep Vaheesan argues, "Section 5 appears to be the paradigmatic example of a statute whose interpretation is entitled to *Chevron* deference."[285]

Because Supreme Court decisions had narrowed antitrust law, by the time of the 2008 election, antitrust enforcers discussed using Section 5's broad powers more seriously. In October 2008, the FTC held a workshop on how it might do so.[286] "Everyone can agree," then-FTC Commissioner Jon Leibowitz said, "that the FTC Act goes well beyond the metes and bounds of the Sherman Act." Other workshop participants expected that the FTC under President Obama would use Section 5 actively; one speaker warned of potential "overreach" in using Section 5. Another thought the Illinois senator would herald "a new stage of the relationship between government and private enterprise."[287]

Given this context, what came next was surprising. In 2015, the FTC, a bipartisan majority said, would stick to using Section 5 for "public policy underlying the antitrust laws, namely, the promotion of consumer welfare" and be reluctant to use Section 5 to address business behavior that wasn't already illegal under other antitrust laws.[288]

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281 Rohit Chopra and Lina Khan, "The Case for 'Unfair Methods of Competition' Rulemaking," *University of Chicago Law Review* 82, no. 2 (March 2020): 376.

282 FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-40 (1972) (observing that Congress in drafting the FTC Act in 1914 "explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common law or statutory standard or by enumerating the particular practices to which it was intended to apply."); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

283 476 U.S. at 454-5 (internal citations omitted).

284 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) The FTC lost three appellate decisions involving Section 5 in the 1980s, none of which involved rule-writing. These losses do not preclude administrative rulemaking interpreting "unfair methods of competition."

285 Sandeep Vaheesan, "Resurrecting 'A Comprehensive Charter of Economic Liberty': The Latent Power of the Federal Trade Commission," *University of Pennsylvania Journal of Business Law* 19, no. 3 (2018): 654.

286 "Workshop on Section 5 of the FTC Act as a Competition Statute," Federal Trade Commission, October 17, 2008, https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf.

287 "Workshop on Section 5," 133, 202, 208.

288 "Statement of Enforcement Principles," Federal Trade Commission.

These guidelines represented a retreat to the Bork-inaugurated bipartisan consensus underlying competition policy, narrowing not just antitrust law but the much more expansive Section 5 tool as well. In a speech on the same day as the announcement, Ramirez highlighted the continuity between the FTC's position on Section 5 with past commissions under Republican and Democratic administrations.[289] President Obama, who by this time was late in his second term and had appointed all five members of the independent agency, had as a candidate in 2008 promised a break from the Bush administration. In contrast, Ramirez reassured an audience at George Washington University Law School, the fundamental takeaway of the FTC's statement on Section 5 was that it did "not signal any change of course in our enforcement practices and priorities."[290] Towards the end of the Trump administration, the FTC has begun using this tool more aggressively, with studies on social media and video streaming data practices, as well as acquisitions by large technology platforms.*

SECTION 6(B)

When Congress chartered the FTC, one goal was to have the commission serve as a research arm for policymakers to understand the economy. To that end, the Federal Trade Commission Act of 1914 gives the FTC the authority to compel information about how a corporation is organized, its management structure, and its operations, among other items. Yet the FTC under President Obama did little research on significant industrial trends, like the emergence of online advertising as a foundational financing mechanism for publishing and communications, the shift in brick-and-mortar to online retail, or the rise of private equity as key capital allocators in a host of industries. The few studies the FTC conducted were on reasonable subjects; one was on patent assertion entities, also known as "patent trolls."[291] But others, like an early 2017 study on the FTC's merger settlements, appear less serious. The FTC looked at its merger divestitures from 2006 to 2012, spanning the Bush and Obama administrations, and called its approach "generally effective," despite failing to preserve competitive outcomes roughly 20 to 25 percent of the time.[292]

LINES OF BUSINESS REPORTS

One initiative pursued by the FTC in the 1960s and 1970s was the Lines of Business Reports, whereby the commission sought to collect detailed statistics on the revenues, profits, and cost structures of the 250 largest companies in the country.[293] The goal was to collect data on

289 Edith Ramirez, remarks prepared for the Competition Law Center, George Washington University Law School, August 13, 2015, https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

290 Ramirez, remarks prepared for the Competition Law Center, 6.

291 "Patent Assertion Entity Activity: An FTC Study," Federal Trade Commission, October 2016, https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

292 See above, "The Failure of Settlement Strategies for Mergers." See also John E. Kwoka, "*Mergers, Merger Control, and Remedies*: A Response to the FTC Critique," March 31, 2017, https://ssrn.com/abstract=2947814 or http://dx.doi.org/10.2139/ssrn.2947814.

293 "Statistical Report: Annual Line of Business Report 1977," Federal Trade Commission, 1977, https://www.ftc.gov/sites/default/files/documents/reports/u.s.federal-trade-commission-bureau-economics-annual-line-business-report-1977-statistical-report/231945.pdf.

concentration levels in the economy, so as to understand the consequences of rapid changes due to conglomerate acquisitions. In 1978, the D.C. Circuit upheld the legal authority of the commission to collect this information, with the Supreme Court declining to review the case.[294] In the early 1980s, the Reagan FTC eliminated this series of reports. The Obama-era FTC did not seek to bring it back.

THE ROBINSON-PATMAN ACT

The Robinson-Patman Act is a law designed to prevent corporations from charging different prices to different groups, which is known as "discriminatory pricing," if the goal of such pricing is to monopolize markets. The law was originally passed in 1936 to ban a system of price discrimination and predatory rebates the A&P supermarket chain enforced on its suppliers. A&P had demanded the right to get better prices than its rival grocers from food producers, so that A&P could undersell them and drive rivals out of business, thus monopolizing the grocery market and acquiring more power over farmers and producers.[295] The Act was used by the FTC and private litigants throughout the 1960s to constrain discounters, chain stores, and large manufacturers. Among other provisions, the law empowers enforcers to prosecute dominant corporations that use price discrimination to bludgeon suppliers or buyers.

Such a law would seem to be useful in the age of Amazon. Yet, not only did the Obama FTC and DOJ decline to resuscitate the Robinson-Patman Act, it attempted to narrow the law's scope for private litigants. The goal of the law was to protect independent stores and manufacturers from domination in the marketplace by distributors or producers with the market power to discriminate among buyers or suppliers. Despite consistent hostility to the Act from the antitrust bar from the 1950s onward, from the 1930s until the 1970s, the preponderance of all antitrust cases brought by the FTC were Robinson-Patman violations. From 1965 to 1968, the FTC undertook 97 formal investigations and filed 27 complaints per year.[296]

This enforcement regime collapsed in the 1970s, when enforcers chose to stop bringing complaints. Robinson-Patman had been an object of derision across the traditional antitrust spectrum, with Robert Bork dubbing it the "Typhoid Mary of Antitrust" and Herbert Hovenkamp calling the law "irritating to almost anyone who is serious about antitrust."[297] Since 1992, the Antitrust Division and the FTC have brought just a single complaint under the Act, leaving enforcement largely to private litigants.[298] Chain stores such as Walmart and Amazon have

294 Federal Trade Commission Annual Report, 1978, 28, https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1978/ar1978_0.pdf.

295 Edward Krugman, "Soap, Cream of Wheat and Bakeries: The Intellectual Origins of the Colgate Doctrine," *St. John's Law Review* 65, no. 3 (Summer 1991): 827-838; Matt Stoller, *Goliath: The Hundred Year War Between Monopoly Power and Democracy*, (Simon and Schuster, 2019).

296 D. Daniel Sokol, "Analyzing Robinson-Patman," *George Washington Law Review* 83, no. 6 (2015): 2064-2100.

297 Robert Bork, "The Place of Antitrust Among National Goals," remarks before the National Conference Board, March 3, 1966, 9; Herbert Hovenkamp, "The Robinson-Patman Act and Competition: Unfinished Business," *Antitrust Law Journal* 68, no. 1 (2000): 125.

298 Deborah A. Garza et al., "Antitrust Modernization Commission: Report and Recommendations," Antitrust Modernization Commission, April 2007, 316, https://digital.library.unt.edu/ark:/67531/metadc1228317/.

become far more dominant in the post-Robinson-Patman environment, and price discrimination and predatory rebating are regular practices across the economy. Courts have also made it more difficult for the government to bring and win Robinson-Patman cases.[299] The FTC under Obama chose to continue a regime of nonenforcement and to sustain the assault on the law through means other than direct repeal.

In 2015, the FTC also sought to narrow the scope of the Act for private litigants, filing an amicus brief authored by Competition Bureau Director Deborah Feinstein, General Counsel Jonathan Nuechterlein, and six other staff members to overturn a court decision enabling a retailer to address price discrimination in packaging by Clorox.[300] In true bipartisan fashion, Nuechterlein subsequently co-authored a paper with Bush FTC Chair Tim Muris defending A&P's practices of price discrimination in the 1930s, and did so in a study financed by Amazon. Such practices, they argued, were simply those of a large corporation efficiently outcompeting smaller stores.[301]

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299 See, for example, Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006) (limiting the scope of the Act, interpreting it not to prevent all price differentiation, but only such discrimination as would injure marketplace competition).

300 Deborah L. Feinstein et al., Brief of Amicus Curiae, Woodman's Food Market, Inc. v. The Clorox Co. and the Clorox Sales Co., November 2, 2015, https://www.ftc.gov/system/files/documents/amicus_briefs/woodmans-food-market-inc.plaintiff-appellee-v.clorox-co.clorox-sales-co.defendants-appellants/151102woodmanvscloroxamicusbrief.pdf; the others were Assistant Director Michael Bloom, Deputy Assistant Director James Mongoven, attorneys Julie Goshorn and Christopher Grengs, Director of Litigation Joel Marcus, and attorney in the Office of the General Counsel Bradley Grossman. It is no coincidence that practices regularly used by the A&P and barred by the Robinson-Patman Act are justified by Amazon-financed legal research, including one paper co-authored by Bush FTC Chair Tim Muris and Obama FTC general counsel Jonathan Nuechterlein.

301 Timothy J. Muris and Jonathan E. Nuechterlein, "Antitrust in the Internet Era: The Legacy of *United States v. A&P*," *Review of Industrial Organization* 54, no. 4 (2019): 651-681.

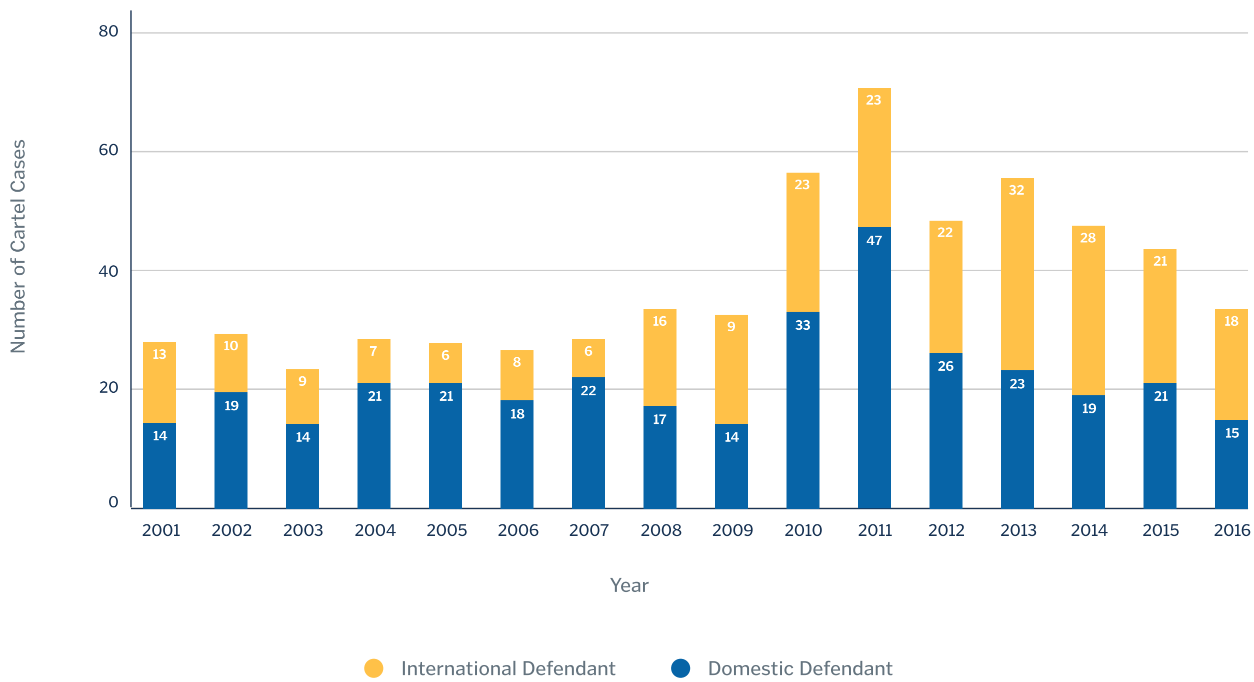
CARTELS

Cartels can undermine open and competitive markets on which consumers depend, and prosecuting certain kinds of cartel activities, such as wage-fixing agreements to reduce wages, are meaningful ways of vigorously promoting the original intent of the laws. Cartel enforcement is generally an area with substantial investment of resources, largely because Chicago School and post-Chicago School enforcers see price-fixing as the only clear per se violation of antitrust laws and an easy way to prove their aggressiveness on enforcement.

Zealous cartel enforcement absent strong monopolization and merger enforcement can have a series of harmful effects. Cartel enforcement sometimes promotes the acquisition of market power by powerful corporations, which is one reason it is the remaining antitrust violation where enforcers and judges are still eager to act. Strict anti-cartel rules can make it difficult for weak corporations to collectively bargain against a monopolist, such as newspapers trying to negotiate terms with Google and Facebook, or book publishers attempting to bargain with Amazon. For instance, in 2009, when book publishers sought to build their own electronic book reading device with Apple in order to compete with Amazon's Kindle and Amazon's position as the monopoly book distributor, the DOJ stepped in on behalf of the monopolists to sue Apple and the publishers for collusion.[302]

302 United States v. Apple Inc., 952 F.Supp.2d 638 (S.D.N.Y. 2013).

CHART 7: TOTAL NUMBER OF CARTEL CASES (CRIMINAL AND CIVIL NON-MERGER) BROUGHT BY THE DEPT. OF JUSTICE ANTITRUST DIVISION



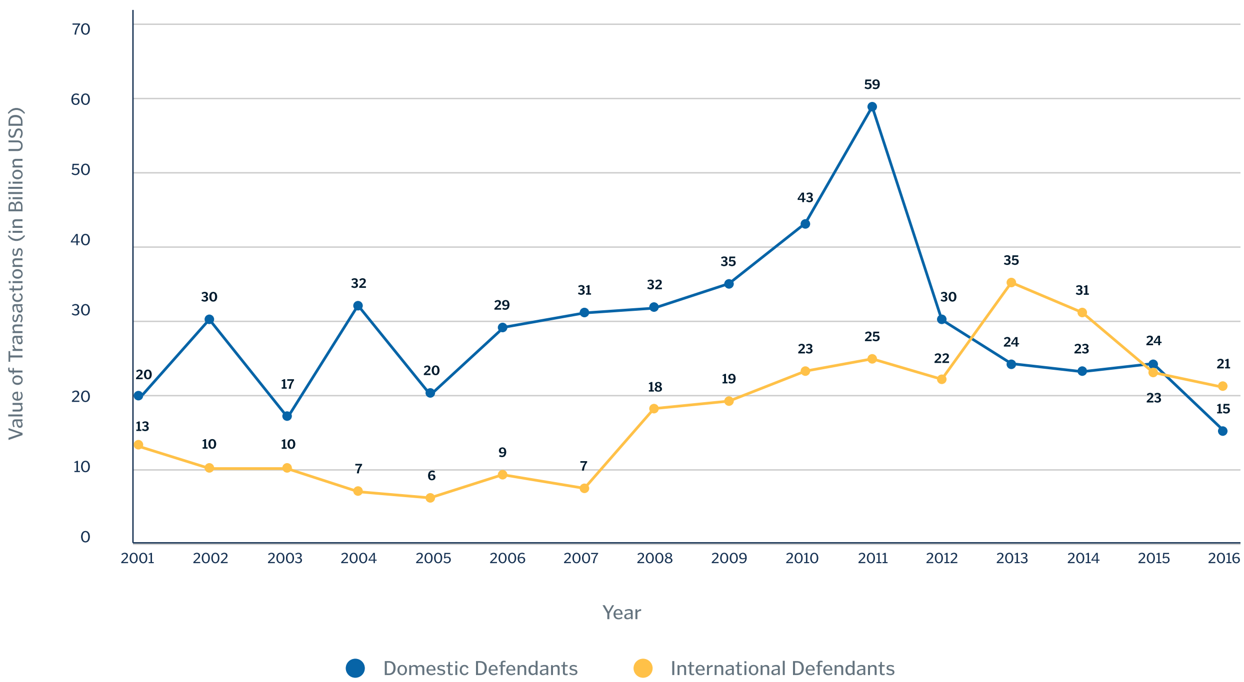
Additionally, the reluctance to address monopolization and merger problems combined with a relatively more aggressive approach to cartels creates an incentive for anticompetitive mergers. If price-fixing within a cartel is illegal or even criminal, but combining entities to price-fix via a monopoly or oligopoly is legal, why not simply merge? A good example of this is a private class action lawsuit against The Walt Disney Company, Pixar, and Lucasfilm in which animators and visual effects artists received $100 million in a settlement over allegations that, from at least 2004 onward, the three companies colluded to suppress wages with an agreement not to hire each other's workers. Wage-setting through a conspiracy not to hire a rival's workers is a form of cartel behavior. Disney subsequently bought Pixar and Lucasfilm, rendering the need to collude moot. It is legal for a corporation to lower the wages of its own employees. In other words, what was illegal for separate companies to do became legal once those corporations merged to a position of market power.[303]

The Obama administration's record in criminal antitrust enforcement, mostly made up of prosecuting cartels, represented continuity with the approach to antitrust taken since the 1970s. Though the total number of cartel cases increased from the Bush administration to the Obama administration, the pattern looks less significant when one looks at criminal cases dating back to the Reagan administration. Data collected by Vivek Ghosal and D. Daniel Sokol shows that the

303 Ashley Milano, "Disney, Pixar, Lucasfilm Settle Animation Workers' Antitrust Litigation for $100M," *Top Class Actions,* February 2, 2017, https://topclassactions.com/lawsuit-settlements/employment-labor/462278-disney-pixar-lucasfilm-settle-animation-workers-antitrust-litigation-100m/.

Obama administration may have brought more cartel cases than its predecessor, but that it also brought cases at lower or comparable rates to George H.W. Bush and Ronald Reagan.[304] Overall, federal cartel enforcement has undergone a long-term decline in activity.[305] Further, much of the Obama administration's bringing more cases than Bush came in cases against international defendants, which could indicate a shift in resource allocation to anticompetitive behavior and collusion by non-U.S. citizens and corporations.

CHART 8: CRIMINAL ANTITRUST CASES FILED BY THE DEPT. OF JUSTICE UNDER THE BUSH AND OBAMA ADMINISTRATIONS



The general track record of the Obama administration is continuity with previous administrations—a significant number of cases that distracted from the much more significant problem of corporate monopoly, situated in a framework that encouraged mergers.

304 Vivek Ghosal and D. Daniel Sokol, "The Rise and (Potential) Fall of U.S. Cartel Enforcement," *University of Illinois Law Review*, no. 2 (2020): 485, 486, https://illinoislawreview.org/print/vol-2020-no-2/the-rise-and-potential-fall-of-u-s-cartel-enforcement/.

305 The Trump administration and Assistant Attorney General Makan Delrahim appear to have taken this decline to new lows, with criminal cartel enforcement dropping to their lowest levels since the 1970s. Kadhim Shubber, "US Price-Fixing Prosecutions at Historic Lower for Third Straight Year," *Financial Times,* November 5, 2019; Kadhim Shubber, "US Antitrust Enforcement Falls to Slowest Rate Since 1970s," *Financial Times*, November 28, 2018.

CHART 9: U.S. ANTITRUST CASES: TOTAL, CIVIL, AND CARTEL

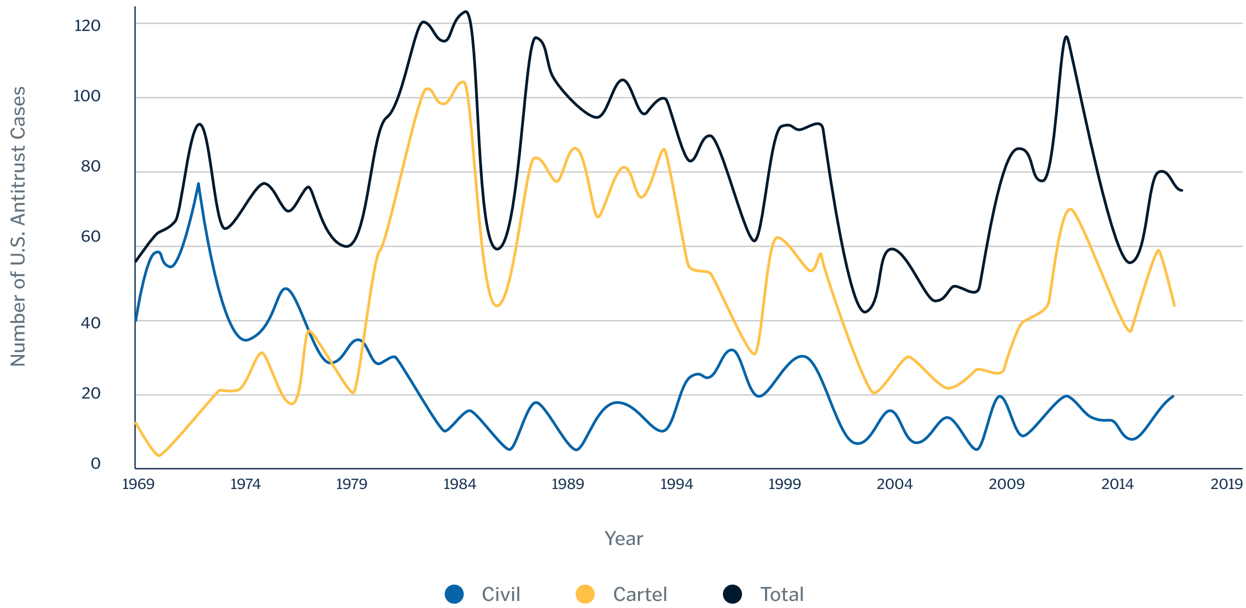
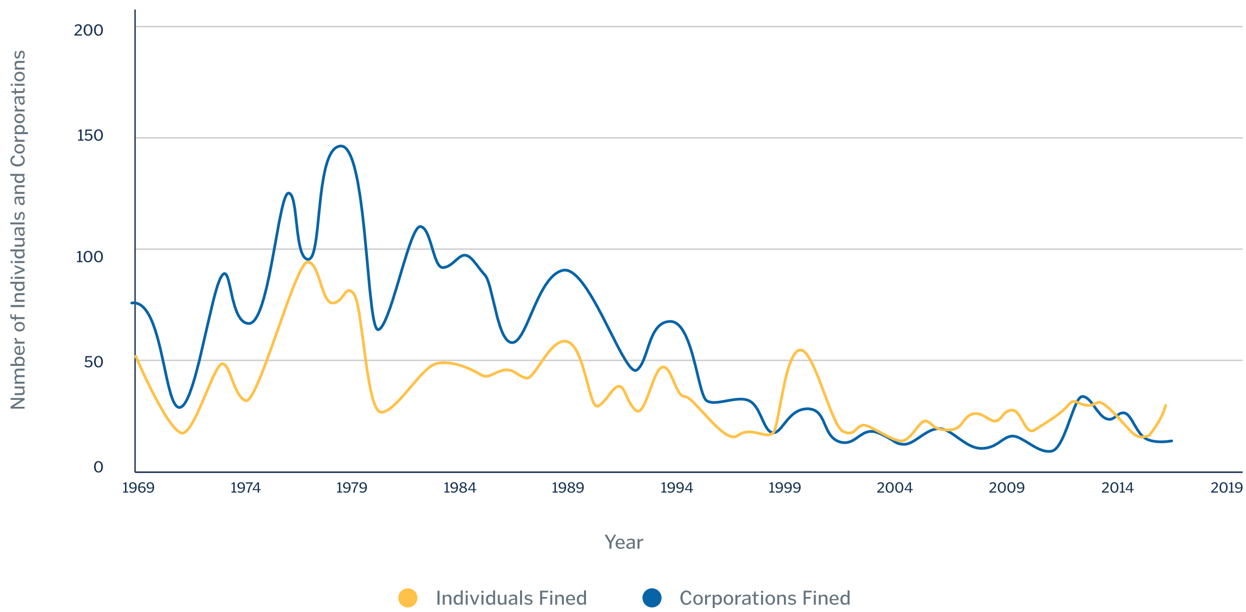


CHART 10: TOTAL NUMBER OF CORPORATIONS AND INDIVIDUALS FINED



Source: Vivek Ghosal and D. Daniel Sokol, "The Rise and (Potential) Fall of U.S. Cartel Enforcement," University of Illinois Law Review, no. 2 (2020): 485, 486, https://illinoislawreview.org/print/vol-2020-no-2/the-rise-and-potential-fall-of-u-s-cartel-enforcement/.

Besides generally maintaining the approach to criminal enforcement set by previous Democratic and Republican presidents, the Obama administration shifted cartel enforcement in two ways. First, Antitrust Division closed regional offices. Second, the Antitrust Division failed to aggressively prosecute no-poaching agreements for workers in Silicon Valley.[306]

REDUCTION OF REGIONAL FOCUS

The DOJ shuttered Antitrust Division field offices that were heavily involved in anti-cartel enforcement.[307] In 2012, the administration decided to close four of its seven antitrust field offices—Atlanta, Cleveland, Dallas, and Philadelphia. These field offices did primarily criminal and cartel cases, such as conspiracies to rig municipal contracts or construction bids. As Robert Connolly, chief of the Philadelphia field office, said when the office was closed, "The remaining offices can't cover the territory." Connelly explained what he believed caused the administration to make the decision in an interview with *The American Prospect*. "I think there's a sense that the Antitrust Division is not that interested in local and regional cases. … They want a case with headlines, a lot of zeroes."[308]

FLINCHING FROM NO-POACH CASES

When presented with an opportunity to develop good law on a clear and high-profile case against some of the country's most powerful and well-known Silicon Valley corporations, the Justice Department backed down. In 2010, the Justice Department charged Apple, Google, Intel, and other prominent Silicon Valley companies with a civil violation for colluding not to compete for each other's workers, a clear violation of antitrust laws. Since the mid-2000s, these companies had agreed not to recruit their respective employees, affecting some 64,000 workers.[309] The case should have been relatively straightforward to bring: no-solicitation agreements among buyers—in this case, of labor—are already illegal as a form of bid-rigging or market allocation by buyers. In other contexts, these types of price-fixing agreements have been found to be criminal violations.[310]

On the same day that the Justice Department brought its cases, it immediately settled with all companies on the condition that the Silicon Valley companies would refrain "from engaging

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306 David Dayen, "Bring Back Antitrust," *The American Prospect*, November 9, 2015, https://prospect.org/justice/bring-back-antitrust/; Sean Hollister, "Steve Jobs Personally Asked Eric Schmidt to Stop Poaching Employees, and Other Unredacted Statements in a Silicon Valley Scandal," *The Verge*, January 27, 2012, https://www.theverge.com/2012/1/27/2753701/no-poach-scandal-unredacted-steve-jobs-eric-schmidt-paul-otellini.

307 "Justice Department Announces More Than $130 Million in Cost Saving and Efficiency Measures to Utilize Resources More Effectively," press release, Department of Justice, October 5, 2011, https://www.justice.gov/opa/pr/justice-department-announces-more-130-million-cost-saving-and-efficiency-measures-utilize.

308 Dayen, "Bring Back Antitrust."

309 *When Rules Don't Apply*, Filmmakers Collaborative SF, 2019.

310 See Mandeville Island Farms v. American Crystal Sugar, 334 U.S. 219, 235-236 ("The [Sherman Antitrust Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. … The Act is comprehensive in its terms and coverage, protecting all who are made victim of the forbidden practices by whomever they may be perpetrated."). For an example of a criminal price-fixing case, see "Six Additional Individuals Indicted On Antitrust Charges In Ongoing Broiler Chicken Investigation," press release, Justice Department, October 7, 2020, https://www.justice.gov/opa/pr/six-additional-individuals-indicted-antitrust-charges-ongoing-broiler-chicken-investigation.

in anticompetitive no solicitation agreements."[311] In other words, as engineer Neil Haran said about the case in the film *When Rules Don't Apply*, "There were no penalties, [the Silicon Valley companies] basically just got a slap on the wrist and told not to do it again."[312] In 2019, Gene Kimmelman, the Antitrust Division's chief counsel for competition policy at the time, cited the fear of losing: "Do you go for the jugular and say, 'My god, this could've been awful' and we're going to litigate and we are going to just roll the dice? We may win. We may lose."[313] Despite not requiring any individual executives to plead guilty to the collusion, the Justice Department declared that the settlement "resolves the department's antitrust concerns with regard to these no solicitation agreements."[314]

More than a year later, a private class action suit brought by hurt workers revealed that the hiring cartel involved the highest levels of Silicon Valley leadership. Famous executives such as Apple's Steve Jobs, Intel CEO Paul Otellini, and then-Google CEO Eric Schmidt all turned out to have actively colluded against their workers, with Otellini writing in an email that he did not want his "handshake 'no recruit'" agreement with Schmidt to be "broadly known."[315] Estimating the damages to the workers in lost wages and hampered wage growth at $3 billion, the class action suit was successfully certified by a federal judge—a significant evidentiary hurdle given current standards—and the class action suit ultimately secured $415 million for the affected workers, some five years after the DOJ's suit.[316]

When presented with an opportunity—a relatively easy one, given the per se rule against interfirm coordination—to enforce the law to protect workers, the Justice Department settled on a weak resolution in what was, given the success of private enforcers, clearly a meritorious case. That antitrust enforcers had infrequently challenged employers, as Kimmelman raised, should have instead been seen as an opportunity to develop antitrust enforcement in favor of working people and case law to guide private litigants.

***The FTC announced this study as this report was being finalized. For more information see: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp, Federal Trade Commission. February 11, 2020 https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies 6(b) Orders to File Special Reports to Social Media and Video Streaming Service Providers, Federal Trade Commission. December, 2020 https://www.ftc.gov/reports/6b-orders-file-special-reports-social-media-video-streaming-service-providers**

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311 "Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements," press release, Department of Justice, December 21, 2010, https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation; "Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements," press release, Department of Justice, September 24, 2010, https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee; see also e.g. U.S. v. Lucasfilm, Inc., 2011 WL 2636850 (D.D.C. 2011) ("Specifically, the Proposed Final Judgment would enjoin the defendant from entering into an agreement with any other person or company to in any way refrain from recruiting the other person or company's employees.").

312 *When Rules Don't Apply*, Filmmakers Collaborative SF, 2019.

313 *When Rules Don't Apply*, Filmmakers Collaborative SF, 2019.

314 "Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements."

315 Dan Levine, "Steve Jobs Told Google to Stop Poaching Workers," *Reuters*, January 27, 2012, https://www.reuters.com/article/us-apple-lawsuit/steve-jobs-told-google-to-stop-poaching-workers-idUSTRE80Q27420120127.

316 Alex Wilhelm and Sarah Buhr, "Apple, Google, Other Silicon Valley Tech Giants Ordered to Pay $415M In No-Poaching Suit," *TechCrunch*, September 3, 2015, https://techcrunch.com/2015/09/03/apple-google-other-silicon-valley-tech-giants-ordered-to-pay-415m-in-no-poaching-suit/; *When Rules Don't Apply.*

PART II

ENFORCEMENT IN KEY SECTORS

AGRICULTURE[317]

On the last day of 2007, then-Senator Barack Obama hosted a conference call with independent farmers.[318] The Iowa caucuses were four days away. Among the issues that Obama raised in his Iowa primary campaign was one that affected independent farmers throughout the country: the handful of giant agribusinesses that dictate how the U.S. grows food and raises animals for slaughter.[319] Obama's victory in the Iowa caucuses helped "jump-start" the rest of his presidential campaign.[320]

The Obama administration made early progress on these promises, holding a series of national field hearings for farmers to speak to DOJ and USDA officials about the harms of concentrated agricultural markets and corporate abuse. These hearings informed a rulemaking to revive livestock farmers' critical antimonopoly and fair dealing protections under the Packers and Stockyards Act (PSA).

However, the USDA caved to industry and congressional pressure at critical moments, stalling and diminishing a promising slate of reforms. At the DOJ, despite powerful rhetoric from its leaders, the final report from its Antitrust Division disavowed much of a role for antitrust enforcement in addressing meatpackers' and other agribusinesses' enormous power.

The administration eventually passed watered-down PSA rules in 2016 just before leaving office. All the while, DOJ failed to bring any significant cases against agribusiness after collecting ample evidence of illegal and unfair conduct from farmers, quietly closed an investigation into the seed and agrichemical industry, and even filed a legal brief in court supporting Monsanto's ability to control farmers' seed use.

THE RISE AND FALL OF GIPSA REFORM

The central attempt at taming agribusiness in the Obama administration was the effort to reform the Packers & Stockyards Act. This Progressive-era antimonopoly law sought to widely prohibit unfair or deceptive practices, attempts to monopolize, and market manipulation by dominant

317 Portions of this report are adapted from Open Markets' comment to the USDA on its proposed rule regarding undue and unreasonable preferences and advantages under the Packers and Stockyards Act (PSA). "The Department of Agriculture Must Strengthen the Packers and Stockyards Act to Protect Farmers and Ranchers from Abusive Meatpacker Monopolies," Open Markets Institute, 2020, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ed1585a8c3f6405dc762a85/1590777948532/Open-Markets-Institute-Undue-Preference-Rule-Comment5921.pdf.

318 Lina Khan, "Obama's Game of Chicken," *Washington Monthly*, November/December 2012, https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/.

319 Michael Pollan, "Big Food Strikes Back," *The New York Times Magazine*, October 5, 2016, https://www.nytimes.com/interactive/2016/10/09/magazine/obama-administration-big-food-policy.html.

320 Shawn Gude, "Iowa was Obama's Jump-start," *The Daily Iowan*, May 16, 2008, https://www.politico.com/story/2008/05/iowa-was-obamas-jump-start-010403; Khan, "Obama's Game of Chicken."

meatpackers, which are the companies that slaughter livestock and process and distribute meat. Partly thanks to this law, market concentration in meatpacking declined from five packers with 70 percent of the market in 1916 to just four packers with 26 percent of the market by 1976.[321] Today, the meatpacking industry is more consolidated than in 1918, just before the law was passed.[322]

One reason for this consolidation is that since the 1960s, some courts have claimed that the Packers and Stockyards Act was passed to preserve overall "market competition."[323] Therefore, only actions by packers that affected end-user prices or other conditions at an industrywide level count as violations.[324] This interpretation, requiring industrywide "competitive injury," or price effects in output markets, contradicts the PSA's intention to protect small farmers from unfair treatment in input markets.[325]

During the end of the George W. Bush administration, Congress included a provision in the 2008 Farm Bill instructing USDA to review and update the PSA to address new issues the statute did not include and address vague language to better guide enforcement.[326] President Obama's USDA took up this effort and expanded its reforms to address pro-processor court precedents, retool the law, and increase farmers' protections against abusive, retaliatory, and manipulative tactics by packers.

What started out as strong and promising efforts ended in a demoralizing defeat for advocates and farmers, with watered down interim or proposed rules passing in the last days of the administration, only to be immediately repealed by President Trump's USDA. A combination of corporate pushback, congressional opposition, and fading political will stalled and ultimately dismantled a bold proposal that could have dramatically rebalanced power and protected farmers in the livestock industry.

Personnel is policy, and the process of undermining this antimonopoly vision began with appointments. President Obama picked former Iowa governor Tom Vilsack to lead the USDA. This choice initially worried some activists due to Vilsack's ties to biotech corporations, including Monsanto.[327] But others were encouraged by Obama's appointment of Dudley Butler to head the

321 Patty Judge and Aaron Belkin, "The Supreme Court Has Undermined Iowa's Small Farms and Rural Communities," Take Back the Court, January 2020, 4, 5, https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5e31a3c842c06a4f5c4a1340/1580311498813/Supreme+Court+Has+Undermined+Iowa%27s+Small+Farms.pdf.

322 Khan, "Obama's Game of Chicken."

323 Judge and Belkin, "The Supreme Court Has Undermined Iowa's Small Farms and Rural Communities," 8-10.

324 Judge and Belkin, "The Supreme Court Has Undermined Iowa's Small Farms and Rural Communities," 6, 10.

325 A judge on the Fifth Circuit dissented from that circuit's adoption of the "competitive injury" requirement and criticized the "violence wrought on the statute by the majority's interpretation." Wheeler v. Pilgrim Pride Corp., 591 F.3d 355, 373-6 (5th Circ. 2009).

326 Khan, "Obama's Game of Chicken."

327 Timothy P. Carney, "Close Friend of Agriculture Chief Now a Monsanto Lobbyist," *Washington Examiner*, December 2, 2009, https://www.washingtonexaminer.com/close-friend-of-agriculture-chief-now-a-monsanto-lobbyist; Ari LeVaux, "Monsanto Wins, For Now," *High Country News*, February 16, 2011, https://www.hcn.org/wotr/monsanto-wins-for-now.

Grain Inspection, Packers and Stockyards Administration (GIPSA). Butler was a rancher and longtime trial attorney with a career representing contract growers against meatpackers.[328]

The first two years of GIPSA reform under the Obama administration were promising. USDA and DOJ officials, including Attorney General Eric Holder and Assistant Attorney General for Antitrust Christine Varney, hosted hearings across the country to collect accounts from farmers and advocates about unfair tactics across the agriculture industry including in seeds, dairy, cattle, and poultry markets. Farmers came in droves to speak out against monopoly abuse at considerable risk of retaliation.

The administration made clear that tackling agribusiness abuse was a priority. “We will use every tool we have to ensure fairness in the marketplace,” Attorney General Holder said at the opening hearing in March 2010 in Ankeny, Iowa.[329] Just months later, USDA proposed serious rules that could have reinvigorated PSA enforcement. The new rules forbade packers from retaliating against farmers for speaking out, required packers to justify the prices presented to farmers and submit sample growing contracts to USDA for public posting, banned mandatory arbitration, and critically, removed the need to prove harm to industrywide competition in output markets in order to bring a PSA claim, among many other reforms.[330]

Some GIPSA officials reportedly pushed for even stronger provisions, including strict separations preventing packers from owning livestock, but dropped them for fears of legal challenges.[331] Still, one poultry farmer and whistleblower, Craig Watts, who drove more than 500 miles to attend a DOJ hearing, told the *Washington Monthly* that “with these rules we knew they meant business.”[332]

The rules even had bipartisan Senate support, including from Iowa senators and agriculture policy heavyweights Tom Harkin and Chuck Grassley.[333] But the rules also faced an onslaught of lobbying from enraged agribusinesses, as well as bipartisan opposition in the House. In 2010 alone, the meat industry spent roughly $9 million on lobbying.[334] Despite having the authority and evidence to proceed with the rulemaking, Vilsack appeared to falter under congressional and corporate pressure. In summer 2010, Vilsack extended the rulemaking

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328 Chris Leonard, *The Meat Racket: The Secret Takeover of America's Food Business*, (Simon & Schuster, 2014), 282-283.

329 Khan, “Obama's Game of Chicken.”

330 U.S. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration, Proposed Rule, “Implementation of Regulations Required Under Title XI of the Food Conservation and Energy Act of 2008; Conduct in Violation of the Act,” *Federal Register* 75, no. 119 (June 22, 2010): 35351-3, https://www.govinfo.gov/content/pkg/FR-2010-06-22/pdf/2010-14875.pdf.

331 Leonard, *The Meat Racket*, 284-285.

332 Khan, “Obama's Game of Chicken.”

333 Khan, “Obama's Game of Chicken.”

334 Pollan, “Big Food Strikes Back.”

comment period from a typical 60 days to an unheard-of 150, pushing any finalized rule past the 2010 midterm elections.[335]

During this time, 68 Republican and 47 Democratic members, led by a Blue Dog Democrat prominent on agriculture issues, Minnesota Rep. Collin Peterson, sent a letter to Vilsack arguing the rules were not sufficiently justified and needed more economic analysis.[336] To be clear, USDA did not need congressional support to enact these rules. USDA had based its proposed rules on testimony from farmers, dozens of interviews with experts, and extensive industry study. But USDA's extending the comment deadline gave meatpacking trade organizations more time to oppose the rulemaking.

A month after this letter from Congress, Republicans and the Tea Party insurgence flipped the House. The Republican-controlled House Agriculture Committee continued to ask for more economic analysis and held hearings for trade groups to criticize the rules. The committee's new chairman circulated a letter asking USDA to withdraw the rules entirely; more than a third of the House signed on, including 25 Democrats.[337]

Congress dealt a final blow to the rules by tacking a rider on to an appropriations bill in November 2011 that forbade USDA from using any funds to finalize and implement the most substantial parts.[338] This rider passed every subsequent year of the Obama administration, except 2016.[339] It only gave USDA funding to administer a few watered-down updates to the PSA, primarily to fulfill parts of the 2008 congressional mandate. The subsequent rules did provide small gains, such as prohibiting mandatory arbitration clauses, but they did not address the bulk of the unfair and exploitative tactics of dominant packers, nor the issue of poor PSA court precedent. Frustrated, Butler resigned in January 2012.[340]

For years, Congress continued to block more expansive GIPSA reform efforts with appropriations riders. But in 2015, activists and lawmakers credit a John Oliver segment for exposing chicken farmer abuses and drumming up public pressure against the rider.[341] USDA was able to eke through some Fair Farmer Practices Rules in December 2016.[342]

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335 Khan, "Obama's Game of Chicken."

336 Khan, "Obama's Game of Chicken."

337 Khan, "Obama's Game of Chicken."

338 Khan, "Obama's Game of Chicken."

339 "USDA's 'GIPSA Rule' on Livestock and Poultry Marketing Practices," Congressional Research Service, R41673, January 7, 2016, 29, https://www.everycrsreport.com/files/20160107_R41673_e1d67b445c928f46a6b23a04c38d116fdb819c93.pdf.

340 Leonard, *The Meat Racket*, 284-285.

341 Nathaniel Haas, "John Oliver vs. Chicken," *Politico*, June 1, 2015, https://www.politico.com/story/2015/06/john-oliver-vs-chicken-118510; see also "Last Week Tonight with John Oliver: Chickens," HBO, May 17, 2015, www.youtube.com/watch?v=X9wHzt6gBgI.

342 "Farmer Fair Practices Rules," U.S. Department of Agriculture, Agricultural Marketing Service, last updated March 6, 2017, https://www.gipsa.usda.gov/psp/farmerfairpractices.aspx.

These included critical clarifications about what constituted unfair practices and undue preferences by packers, and upheld USDA's position that farmers did not need to prove harm to industrywide competition in output markets in order to challenge abuse by packers, creating an opening for greater enforcement.[343]

However, the 2016 rules omitted key provisions of the 2010 proposals, including the requirement that packers submit sample contracts to USDA, the requirement that packers justify prices paid to farmers, a ban on packers entering into exclusive agreements with livestock dealers, and a guarantee that packers offer the same terms to larger producers and groups of small producers that, collectively, can meet equivalent quantity commitments.[344]

As these were just interim final or proposed rules, the Trump administration quickly withdrew them, and also dissolved GIPSA as an independent agency within USDA altogether.[345] In their place, USDA proposed new PSA rules with vague language that could actually codify abusive industry practices into law, so long as they pass as "customary in the industry."[346]

The Justice Department proved no more willing to fight for farmers. Despite Holder and Varney's strong words, the Antitrust Division's final report, written under Varney and then-Acting Assistant Attorney General Sharis Pozen and released in May 2012, amounted to the division throwing up its hands. The DOJ acceded to flawed court precedent and accepted that it could not use antitrust law to protect farmers from abusive conduct because the actions, while clearly harmful to individual farmers, were not harmful under the specific definition of industrywide competition.[347] Farmers and other workshop participants, the report wrote, "identified an array of challenges facing the agriculture sector, many, if not most, of which fall outside the purview of the antitrust laws."[348]

The report also outlined areas where the Antitrust Division could act, including mergers and price-fixing, as well as "the appropriate use of intellectual property."[349] Otherwise, many of the abuses described in the hearings "require public or private solutions beyond the antitrust laws,"

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343 "Farmer Fair Practices Rules," U.S. Department of Agriculture; "Scope of Sections 202(a) and (b) of the Packers and Stockyards Act," U.S. Department of Agriculture, Grain Inspection, Packers and Stockyards Administration, Interim Final Rule, *Federal Register* 81, no. 244 (December 20, 2016): 92567-8, https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-30424.pdf.

344 "Scope of Sections 202(a) and (b)," 92577; "Poultry Grower Ranking Systems," U.S. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration, "Poultry Grower Ranking Systems," *Federal Register* 81, no. 244 (December 20, 2016): 92729-92730, https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-30429.pdf; "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act," U.S. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration, Proposed Rule, *Federal Register* 81, no. 244 (December 20, 2016): 92703.

345 Claire Kelloway, "Trump Administration Guts Office Designed to Protect Farmers from Ag Monopolies," *Food & Power,* December 6, 2018, http://www.foodandpower.net/2018/12/06/trump-administration-guts-office-designed-to-protect-farmers-from-ag-monopolies/.

346 "Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act," U.S. Department of Agriculture, Agricultural Marketing Service, *Federal Register* 85, no. 8 (January 13, 2020): 1771, 1772, https://www.federalregister.gov/documents/2020/01/13/2020-00152/undue-and-unreasonable-preferences-and-advantages-under-the-packers-and-stockyards-act.

347 "Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward," U.S. Department of Justice, May 2012, 20, ("The [antitrust] laws apply only if a practice diminishes competition in the market as a whole, although there may be abuse of a single producer."), https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf.

348 "Competition and Agriculture," 3.

349 "Competition and Agriculture," 24.

the report said. “Importantly, though, the Division, in a number of cases, may be able to help advance these other solutions through *competition advocacy* and sharing our expertise with other public or private entities.”[350]

AVOIDING BOLD CASES AND SIDING WITH MONSANTO OVER FARMERS

The DOJ’s record with agriculture markets, outside of the GIPSA hearings, failed to live up to the report’s promises. Specifically, DOJ’s experience with Monsanto demonstrates that even the timid language in its May 2012 report may have promised too much.

To start with, the DOJ didn’t bring a major case against agriculture monopolists, merger or conduct, during President Obama’s administration.[351] Its reticence to act is exemplified by a DOJ antitrust investigation into the seed industry.

The seed and agrichemical industry came up as major issues in the USDA and DOJ’s national hearings. The rise of monopoly power over patented genetically engineered seeds, as well as a massive merger wave through the late 1990s and early 2000s in which Monsanto alone bought nearly 40 companies, ballooned seed prices, constrained seed choices, and locked farmers into limited contracts.[352] Since the 1970s and 1980s, the four largest corn and soybean firms have gone from controlling 59 percent and 42 percent of their markets, respectively, to 85 percent and 76 percent in 2015.[353] Even more critically, Monsanto owned and licensed the genetic traits found in 90 percent of commercial soybean seeds and 80 percent of corn seed.[354]

Contemporaneous reports suggest that there were legitimate concerns as to how Monsanto exercised its power in the seed market. An investigation by several state attorneys general in 2007 found Monsanto made seed retailers sign restrictive contracts excluding competitors in order to carry Monsanto products.[355]

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350 “Competition and Agriculture,” 15-16 (emphasis added).

351 At the end of the Bush administration, in October 2008, the DOJ did bring a major case challenging JBS’ acquisition of National Beef, which would have resulted in the third-largest beef packer purchasing the fourth largest and concentrating 80 percent of all domestic cattle processing into three companies. JBS and National Beef abandoned the acquisition in February 2009. “Competition and Agriculture,” May 2012, 17.

352 “Re: Proposed Merger of Monsanto and Bayer,” The American Antitrust Institute, Food & Water Watch, and the National Farmers Union, July 26, 2017, 2, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper_Monsanto-Bayer_7.26.17_0.pdf; Claire Kelloway and Sarah Miller, “Food and Power: Addressing Monopolization in America’s Food System,” Open Markets Institute, March 2019, 7, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea9fa6c2c1e9c460038ec5b/1588198002769/190322_MonopolyFoodReport-v7.pdf.

353 Kelloway and Miller, “Food and Power,” 6-7.

354 Kelloway and Miller, “Food and Power,” 6.

355 Lina Khan, “How Monsanto Outfoxed the Obama Administration,” *Salon*, March 15, 2013, https://www.salon.com/2013/03/15/how_did_monsanto_outfox_the_obama_administration/. Exclusive contracts, in which a dominant corporation requires other companies (often customers or suppliers) to deal “exclusively” with them and not the dominant company’s competitors, have raised antitrust concerns for over a century. For a proposal to ban dominant corporations from using them, see Open Markets Institute, American Economic Liberties Project, et al., “Petition for Rulemaking to Prohibit Exclusionary Contracts,” https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf.

Between these tactics to control seed retailing and Monsanto's seed trait licensing dominance, antitrust experts believe DOJ could have made a strong case against the chemical company turned seed goliath. "There was a good case to be made, but at the end of the day nobody was prepared to bite the bullet and move forward," antitrust professor and former DOJ attorney Peter Carstensen said.[356]

In the first weeks of January 2010, law enforcers issued a civil investigative demand for information on Monsanto's soybean genetics business.[357] But by Thanksgiving 2012, DOJ closed its investigation of Monsanto and the seed industry without so much as a press release. The public learned the investigation had closed from Monsanto announcing that DOJ had done so "without taking any enforcement action."[358]

Aside from bringing cases in court, the Antitrust Division and FTC still have a valuable tool: their competition advocacy program. By filing amicus briefs in antitrust cases that the government is not directly involved in, federal antitrust enforcers can use their influence in courts to shape the law in antimonopoly directions. However, in one of the highest-profile cases pitting farmers against monopolists, the Obama administration chose the monopolists. The 2013 landmark Supreme Court case *Bowman v. Monsanto* featured a 75-year-old farmer challenging whether Monsanto had a patent right to seeds that came from Monsanto-patented seeds.[359] The DOJ Solicitor General's office argued in favor of Monsanto, arguing that strong patent rights would encourage investment in research and development.[360]

Though not directly an antitrust case, *Bowman* was one of the few instances in which the DOJ actually participated in a case involving agriculture monopolies. Despite arguing that competition policy advocacy may be a better way to address farmers' concerns, the Antitrust Division of the DOJ appears not to have filed a single amicus brief from 2009 to 2016 in an agriculture-related matter.[361] Nor did DOJ appear to file a comment in USDA's call for comments on the 2016 Farmer Fair Practices Rules.[362] As an expert antitrust agency, the DOJ could have argued that the competitive injury requirement under the PSA makes it difficult for farmers to vindicate their rights to open markets and should not require finding marketwide harm but individual abuses of power.

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356 Khan, "How Monsanto Outfoxed the Obama Administration."

357 "UPDATE 1-US Justice Dept Confirms Antitrust Seed Probe," *Reuters*, January 14, 2010, https://www.reuters.com/article/monsanto-doj/update-1-us-justice-dept-confirms-antitrust-seed-probe-idUSN1412458720100114; Tom Philpott, "DOJ Mysteriously Quits Monsanto Antitrust Investigation," *Mother Jones*, December 1, 2012, https://www.motherjones.com/food/2012/12/dojs-monsantoseed-industry-investigation-ends-thud/.

358 Tom Philpott, "DOJ Mysteriously Quits Monsanto Antitrust Investigation."

359 Bowman v. Monsanto, 569 U.S. 278 (2013).

360 Brief for the United States as Amicus Curiae, Bowman v. Monsanto, 569 U.S. 278 (2013) (No. 11-796).

361 The *Bowman* brief was filed by the Department of Justice's Solicitor General's office and not signed by any member of the Antitrust Division or USDA.

362 "Poultry Grower Ranking Systems - Docket Browser," Regulations.gov, U.S. Government, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=GIPSA-2016-PSP-0010-RULEMAKING; "Scope of Sections 202(a) and (b) of the Packers and Stockyards Act - Docket Browser," Regulations.gov, U.S. Government, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=GIPSA-2016-PSP-0009-RULEMAKING; "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act - Docket Browser," Regulations.gov, U.S. Government, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=GIPSA-2016-FGIS-0008-RULEMAKING.

Former DOJ antitrust official Gene Kimmelman in 2018 responded to criticism of the USDA and DOJ's handling of the GIPSA hearings by pointing to congressional pressure and ultimately to "the reality of politics on top of antitrust and regulatory policy...[,] the politics of agribusiness."[363] Such passive excuses reflect an unwillingness to recognize that administration officials can and do shape these politics through policy choices, and did so here in ways that harmed farmers and furthered consolidation in the food supply.

AIRLINES AND ONLINE TRAVEL AGENCIES

In 2009, the airline industry faced strong economic headwinds from the financial crisis and an ensuing recession, and was also in the throes of a wave of consolidation that predated—but also accelerated under—the Obama administration. Two major airline mergers created four giants, with the average domestic airline ticket price increasing by more than 18 percent between 2010 and 2014.[364] The average daily number of flights from small airports decreased every year of Obama's two terms in office.*

Airlines are the prototypical story of deregulation. From the 1930s until 1978, the federal government's Civil Aeronautics Board regulated the airline industry. The CAB regulated how the airlines did business and what routes they had to serve. In exchange for serving those routes and following the CAB's rules, the CAB promised airlines a 12 percent rate of return.[365] Thinking that deregulating the airline industry would lead to lower prices and more innovative service, the Carter administration oversaw passage of the Airline Deregulation Act of 1978. The Carter administration assumed that, even with the end of public route and price-setting, antitrust would continue to foster competition to discipline airlines.[366]

Yet as airline deregulation wrapped up in 1980, the incoming Reagan administration was poised to defang antitrust enforcement. Under the new regulatory regime, the Department of Transportation (DOT) and Department of Justice would share authority over airlines; the FTC and individual states would, for the most part, have little power, because the FTC was excluded

363 Transcript of FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Hearings on Competition and Consumer Protection in the 21st Century, November 1, 2018, 252.

364 Comment of Airlines for America, "Part One: Proposals for Fundamental Reform of DOT Economic Regulation and Enforcement," Notification of Regulatory Review, DOT-OST-2017-0069, December 1, 2017, 6 of Appendix A: "U.S. Airline Industry Review: Allocating Capital to Benefit Customers, Employees and Investors."

365 "40 Years After Deregulation, Remaining Challenges for Airlines and Public Policy," The Brookings Institution, October 30, 2018, https://www.brookings.edu/wp-content/uploads/2018/11/es_20181030_airline_deregulation_transcript.pdf.

366 Alfred E. Kahn, "Deregulatory Schizophrenia," *California Law Review* 75, no. 3 (May 1987): 1059 ("While prepared to defend enthusiastically the deregulation with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement."). See also Kahn, "Deregulatory Schizophrenia," 1065 ("On the other hand, I think Professor Schwartz's worries about our ending up with only three or four carriers are probably unfounded, although if we run into a major recession, who can be sure? I doubt that even the Reagan Administration would permit a merger among the six largest carriers-American, United, Delta/Western, Northwest/ Republic, Texas Air, and TWA/Ozark.").

by statute and states were preempted. The combination of deregulation and permissive antitrust enforcement that characterized the Reagan, Clinton, and both Bush administrations shaped an airline industry susceptible to booms and busts. After the September 11 attacks, the airline industry experienced another one of these cycles: U.S. Airways and America West consolidated and, after swift approval,[367] brought the number of national airlines down from nine to eight.[368]

The cyclical trend toward consolidation would prove to be just starting as then-Senator Obama ran for president. Just days before his election in 2008, the Bush DOJ announced it had cleared Delta's merger with Northwest Airlines after a "thorough, six-month investigation."[369] The merger would be good for U.S. flyers, the Bush DOJ said, and would not hurt competition in the airline industry.

President Obama's DOJ would, despite his promise to reinvigorate antitrust enforcement, oversee three more airline mergers: United-Continental, Southwest-AirTran, and American-U.S. Airways. Instead of outright stopping the record-setting combinations of major airlines, enforcers fixated on narrow "city-pair" markets, examining whether the merging parties both served the same routes. Repeatedly, Obama administration officials waved through headline-grabbing mergers and acquisitions and justified them as "targeted" fixes. Despite these "targeted" fixes enforcers arranged, airlines became more powerful until they became a sturdy oligopoly of just four players: United, American, Delta, and Southwest—with a handful of minor carriers like JetBlue, Hawaiian, and Alaska. Fares and fees climbed, as did complaints and outsourcing to squeeze workers.[370] Cities across the country, like Memphis and Cincinnati, suffered as they lost service and, consequently, local businesses that need access to convenient transportation to thrive.

There were three key developments in the Obama administration's airline industry record: the airline mergers overseen by the DOJ, Google's purchase of flight-comparison software leader ITA, and DOT consumer protection rulemakings.

AIRLINE CONSOLIDATION ACCELERATES

The Obama-era DOJ's first big test in airline industry consolidation came with United's $3 billion acquisition of Continental Airlines in May 2010. *The New York Times* predicted that, though the deal would make United the world's largest airline, it would face "renewed regulatory zeal

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367 The Bush DOJ closed its investigation a little more than one month after the merger was announced. Micheline Maynard, "US Airways and America West Plan to Merge," *The New York Times*, May 20, 2005, https://www.nytimes.com/2005/05/20/business/us-airways-and-america-west-plan-to-merge.html; "Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the America West/US Airways Investigation," press release, Department of Justice, June 23, 2005, https://www.justice.gov/archive/atr/public/press_releases/2005/209709.htm.

368 "U.S. Backs Air Merger," *Reuters*, June 24, 2005, https://www.nytimes.com/2005/06/24/business/us-backs-air-merger.html; Ben Mutzabaugh, "Era of Airline Merger Mania Comes to a Close with Last US Airways Flight," *USA Today*, October 15, 2015, https://www.usatoday.com/story/travel/flights/todayinthesky/2015/10/15/airline-mergers-american-delta-united-southwest/73972928/.

369 "Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation," press release, Department of Justice, October 29, 2008, https://www.justice.gov/archive/opa/pr/2008/October/08-at-963.html.

370 Karl Russell, "Why We Feel So Squeezed When We Fly," *The New York Times*, May 2, 2017, https://www.nytimes.com/interactive/2017/04/17/business/how-flying-changed.html.

in Washington."[371] "Unlike the Bush administration's six-month review of the Delta-Northwest deal," the paper of record reported, "analysts expect a lengthier and more complex review of this merger."[372]

Four months later, the DOJ said it would not challenge the deal.[373] Instead, it only required United and Continental to give up slots at Newark International Airport to Southwest Airlines.[374] DOJ Assistant Attorney General for Antitrust Christine Varney touted the settlement because it "typified" the DOJ's "philosophy of targeted solutions."[375] Because United and Continental tended not to serve the exact same routes, Varney viewed the two airlines as having "largely complementary networks"; thus, the agency allowed the merger to proceed "for the benefit of consumers but without creating obstacles to a transaction that was otherwise lawful under the antitrust laws."[376] DOJ did not appear to substantially consider other potential market power concerns raised by the merger, such as power over employees, subcontractors, or airline data, nor did enforcers acknowledge the limits of the "city pair" overlap approach.

A month after United's acquisition cleared, Southwest took advantage of a permissive legal environment and agreed to buy competing low-cost airline AirTran Airways for $1.4 billion.[377] Though Southwest had up until then rarely engaged in acquisitions—the merger was only the company's third in 30 years—Southwest's then-CEO Gary Kelly explained that, "As our competition changes, we don't live in a vacuum."[378] Southwest, Columbia Business School professor Brett R. Gordon said at the time, "is following the trend in the industry: merge or acquire in order to stay alive and competitive."[379] Roughly six months later, in April 2011, DOJ blessed that purchase too. Citing its "thorough investigation," DOJ said that despite some overlaps between Southwest and AirTran's service, it was convinced that the "consumer benefits" from the merged company made the merger acceptable.[380]

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371 Jad Mouawad and Michael J. de la Merced, "United and Continental Said to Agree to Merge," *The New York Times*, May 2, 2010, https://www.nytimes.com/2010/05/03/business/03merger.html.

372 Mouawad and de la Merced, "United and Continental Said to Agree to Merge."

373 "United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns," press release, Department of Justice, August 27, 2010, https://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response.

374 A "slot" is a right for an airline to take off or land at specific airports at certain times. Many airports grant access to slots and other airport facilities with "long-term exclusive contracts" with airlines, operating as a barrier for other airlines to use airports. Federico Ciliberto and Jonathan Williams, "Limited Access to Airport Facilities and Market Power in the Airline Industry," *The Journal of Law & Economics*, 53, no. 3 (2010): 467-495.

375 Christine A. Varney, "Overview of 2010 Antitrust Enforcement," remarks prepared for the 7th Annual Institute on Corporate Securities and Related Aspects of Mergers and Acquisitions, October 7, 2010, https://www.justice.gov/atr/speech/overview-2010-antitrust-enforcement.

376 Varney, "Overview of 2010 Antitrust Enforcement." Within a year of overseeing the United-Continental investigation, Varney became a partner at Cravath, Swaine & Moore, which represented United in the merger. A retrospective study of the United-Continental merger found a statistically significant price increase on those routes where United and Continental did compete directly against each other. Ying Shen, "Market Competition and Market Price: Evidence From United/Continental Airline Merger," *Economics of Transportation*, 10 (2017).

377 Jad Mouawad, "Southwest, Determined to Expand, Buys AirTran," *The New York Times*, September 27, 2010, https://www.nytimes.com/2010/09/28/business/28air.html.

378 Mouawad, "Southwest, Determined to Expand, Buys AirTran;" Mike Esterl, "Discount Carriers Southwest, AirTran Tie Knot," *The Wall Street Journal*, September 28, 2010, https://www.wsj.com/articles/SB10001424052748704654004575517510208350940?st=7s7brfjd795ytuz.

379 Mouawad, "Southwest, Determined to Expand, Buys AirTran."

380 "Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest's Acquisition of Airtran," press release, Department of Justice, April 26, 2011, https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation.

The final major airline merger of the Obama administration, between American Airlines and U.S. Airways in 2013, created one of the world's largest airlines. At first, DOJ appeared to slam the brakes on further airline consolidation. In its August 2013 complaint seeking to block the merger, the DOJ appeared to acknowledge that airline consolidation had failed flyers. "In recent years," DOJ observed, "the major airlines have, in tandem, raised fares, imposed new and higher fees, and reduced service. Competition has diminished and consumers have paid a heavy price."[381] Predicting that the airlines would claim that their merger would advance efficiency, DOJ pointed to the 2010 United-Continental merger, arguing, "The American public has seen this before."[382] Reflecting on the United-Continental and Southwest-AirTran mergers, DOJ noted that both combinations subsequently reduced service.[383] In other words, DOJ acknowledged that "increasing consolidation among large airlines has hurt passengers."[384] DOJ pointed out that U.S. Airways and American competed directly against each other on "thousands" of routes.[385] Unless DOJ stopped U.S. Airways from merging with American, higher prices "would be right around the corner."[386]

Just as notably, Assistant Attorney General for the DOJ Antitrust Division Bill Baer insisted that the merger had to be stopped outright. Potential remedies such as selling off slots at Reagan National Airport—where the two airlines would have had a majority of all slots—would not make the merger acceptable, he said, because the airlines "want to fly where they fly without competition."[387] The merger would hurt competition in the national air travel market "regardless of whether you have an issue at Washington National or not."[388]

Despite the strong language in its complaint, DOJ's November 2013 settlement only required the new American Airlines to give up slots at National and LaGuardia airports. What was particularly remarkable about the settlement is that it didn't address any of the key harms the complaint alleged.[389] Days after submitting the settlement, Baer told a House subcommittee that the settlement was "actually better than a full-stop injunction" because an outright block would have preserved an "already pretty cozy" status quo.[390] "[O]pening up" LaGuardia and National, according to Baer, would be a "real opportunity here to positively change the competitive

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381 Complaint, United States. v. US Airways Group, August 13, 2013, 3, https://www.justice.gov/atr/case-document/file/514531/download.

382 Complaint, United States v. US Airways, 7.

383 Complaint, United States v. US Airways, 25.

384 Complaint, United States v. US Airways, 14.

385 Complaint, United States v. US Airways, 3.

386 Complaint, United States v. US Airways, 26.

387 Justin Elliott, "The American Way," *ProPublica*, October 11, 2016, https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust.

388 Elliott, "The American Way."

389 Lina Khan, "The Government Says Airlines Prey on Consumers. That's the Government's Fault." *The Washington Post*, July 9, 2015, https://www.washingtonpost.com/posteverything/wp/2015/07/09/the-government-says-airlines-prey-on-consumers-thats-the-governments-fault/.

390 "Antitrust Enforcement Agencies," hearing before the House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, November 15, 2013, 48, https://docs.house.gov/meetings/JU/JU05/20131115/101486/HHRG-113-JU05-Transcript-20131115.pdf.

dynamic."[391] Critics have since raised questions about potential political interference over the decision to settle the merger.[392]

This "targeted" approach failed, even by the Obama DOJ's own standards. Despite its claims, DOJ's focus on narrow markets, at the expense of economic power, has not been unambiguously beneficial for flyers. Studies note increased fares, fees, and worse service, among other developments.[393] A few giant institutional investors have "common ownership" in the four major U.S. airlines, resulting in higher ticket fares, according to one 2018 paper.[394] Another study found that the "legacy" airlines—the major airlines minus Southwest—appear to be able to coordinate offering fewer seats with other airlines through their public earnings calls.[395]

Having fewer airlines also increased the power airlines have as employers over their workers. The four giant airlines are able to reduce the number of pilots, flight attendants, mechanics, agents, and technicians working in the industry. This, in turn, gives workers fewer choices and companies to turn to for better working terms. Meanwhile, airlines have increasingly outsourced much of their service and support work; outsourced workers, who are often paid less than they would be in-house at an airline, went from 19 percent of all aviation-related work in 2001 to 30 percent in 2018, economist Brian Callaci found.[396] Similarly, major airlines appear to have outsourced operations to regional airlines, which also tend to pay their workers less. Besides regional airlines' lower labor costs, the arrangement also gives the major airlines more control over last-minute schedule changes, with fewer legal responsibilities.[397] Ultimately, the four major airlines have incredible buyer power over their workers, as well as the staffing firms and smaller regional airlines with which they contract.

GOOGLE-ITA DRIVES CONSOLIDATION AMONG ONLINE TRAVEL AGENCIES

The 2010 Google-ITA merger demonstrates the tendency of concentrated power to compel concentration elsewhere. In this case, the online travel industry became an indirect casualty of antitrust enforcers' inability to see Google's power, to the detriment of flyers and upstart online travel businesses.

391 "Antitrust Enforcement Agencies," 48.

392 Elliott, "The American Way."

393 Elliott, "The American Way"; Fiona Scott Morton, "Benefits of Preserving Consumers' Ability to Compare Airline Fares via OTAs and Metasearch Sites," Travel Fairness Now, May 15, 2015, https://www.airtravelfairness.org/wp-content/uploads/2017/09/CRAFinalReport.pdf.

394 José Azar, Martin C. Schmalz, and Isabel Tecu, "Anticompetitive Effects of Common Ownership," *The Journal of Finance*, 73, no. 4 (August 2018), https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.12698.

395 Gaurab Aryal, Federico Ciliberto, and Benjamin T. Leyden, "Coordinated Capacity Reductions and Public Communication in the Airline Industry," CESifo Working Paper No. 8115 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544501&dgcid=ejournal_htmlemail_cesifo:working:paper:series_abstractlink.

396 Brian Callaci, "Fissuring in Flight: Consolidation and Outsourcing in the US Domestic Airline Industry, 1997-2018," Communications Workers of America, January 7, 2020, https://cwa-union.org/sites/default/files/20200108-fissuring-in-flight.pdf.

397 Callaci, "Fissuring in Flight."

ITA sold software that allowed online travel agency intermediaries (OTAs), like Hotwire or TripAdvisor, to present flyers with flight information from multiples airlines so that flyers could compare airline fares.[398] OTAs were marketing channels for airlines, earning revenue by getting marketing fees from airlines for referring customers. Google sought to use ITA's proprietary software to develop its own flight-comparison tool to compete with OTAs. Though ITA had three other software competitors, ITA was, according to DOJ's complaint, "dominant" and the only price comparison system "currently capable of supporting many of the innovative comparative flight search services that are the core attraction" for travel sites.[399] On its website promoting the deal, Google argued that its purchase of ITA "will not change existing market shares" and collected quotations from prominent antitrust scholars like Joshua Wright and Andrew Gavil minimizing the acquisition's risk of breaking the antitrust laws.[400]

DOJ eventually agreed in late 2011 not to challenge the merger in exchange for conditions that ITA honor existing software licenses to OTAs, continue to offer its software to OTAs on fair terms, and set up an internal "firewall." The firewall would prevent Google from exploiting information from OTAs to benefit its own burgeoning OTA: Google Flights.[401] DOJ official Joseph Wayland said that the settlement "assures that airfare comparison and booking Web sites will be able to compete effectively, providing benefits to consumers."[402] Antitrust expert Herbert Hovenkamp called the settlement "a victory for both sides because the parties get to go ahead with the merger and the Justice Department gets to go to the public and say, 'We've protected you from the anticompetitive possibilities.'"[403]

OTAs faced three business threats. First, they would have to rely on the benevolence of a new powerful competitor, Google, to keep access to the software that let them present flying options to customers. Second, Google would become a competitor, and could underprice OTAs by cross-subsidizing its online travel search business with its general search business. Third, airline consolidation had radically eroded competition for consumers, so airlines no longer needed to pursue a variety of marketing channels to attract customers. Airlines could reduce the payments they made to OTAs, and they could even exercise power to withhold flight price, availability, and scheduling information from online travel agencies. Their goal was to make it harder for flyers to compare fare prices. Airlines could accomplish this goal by directing customers to their own

398 Complaint, United States v. Google Inc. and ITA Software Inc. (D.D.C. April, 8, 2011), https://www.justice.gov/atr/case-document/file/497686/download. Hotwire, the DOJ explains, is an online travel agency (OTA) and TripAdvisor, a metasearch site. Both are examples of OTIs because they help travelers compare travel information, but metasearch sites do not let people purchase fares on their sites. Instead, they direct users toward the hotel or airline site.

399 Complaint, United States v. Google Inc. and ITA, 11.

400 "Facts About Google's Acquisition of ITA Software," Google (emphasis removed), https://www.google.com/press/ita/; "Facts About Google's Acquisition of ITA Software: What People are Saying," Google, https://www.google.com/press/ita/saying.html; Ville Heiskanen and Jeff Bliss, "Google's ITA Acquisition to Face Scrutiny, UBS Says," *Bloomberg*, July 2, 2010, https://www.bloomberg.com/news/articles/2010-07-02/google-s-ita-acquisition-to-face-tough-scrutiny-ubs-says?sref=ZvMMMOkz.

401 Competitive Impact Statement, Department of Justice, Antitrust Division, United States v. Google Inc. and ITA Software Inc., https://www.justice.gov/atr/case-document/file/497671/download.

402 Claire Cain Miller, "U.S. Clears Google Acquisition of Travel Software," *The New York Times*, April 8, 2011, https://www.nytimes.com/2011/04/09/technology/09google.html.

403 Miller, "U.S. Clears Google Acquisition of Travel Software."

websites by withholding their flight information from third party OTAs, or by putting conditions on OTAs that prevented the intermediaries from showing certain tickets to consumers.[404]

Delta was a leader in organizing control of its data to structure broader flight purchasing markets. In 2010, as it was finishing its corporate integration following its 2008 acquisition of Northwest, Delta began cutting off flight information from travel websites, including notables like Hipmunk and TripAdvisor among, by one OTA's estimate, more than 30 others.[405] Other airlines enacted similar policies; American Airlines withdrew its flight information from Orbitz and Expedia in 2011 as a result of better bargaining leverage.[406] American's website that year required travel agencies to agree that its "content and data constitute American's valuable property" and placed strict restrictions on redistributing American information.[407]

One motivation for airlines to guard their ticket information zealously—besides discouraging price comparison—is control: United Airlines listed the potential failure or interruption of service from "third-party service providers," including online travel sites, as a "risk factor" in every one of its annual reports from 2009 to 2016.[408] OTAs quickly found themselves having to bargain with fewer airlines for their flight information. In the end, flyers suffered as they must pay more, or spend more effort toggling between different airlines, as opposed to comparing options in one place.

Together, these pressures helped produce a wave of more than a dozen defensive acquisitions in the OTA industry throughout President Obama's first and second terms. Notable mergers and acquisitions include Priceline's $1.8 billion purchase of Kayak and Expedia's $632 million purchase of Trivago, both in 2013.[409]

The wave culminated in Expedia's $1.3 billion purchase of Orbitz in 2015. DOJ declined to challenge the transaction at all, despite Expedia's $280 million purchase of Travelocity earlier that year. The American Hotel and Lodging Association claimed that the merger would result in Expedia and Priceline having 95 percent of the $152 billion per year online travel industry.[410]

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404 Gregory Karp, "American Airlines takes fares off Orbitz," *The Chicago Tribune*, August 26, 2014; Matt Stoller, "The Wave of Terror in American Commerce (Big issue 6-21-2019)," BIG, June 21, 2019, https://mattstoller.substack.com/p/the-wave-of-terror-in-american-commerce.

405 Delta and Northwest reportedly needed 18 months after their merger in April 2008 to completely integrate. Seth W. Feaster, "How to Merge Two Airlines," *The New York Times*, May 18, 2011, https://archive.nytimes.com/www.nytimes.com/interactive/2011/05/18/business/delta-northwest-merger-graphic.html?_r=0; a Skift commentator called the estimate that Delta cut off more than 30 sites "a bit misleading," though noted that Delta began cutting travel sites off from flight information since 2010. Dennis Schaal, "Delta Keeps Pruning Website Distribution Relationships," *Skift*, June 21, 2014, https://skift.com/2014/06/21/delta-keeps-pruning-website-distribution-relationships/.

406 Jane L. Levere, "American Airlines in Fee Battle With Web Agencies," *The New York Times*, January 4, 2011, https://www.nytimes.com/2011/01/05/business/05air.html?pagewanted=all.

407 "Agency – AA Addendum To The ARC Reporting Agreement," American Airlines, December 19, 2006, accessed via the Wayback Machine, https://web.archive.org/web/20110210203600/http:/www.aa.com/i18n/agency/Agency/Agency_Addendum.jsp.

408 See Investor Relations, United Airlines, https://ir.united.com/.

409 Rafat Ali, "The Consolidation in the Online Travel Booking Space Over the Last Two Years," *Skift*, July 7, 2014, https://skift.com/2014/07/07/the-consolidation-in-the-online-travel-booking-space-over-the-last-two-years/.

410 Cecilia Kang and Brian Fung, "Expedia and Orbitz are Merging. Here's What it Means for You," *The Washington Post*, September 16, 2015, https://www.washingtonpost.com/news/the-switch/wp/2015/09/16/expedia-and-orbitz-are-merging-heres-what-it-means-for-you/.

Yet Assistant Attorney General Baer said DOJ "concluded that the acquisition is unlikely to harm competition and consumers" and pointed to, among other factors, the "rapidly evolving" nature of the online travel business to justify inaction.[411] In 2020, regulators and competitors noted that the OTA market is heavily concentrated, and consumers face few options for comparing airline ticket prices.[412] Meanwhile, the policy-created duopoly of Expedia and Priceline began extracting revenue elsewhere in the travel space, focusing on areas they had market power, such as hotels.[413]

CONSUMER PROTECTION RULES PROVE INSUFFICIENT

Having presided over waves of consolidation in the travel and air industry, the Obama administration did try to pass some valuable consumer protection rules. The Department of Transportation passed rules on tarmac delays, flight delay transparency, and flyer complaints, which they made easier to file.[414] And in President Obama's second term, DOT began investigating airlines' practice of withholding flight fare, schedule, and availability information from online travel agencies and metasearch sites like Hipmunk, culminating in a Request For Information for a study in October 2016.[415]

But absent stronger limits on market power, federal action proved limited both by industry structure and time. In 2015, for example, DOJ opened an investigation into whether the four major airlines had colluded with each other to raise fares. But it closed the investigation quietly days before President Trump's inauguration, struggling to find explicit proof of collusion.[416] *The Wall Street Journal* reported that DOJ investigators "still harbor concerns about what they view as cozy relationships in the industry, but haven't found conduct that clearly crossed the line into an antitrust violation."[417] As DOJ had warned in the American-US Airways merger in 2013, coordination of fares or other offerings "becomes easier as the number of major airlines dwindles and their business models converge."[418]

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411 Davey Alba, "Expedia Buys Travelocity, Merging Two of the Web's Biggest Travel Sites," *Wired*, January 23, 2015, https://www.wired.com/2015/01/expedia-buys-travelocity-merging-two-webs-biggest-travel-sites/; "Justice Department Will Not Challenge Expedia's Acquisition of Orbitz," press release, Department of Justice, September 16, 2015, https://www.justice.gov/opa/pr/justice-department-will-not-challenge-expedias-acquisition-orbitz.

412 Rachel Lerman, "Government Kept to the Sidelines as Google Got Big. Now Regulators Have the Chance to Rein the Company Back In," *The Washington Post*, October 12, 2020, https://www.washingtonpost.com/technology/2020/10/12/google-antitrust-ita-merger/.

413 Gerrit De Vynck and Olivia Zaleski, "Hotels Plan Lobbying Push Over Priceline-Expedia 'Monopoly,'" *Bloomberg*, May 5, 2017, https://www.bloomberg.com/news/articles/2017-05-05/u-s-hotels-plan-attack-on-the-priceline-expedia-monopoly?sref=q0qR8k34.

414 Rachel Y. Tang, "Airline Passenger Rights: The Federal Role in Aviation Consumer Protection," Congressional Research Center, R43078, August 17, 2016, https://fas.org/sgp/crs/misc/R43078.pdf.

415 "Exploring Industry Practices on Distribution and Display of Airline Fare, Schedule, and Availability Information," U.S. Department of Transportation, Office of the Secretary, *Federal Register* 81, no. 210 (October 31, 2016): 75481-2, October 31, 2016, https://www.govinfo.gov/content/pkg/FR-2016-10-31/pdf/2016-26191.pdf.

416 Brent Kendall and Susan Carey, "Obama Antitrust Enforcers Won't Bring Action in Airline Probe," *The Wall Street Journal*, January 11, 2017, https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781?st=y6iy5s6ru7pe1y5.

417 Brent Kendall and Susan Carey, "Obama Antitrust Enforcers Won't Bring Action in Airline Probe."

418 Complaint, U.S. et al. v. US Airways Group & AMR Co., 17.

AMAZON AND E-COMMERCE

When Obama was inaugurated, the online retail industry was competitive, with legacy retailers and online-only stores like Amazon competing for newly wired customers. Many of Amazon's innovations were also new. Prime had launched in 2004, and the Kindle had launched in 2007. In 2009, the corporation's revenue was just shy of $25 billion.[419]

Yet Amazon presented a problem for Obama-era enforcers. CEO Jeff Bezos' strategy was to use low consumer prices to acquire bargaining power against suppliers. Adherents of the consumer welfare model of antitrust saw such a business model as evidence of efficiency, not squeezing workers and suppliers with superior bargaining power. As Amazon grew in size and scope, the administration not only failed to recognize a problem, but in fact delivered a big win to Amazon in the form of an antitrust suit against its competitors in book publishing.[420]

Bezos began Amazon in 1994 with the goal of forming, according to early employees, "a 'utility' that would become essential to commerce."[421] By 1996, the company's primary market of book sales was growing rapidly, especially because Bezos was able to raise large amounts of money from venture capitalists and Wall Street and lose it in a bid to win market share. That year, the corporation lost $5.8 million on sales of $15.7 million; Amazon's financiers saw its monopoly potential.[422] From 1996 to 2002, the corporation raised $2.2 billion in bonds and stock offerings, continuing to burn cash.[423] In 1999, it launched a toys and video games division, leveraging its book customers into new areas.[424]

The Bush administration allowed Amazon to structure the online markets in which it operated. In many areas of retail that Amazon entered, it sold products at a loss to take market share from competitors, a tactic known as predatory pricing. The corporation also acquired 14 companies during the Bush years.[425] In that same period it launched its Prime membership program and Amazon Web Services and continued to roll out its new third-party merchant platform.[426] Then, it began bargaining aggressively against suppliers, such as book publishers, logistics carriers, and warehouse workers. By the time of Obama's inauguration, Amazon's key monopolization

419 "2009 Annual Report," Amazon.com, 25.

420 Jeffrey Rosen, "How the Obama Administration's Suit Against Book Publishers Proves the Bankruptcy of Our Antitrust Laws," *The New Republic*, April 18, 2012, https://newrepublic.com/article/102740/apple-amazon-anti-trust-justice-department-book-publishers.

421 Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal*, 126, no. 3 (2017): 755.

422 "Form S-1, Amazon.com, Inc." May 14, 1997, https://www.sec.gov/Archives/edgar/data/1018724/0000891020-97-000839.txt.

423 "Amazon Posts a Profit," *CNNMoney*, January 22, 2002, https://perma.cc/SMF3-2UCK.

424 "1999 Annual Report," Amazon.com, 2.

425 "Big Tech Mergers: Amazon," American Economic Liberties Project, https://www.economicliberties.us/big-tech-merger-tracker/#.

426 Matt Day and Jackie Gu, "The Enormous Numbers Behind Amazon's Market Reach," *Bloomberg*, March 27, 2019, https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/.

strategies were in place: predatory pricing, mergers, leveraging power from one market into another, and tying products.

The 2008 recession hit small retailers particularly hard.[427] From 2009 to 2016, local retail businesses faced a period of stagnation, marked by declining access to capital and a rise in tax incentives for big-box corporations. Over the same period, Amazon's annual revenue increased by 700 percent.[428] The Obama administration's approach to Amazon adhered to the consumer welfare standard: corporations could engage in takeovers and anticompetitive behavior, as long as consumer prices were kept low. By carefully leveraging Obama antitrust officials' presupposition that lower prices could only be good, Amazon was free to leverage its position to expand its dominance in ever-widening sectors of the economy. It did so through three strategic beachheads: books, retail, and logistics.

AMAZON BUILDS GATEKEEPING POWER IN THE BOOK MARKET

"Jeff once said he couldn't imagine anything more important than reinventing the book," said top Amazon executive Steve Kessel in 2008.[429] And over the following years, Amazon remade the book market in its image. The corporation acquired smaller online booksellers like abebooks.com (2008), bookfinder.com (2008), bookdepository.com (2011), and book review website Goodreads (2013). The DOJ and FTC declined to review any of these acquisitions. By 2014, Amazon captured 60 to 70 percent of online physical and e-book sales.[430] The corporation also controlled a huge portion of the e-book space; with its 2007 release of Kindle, Amazon controlled most of the e-book market.[431]

Amazon's power in e-books was existentially threatening for book publishers. After establishing control, Amazon forced e-book prices down to $9.99—unsustainable prices for the rest of the industry. To keep Amazon at bay, some publishers signed new pricing deals with Apple that gave the publishers more control over prices for e-books purchased through Apple. The Department of Justice, fixated on maintaining low consumer prices, filed an antitrust lawsuit against five major book publishers and Apple for price-fixing.

427 "Dynamism in Retreat: Consequences for Regions, Markets, and Workers," Economic Innovation Group, February 2017, https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf.

428 "Annual Net sales of Amazon 2004-2019," Statista, May 25, 2020, https://www.statista.com/statistics/266282/annual-net-revenue-of-amazoncom/.

429 Brad Stone, "Amazon Accelerates Its Move to Digital," *The New York Times*, April 7, 2008, https://www.nytimes.com/2008/04/07/technology/07amazon.html.

430 Polly Mosendz, "Amazon Has Basically No Competition Among Online Booksellers," *The Atlantic*, May 30, 2014, https://www.theatlantic.com/business/archive/2014/05/amazon-has-basically-no-competition-among-online-booksellers/371917.

431 Mosendz, "Amazon Has Basically No Competition Among Online Booksellers"; Matt Stoller, Pat Garofalo, and Olivia Webb, "Understanding Amazon: Making the 21st-Century Gatekeeper Safe for Democracy," American Economic Liberties Project, July 24, 2020, https://www.economicliberties.us/our-work/understanding-amazon-making-the-21st-century-gatekeeper-safe-for-democracy/#.

AMAZON CONSOLIDATES ONLINE RETAIL

Amazon was similarly aggressive in retail. Amazon's retail acquisitions during the Obama years included Zappos, which competed for the shoe e-retail market, Diapers.com, and Soap.com, which competed in their respective consumer products markets.[432] The Obama FTC and DOJ, focused as they were on low prices, looked the other way—even when some of the acquisitions involved anticompetitive behavior.

The case of Quidsi, parent company of Diapers.com and Soap.com, is illustrative.[433] In 2008, Quidsi was one of the fastest-growing e-commerce companies, competing with Amazon in baby products and cleaning products. In 2009, Amazon offered to buy the company. Shortly after the executives declined the overture, Amazon slashed its baby products prices by up to 30 percent. Quidsi executives noticed that Amazon's pricing algorithm had been pegged to Diapers.com prices; when Diapers.com lowered its prices, the Amazon prices declined accordingly. Bezos reportedly threatened to drive diaper prices to zero, even as Amazon was losing $200 million a month with this predatory pricing.[434] Quidsi was forced into a sale with Amazon, which then raised its prices on baby products. The FTC investigated the acquisition, but determined no action was warranted.[435] The focus was, again, on maintaining low consumer prices in the short-term, even if competitors were destroyed along the way and prices later went up.

In addition, Amazon used what were known as price parity agreements, or most favored nation clauses, to prohibit suppliers from offering their products through other channels at more favorable prices.[436] These agreements tend to push up prices and discourage competition. European competition authority enforcers took action in Europe, but Amazon faced no pressure in the United States until Senator Richard Blumenthal (D-CT) wrote a letter in 2018.[437]

AMAZON BUILDS A LOGISTICS EMPIRE

Amazon extended its reach into the logistics market, largely through internal investment. From 2009 to 2016, Amazon increased its control of warehouse infrastructure from less than 25 million

432 Ben Parr, "Here's Why Amazon Bought Zappos," *Mashable*, July 22, 2009, https://mashable.com/2009/07/22/amazon-bought-zappos/.

433 See Khan, "Amazon's Antitrust Paradox," 768-774.

434 Will Oremus, "The Time Jeff Bezos Went Thermonuclear on Diapers.com," *Slate*, October 10, 2013, https://slate.com/technology/2013/10/amazon-book-how-jeff-bezos-went-thermonuclear-on-diapers-com.html; "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations," US House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

435 "Closing Letter to Counsel for Quidsi, Inc.," Federal Trade Commission, March 23, 2011, https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/amazoncom-inc-quidsi-inc.

436 Petition for the Investigation of Amazon.com, Inc., submitted by the International Brotherhood of Teamsters, Communications Workers of America, United Food & Commercial Workers International Union, Service Employees International Union, and Change to Win, February 2020, http://www.changetowin.org/wp-content/uploads/2020/02/Petition-for-Investigation-of-Amazon.pdf.

437 Jonathan B. Baker and Fiona Scott Morton, "Antitrust Enforcement Against Platform MFNs," *Yale Law Journal* 127, no. 7 (2019): 2176, 2185; Letter from Senator Blumenthal to Assistant Attorney General Makan Delrahim, December 19, 2018, https://www.blumenthal.senate.gov/imo/media/doc/12.19.18%20-%20DOJ%20-%20Price%20Parity.pdf.

square feet in 2009 to almost 125 million in 2015.[438] In the one-year span of 2015 to 2016, Amazon doubled its number of distribution facilities.[439]

But Amazon attempted more than just to expand capacity. Following the same playbook it used for other industries, Amazon also expanded its control of logistics through acquisitions. In 2012, Amazon acquired Kiva Systems, a company producing shipping fulfillment robotics. This move, in the words of a *Bloomberg* article, "effectively gave Jeff Bezos…command of an entire industry."[440] The acquisition went through without complaint from antitrust agencies. A few months later, when Amazon halted Kiva's other contracts to keep the robots solely for Amazon, the complaints from the businesses that had used Kiva robotics were unheeded. Amazon would effectively dominate yet another platform, this one for modern warehousing.

As Amazon's logistics empire grew, the corporation hired warehouse workers at a rapid clip. In 2009, there were 24,300 employees, including both corporate and low-wage warehouse workers.[441] By 2015, that number had grown by nearly eight times to 230,800.[442] The Obama administration, eager for jobs during a recession, ignored reports from workers that conditions inside the warehouses were abusive and dangerous. In 2013, President Obama chose a Chattanooga, Tennessee, Amazon warehouse as a site to announce corporate tax cuts as part of a push to create more jobs. The American Booksellers Association sent Obama a letter expressing disappointment over Amazon being "touted as a 'jobs creator'… when, frankly, the exact opposite is true," but the administration did not publicly respond.[443]

Amazon's control of the books, online retail, and logistics industries fueled the corporation's most explosive growth to date. Its revenue exploded from 2009 to 2016, growing by 444 percent to $136 billion. E-retail sales doubled between 2011 and 2016, and Amazon's share of this ever-larger pie increased from approximately 25 percent to 46 percent.[444] It acquired the kind of power that *The New Yorker* called "something radically new in the history of American business."[445] Fortunately, lawmakers in Congress are beginning to catch up. The House Judiciary Committee's 2020 report on competition in digital markets makes a number of important recommendations

438 Stacy Mitchell and Olivia LaVecchia, "Amazon's Stranglehold: How the Company's Tightening Grip on the Economy Is Stifling Competition, Eroding Jobs, and Threatening Communities," Institute for Local Self-Reliance, November 29, 2016, 49, https://ilsr.org/amazon-stranglehold/.

439 Olivia LaVecchia, "Mapping Amazon's U.S. Logistics Network," Institute for Local Self-Reliance, November 29, 2016, https://ilsr.org/amazon-logistics-map/.

440 Kim Bhasin and Patrick Clark, "How Amazon Triggered a Robot Arms Race," *Bloomberg*, June 29, 2016, https://www.bloomberg.com/news/articles/2016-06-29/how-amazon-triggered-a-robot-arms-race?sref=ZvMMMOkz.

441 Harry McCracken, "Amazon's Wild 24-year Ride, From 11 Employees to 600,000-plus," *Fast Company*, April 11, 2019, https://www.fastcompany.com/90331689/amazons-wild-24-year-ride-from-11-employees-to-600000-plus.

442 McCracken, "Amazon's Wild 24-year Ride."

443 David Grogan, "ABA Criticizes President's Choice of Venue for Jobs Speech," American Booksellers Association, July 29, 2013, https://www.bookweb.org/news/aba-criticizes-president%e2%80%99s-choice-venue-jobs-speech.

444 Mitchell and LaVecchia, "Amazon's Stranglehold," 10.

445 George Packer, "Cheap Words," *The New Yorker*, February 10, 2014.

that will curtail Amazon's power.[446] Chief among them: breaking up Amazon and restructuring the corporation to eliminate the potential for abusive conduct.

DEFENSE AND AEROSPACE

In defense and aerospace, the Obama administration inherited a highly concentrated market sector with limited government bargaining power. The story of the Obama administration's approach to concentration in these industries is similar to the story across much of the U.S. political economy: feint towards action with ultimate policy deference to a concentrated status quo.

The defense and aerospace industries are structured by antitrust and procurement laws. At the end of the Cold War, the Clinton administration oversaw a dramatic consolidation of prime contractors. Fifty-one aerospace and electronics companies combined into just five, all of whom are also massive defense contractors.[447]

The Bush administration oversaw some merger and acquisition activity in the defense and aerospace sectors, but largely structured the defense environment around increased spending on warfare. Though the Obama administration oversaw a decline in spending on weapons systems, it largely retained the concentrated structure it inherited.

The administration opposed further mergers among the largest prime contractors but allowed smaller contractors and subcontractors to merge and private equity to operate aggressively. Under its watch, Orbital Sciences Corp. and the Aerospace and Defense groups of Alliant Techsystems Inc. (ATK) consolidated the rocket engine industry in 2015, the penultimate step in ICBM consolidation, which was completed with Northrop Grumman's purchase of the new Orbital/ATK in 2018.[448] The entire nuclear triad is now dependent upon Northrop Grumman, which is responsible for the new ICBMs, the B-21 bomber, and the motors that launch nuclear missiles from ballistic submarines.[449]

The same groundwork was laid in the defense communications industry when Harris bought Exelis, also in 2015, concentrating radio production and leading to the post-Obama era merger

446 Majority Staff Report and Recommendations, "Investigation of Competition in Digital Markets."

447 John A. Tirpak, "The Distillation of the Defense Industry," *Air Force Magazine*, 1998, https://www.airforcemag.com/PDF/MagazineArchive/Documents/1998/July%201998/0798industry.pdf.

448 Mike Wall, "Orbital-ATK Merger," *Space*, https://www.space.com/28515-orbital-atk-merger-private-spaceflight.html.

449 Mark Thompson, "The Broken Leg of America's Nuclear Triad," POGO, September 9, 2019, https://www.pogo.org/analysis/2019/09/the-broken-leg-of-americas-nuclear-triad/.

between L3 and Harris, which created the seventh-largest defense contracting firm and completed the consolidation of the defense communications industry.[450] Private equity companies made 129 acquisitions in the defense and aerospace industry from 2011 to 2016.[451] And Lockheed Martin purchased helicopter giant Sikorsky, prompting DOD acquisition head Frank Kendall to propose new antitrust authority to enable the Pentagon to block mergers and protect the defense supply base.[452]

"With size comes power, and the department's experience with large defense contractors is that they are not hesitant to use this power for corporate advantage," said Kendall.[453] Nevertheless, the Department of Justice and FTC resisted Kendall's entreaty, and he dropped the matter.[454]

The administration, in other words, left a highly concentrated industry alone. According to Deloitte, the top 10 largest aerospace and defense companies accounted for 86 percent of industry revenues in 2016.[455]

CONSOLIDATION INFLATES COSTS

The Obama administration also declined to improve government bargaining power by making contracting law reforms. Congress enacted two major federal acquisition reform laws during the Clinton era: the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1996. They restructured government contracting almost exclusively to the benefit of corporate interests.[456] They made it more difficult for contracting officers to get cost data from contractors; limited competition for federal contract awards; and increased the number of sole-source monopoly contracts by opening up a significant loophole, primarily around a greatly expanded definition of commercial items.[457] Together, these "reforms" effectively got rid of the government's traditional goals of ensuring fair competition and low prices, more or less freeing bureaucrats from selecting the lowest bidders and forcing them to accept fewer choices at higher cost.[458]

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450 Joe Gould, "Exelis, Harris Announce $4.75 Billion Merger," *DefenseNews*, February 6, 2015, https://www.defensenews.com/industry/2015/02/06/exelis-harris-announce-4-75-billion-merger/; "Trends in Aerospace and Defense Mergers and Acquisitions," Deloitte, 2017, https://www2.deloitte.com/tw/en/pages/manufacturing/articles/aerospace-defense-ma.html.

451 Andrew Clevenger, "Kendall's Remarks Inject Uncertainty Into M&A Market," *DefenseNews*, October 4, 2015, https://www.defensenews.com/industry/2015/10/04/kendall-s-remarks-inject-uncertainty-into-m-a-market/.

452 Aaron Mehta, "Kendall Drops Legislative Merger Restriction Push," *DefenseNews*, May 10, 2016, https://www.defensenews.com/pentagon/2016/05/10/kendall-drops-legislative-merger-restriction-push/.

453 Mehta, "Kendall Drops Legislative Merger Restriction Push."

454 Mehta, "Kendall Drops Legislative Merger Restriction Push."

455 "Merger and Acquisition Trends in Aerospace and Defense: A Closer Look at Value Creation," Deloitte, 2017, https://www2.deloitte.com/content/dam/Deloitte/tw/Documents/manufacturing/tw-aerospace-defense-trends.pdf.

456 Richard C. Loeb, "Caveat Emptor: Reversing the Anti-Competitive and Over-Pricing Policies that Plague Government Contracting," American Economic Liberties Project, Working Paper Series on Corporate Power #4, June 2020, https://www.economicliberties.us/wp-content/uploads/2020/06/Working-Paper-Series-on-Corporate-Power_4.pdf.

457 "Acquisition, Spare Parts Procurements From TransDigm, Inc.," Department of Defense, Office of Inspector General, February 23, 2006, https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf.

458 Ralph Vartabedian, "U.S. Mounts High-Stakes Computer Reform Effort," *Los Angeles Times*, December 10, 1996, https://www.latimes.com/archives/la-xpm-1996-12-10-mn-7547-story.html.

From 2008 to 2018, the cost of federal defense contracts continued to climb; the average cost of a Pentagon weapons system jumped by 13 percent, without accounting for inflation.[459] By the early years of the Trump administration, nearly two-thirds of DOD major weapons system contracts had only one major bidder.[460]

This lack of competition on major weapons systems is consistent with an overall decline in defense competition during the Obama administration. In 2008, the competition rate, or the percentage of contracts for which there was some level of competition, for all DOD contract obligations was 62.6 percent.[461] By 2012, it had dropped to 57.1 percent, and by 2017, it was at 55.4 percent.[462] Lower competition rates fueled higher prices.

Perhaps the most notorious example of this is Transdigm, a company that offers "private equity-like returns" to its shareholders by purchasing sole or single-source suppliers of obscure airplane parts and increasing prices by as much as eight times the original amount.[463] Transdigm's profit margins using this model are 54.5 percent.[464]

CONSOLIDATION PROMOTES OFFSHORING OF CRITICAL DEFENSE INDUSTRY INPUTS

In 2018, the Pentagon released a report illustrating the disastrous consequences a quarter-century of consolidation has had on our national security. "China is the single or sole supplier for a number of specialty chemicals used in munitions and missiles," the report warned. The military was now dependent on one or two producers across major weapons lines, in everything from chaff to flares to high voltage cable, fittings for ships, valves, and key inputs for satellites and missiles. And a "sudden and catastrophic loss of supply would disrupt DoD missile, satellite, space launch, and other defense manufacturing programs. In many cases, there are no substitutes readily available."[465]

459 Mark Thompson, "The Incredibly Shrinking Defense Industry," POGO, August 1, 2019, https://www.pogo.org/analysis/2019/08/the-incredibly-shrinking-defense-industry/.

460 "Weapons Systems Annual Assessment: Limited Use of Knowledge-Based Practices Continues to Undercut DOD's Investments," U.S. Government Accountability Office, May 2019, https://www.gao.gov/assets/700/698933.pdf.

461 "Defense Contracting: Actions Needed to Increase Competition," U.S. Government Accountability Office, May 28, 2013, https://www.gao.gov/products/GAO-13-325.

462 "Defense Contracting" U.S. Government Accountability Office; "Contracting Data Analysis: Assessment of Government-wide Trends," U.S. Government Accountability Office, March 2017, https://www.gao.gov/assets/690/683273.pdf.

463 Matt Stoller and Lucas Kunce, "America's Monopoly Crisis Hits The Military," *The American Conservative*, June 27, 2019, https://www.theamericanconservative.com/articles/americas-monopoly-crisis-hits-the-military/.

464 Stoller and Kunce, "America's Monopoly Crisis Hits The Military."

465 "Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States," Interagency Task Force, September 2018, accessed via Wayback Machine, https://web.archive.org/web/20190108195157/https:/media.defense.gov/2018/Oct/05/2002048904/-1/-1/1/ASSESSING-AND-STRENGTHENING-THE-MANUFACTURING-AND%252525252520DEFENSE-INDUSTRIAL-BASE-AND-SUPPLY-CHAIN-RESILIENCY.PDF; Stoller and Kunce, "America's Monopoly Crisis Hits The Military."

When an industry consolidates, it enables that industry to shift production overseas and still sell to the Department of Defense because there is no domestic competition providing product-sourcing differentiation. Just as the Pentagon becomes a price taker rather than price setter when companies like Transdigm consolidate their industry, the Pentagon becomes a source taker rather than source setter when other industries consolidate. The Pentagon reviews hundreds of mergers and acquisitions each year, and while each may seem benign on its own, in its entirety the full body of defense merger and acquisition activity leads to higher prices, lower quality, and diminished domestic production.

The Obama administration was not responsible for the trend in shifting production overseas but did little to reverse it. In fact, its general acceptance of the status quo and unwillingness to address consolidation outside the big five contractors solidified the dire consequences outlined in the 2018 Pentagon report of U.S. reliance on an adversary for a significant portion of its national security end items. Notable exceptions to administration inaction on outsourcing include using Title III Defense Production Act funds to support the creation of a lithium-ion battery manufacturing facility in California, to support radar technology, the processing of high-purity beryllium metal, and several other cutting edge or single-point of failure efforts.[466]

GOOGLE, FACEBOOK, AND ONLINE ADVERTISING AND COMMUNICATIONS

The most important shift in the corporate world from 2009 to 2017 was the rise of monopolistic technology corporations, which not only dominated large markets themselves but also spurred other corporations in related and adjacent markets to merge or attempt to acquire more market power.

Two of these corporations—Google and Facebook—monopolized communications and online advertising markets. In 2008, Google was already dominant, with roughly 70 percent of the market share for desktop search and $22 billion in revenue.[467] By 2016, its market share in desktop and mobile search topped 90 percent, its revenue had increased to $89 billion, and it had added to its search monopoly with significant if not dominant shares in mobile phone operating

466 Brett B. Lambert, testimony prepared for the U.S. House Subcommittee on Monetary Policy and Trade, May 8, 2013, https://docs.house.gov/meetings/BA/BA20/20130508/100809/HHRG-113-BA20-Wstate-LambertB-20130508.pdf.

467 "Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement," press release, Department of Justice, November 5, 2008, https://www.justice.gov/archive/opa/pr/2008/November/08-at-981.html; "2008 Annual Report, Google Inc.," 36.

systems, browsers, travel information, local search, maps, advertising technology, online video, analytics, and mobile-device app stores.[468]

Facebook's rise was even starker; it earned its market power in social media and social media advertising during the Obama era, growing to $27 billion of revenue in 2016 and garnering the ability to influence elections worldwide.[469]

Both corporations acquired dozens of competitors, with few mergers undergoing scrutiny by enforcers despite evidence of anticompetitive intent.[470]

Google and Facebook rode two significant trends to dominance. The first was the financial crisis, which took a savage toll on advertising markets as advertisers cut spending across the board. The second was the shift of internet usage from desktop sites to mobile apps, alongside Apple's creation of the iPhone in 2007 and its app store in 2008. The combination of the ad bust and the structural shift to mobile meant that in the recovery, American information industries were rebuilt on top of a new technological and legal underpinning.

It is important to recognize that these corporations are intertwined with the broader economy. Not only did tech platforms garner immense power during this era, but they became corporate role models, with strategists in every industry attempting to replicate their successful business models or, as AT&T did in seeking to acquire Time Warner, defend themselves from Big Tech by bulking up. Other sections of the report will illustrate the effects of the rise of Google and Facebook on other areas of the economy, such as the newspaper industry, the broader media and telecom sector, and travel. In the first case, news, and in particular local news, has been starved nearly to death. In the second, studios, theaters, and telecommunications have consolidated in an attempt to survive by replicating the predatory business models of the platforms, and in the third, the online travel agency market has both consolidated and been severely eroded. But first it is important to understand the public policy regime that enabled the dominance of Google and Facebook.

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468 "Worldwide Desktop Market Share of Leading Search Engines from January 2010 to October 2020," Statista, November 2020, https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/; "Market Share of Selected Leading Mobile Search Providers in the United States from October 2012 to October 2020," Statista, November 2020, https://www.statista.com/statistics/511358/market-share-mobile-search-usa/#:~:text=In%20October%202020%2C%20Google%20accounted,apps%20in%20the%20United%20States.

469 "Facebook Reports Fourth Quarter and Full Year 2016 Results," press release, Facebook, February 1, 2017, https://s21.q4cdn.com/399680738/files/doc_financials/2016/Q4/Facebook-Reports-Fourth-Quarter-and-Full-Year-2016-Results.pdf.

470 Tim Wu and Stuart A. Thompson, "The Roots of Big Tech Run Disturbingly Deep," *The New York Times*, June 7, 2019, https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html.

GOOGLE

Google was a big company in 2008 and dominant in search, but nothing like the goliath we know today. As the House Antitrust Subcommittee investigation into digital markets showed, Google innovated around key search technologies in the early 2000s, but after 2002, it grew the bulk of its new lines of business through acquisitions.

When the Obama administration took over, a merger wave in the advertising and internet commerce space was already underway. During the Bush administration, Google acquired Applied Semantics (2003), Keyhole (2004), Android (2005), Urchin (2005), YouTube (2006), and DoubleClick (2007), creating the foundation for its third-party advertising network, Maps, mobile-phone operating systems and Google Play, Analytics, and Google Ads.[471] The Bush Department of Justice did not file a single monopolization case against Google, nor did either the DOJ or FTC challenge mergers by Google (with the partial exception of ITA, where the administration allowed the merger but imposed behavioral conditions).[472] This lax policy was bipartisan; with few exceptions, Democratic FTC commissioners also voted to allow such mergers.

The key purchase was DoubleClick, the only acquisition to have solicited a dissenting vote from an FTC commissioner. The purchase was controversial at the time; *The New York Times* pointed out that the sale offered Google "access to DoubleClick's advertisement software and, more importantly, its relationships with Web publishers, advertisers and advertising agencies."[473] Importantly, Google would have personally identifying information on most web surfers on third-party sites, though the corporation pledged not to combine this information with its profiles of those who used its search product.[474] After an eight-month investigation, the FTC approved the deal in a 4-1 vote.[475] In a prescient dissent, Commissioner Pamela Jones Harbour noted the "combination is likely to 'tip' both the search and display markets in Google's favor, and make it more difficult for any other company to challenge the combined firm."[476]

By the time President Obama took office, Google was already dominant in desktop search and online video. In June 2009, *The New York Times* noted that "Google handles roughly two-thirds of all Internet searches. It owns the largest online video site, YouTube, which is more than 10

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471 Wu and Thompson, "The Roots of Big Tech"; "Google Acquires Keyhole," *The Wall Street Journal*, October 27, 2004, https://www.wsj.com/articles/SB109888284313557107#:~:text=Search%20giant%20Google%20Inc.%20said,level%20images%20of%20specific%20addresses; Greg Sterling, "Keyhole Now Live on Google Maps," *Search Engine Journal*, April 5, 2005, https://www.searchenginejournal.com/keyhole-now-live-on-google-maps/1527/#close.

472 Brent Kendall, "Justice Department Doesn't Deliver on Promise to Attack Monopolies," *The Wall Street Journal*, November 7, 2015, https://www.wsj.com/articles/justice-department-doesnt-deliver-on-promise-to-attack-monopolies-1446892202.

473 Louise Story and Miguel Helft, "Google Buys DoubleClick for $3.1 Billion," *The New York Times*, April 14, 2007, https://www.nytimes.com/2007/04/14/technology/14DoubleClick.html.

474 Story and Helft, "Google Buys DoubleClick."

475 "Statement of Federal Trade Commission Concerning Google/DoubleClick," Federal Trade Commission, FTC File No. 071-0170, 2007, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

476 Dissenting Statement of Commissioner Pamela Jones Harbour, in the matter of Google/DoubleClick, 2007, 5, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

times more popular than its nearest competitor. And last year, Google sold nearly $22 billion in advertising, more than any media company in the world."[477]

Observers thought the new Antitrust Division and Federal Trade Commission would be more assertive. As a candidate, Obama had promised more aggressive regulations on privacy.[478] Moreover, new DOJ Assistant Attorney General Christine Varney had represented Netscape in its fight against Microsoft's anticompetitive behavior; in her first few months in office, she explicitly repudiated the Bush administration's approach to monopolization cases, promising a return to what guided the Clinton administration, when one or two dominant firm cases were brought every year.[479] "There is no adequate substitute for a competitive market, particularly during times of economic distress," Varney said.[480] She called attention to the technology industry specifically, saying that she would restore the Antitrust Division to its role as "a leader in its enforcement efforts in technology industries."[481]

And yet, enforcers continued the Bush-era status quo, enabling the online advertising sector to be rebuilt on top of Google's monopoly. As the 2020 House Antitrust Subcommittee report on competition in digital markets noted, "Despite notable changes in the market—such as the switch from desktop to mobile—Google has maintained this dominance for more than a decade, a period during which its lead over its most significant competitors has only increased."[482] During the Obama era, Google extended its dominance in desktop search to mobile, and began turning the web into a walled garden. It did this by buying competitors, engaging in anticompetitive behavior, and invading user privacy to privilege its targeted ad business, which relied on detailed data-rich personal profiles.

The administration's mishandling of Google can be broken down into four categories: an absence of merger challenges; tolerating monopolization; failure to regulate online ad markets through data rules; and weak settlements on privacy violations.

Absence of Merger Challenges

From 2009 to 2016, Google acquired more than 150 companies without a single challenge.[483] One example is Google's $750 million acquisition of AdMob, a mobile ad platform for apps

477 Miguel Helft, "Google Makes a Case That It Isn't So Big," *The New York Times*, June 28, 2009, https://www.nytimes.com/2009/06/29/technology/companies/29google.html.

478 "Privacy and the New Administration," letter from Electronic Privacy Information Center, Center for Digital Democracy, et al. to President-elect Obama, December 19, 2008, https://www.privacycoalition.org/obama-ftc-ltr.pdf.

479 Stephen Labaton, "Obama Takes Tougher Antitrust Line," *The New York Times*, May 11, 2009, https://www.nytimes.com/2009/05/12/business/economy/12antitrust.html; Diane Bartz, "Antitrust Lawyers Say Obama may be Optimistic," *Reuters*, May 18, 2008, https://www.reuters.com/article/industry-usa-politics-obama-antitrust-dc-idUSN1849831920080519; Rajiv Ch, "The Balancing Act of Netscape's CEO," *The Washington Post*, October 24, 1998, https://www.washingtonpost.com/archive/business/1998/10/24/the-balancing-act-of-netscapes-ceo/612ddb2a-df2c-49ff-b162-73e2aad01103/.

480 Labaton, "Obama Takes Tougher Antitrust Line."

481 Christine Varney, "Vigorous Antitrust Enforcement In This Challenging Era," remarks as prepared for the United States Chamber of Commerce, May 12, 2009, https://www.justice.gov/atr/speech/vigorous-antitrust-enforcement-challenging-era.

482 Majority Staff Report and Recommendations, "Investigation of Competition in Digital Markets," 176-177.

483 "Big Tech Mergers," American Economic Liberties Project, https://www.economicliberties.us/big-tech-merger-tracker/#big-tech-merger-tracker5.

and content for mobile websites.[484] The FTC probed the $750 million deal in 2010. One month before approving the deal, Apple announced it would enter the market with a mobile ad service, iAd. The FTC cleared the Google-AdMob deal, concluding that, although the consolidation of "the two leading mobile advertising networks raised serious antitrust issues," and although "the companies also have economies of scale that give them a major advantage over smaller rivals in the business," Apple as a "strong competitor in the mobile advertising market" outweighed potential harm.[485] iAd had yet to launch and had zero market share, and eventually closed down.[486]

Another example is the acquisition of the mapping service Waze, the only serious competitor in the mapping space, which Google purchased to forestall effective competition by Apple and Facebook, who might otherwise have purchased the company.[487] The deal was so flagrantly anticompetitive that before the merger Waze's CEO publicly described Google Maps as his only real competitor.[488] Nevertheless, the FTC approved the deal in 2013, and Google proceeded to engage in an "insane," as one headline put it, price hike of 1,400 percent for the use of its mapping APIs, as well as tying place search to mapping.[489] In 2020, the commission initiated a look back at this acquisition.[490]

Tolerating Monopolization

The opening, and subsequent closing, of an investigation into Google's conduct in the search market was a marker in the administration's antitrust enforcement. A staff report recommended that the FTC bring a lawsuit, stating that Google's conduct "helped it to maintain, preserve and enhance Google's monopoly position in the markets for search and search advertising" in violation of the law.[491] Instead, the FTC unanimously voted to drop the investigation after Google agreed to voluntary changes to its practices.[492] These changes included meeting prior commitments that allow competitors access to certain patents (which were critical in meeting

484 Jason Kincaid, "Google Acquires AdMob for $750 Million," *TechCrunch*, November 9, 2009, https://techcrunch.com/2009/11/09/google-acquires-admob/.

485 "FTC Closes its Investigation of Google AdMob Deal," press release, Federal Trade Commission, May 21, 2010, https://www.ftc.gov/news-events/press-releases/2010/05/ftc-closes-its-investigation-google-admob-deal.

486 "iAd App Network will be Discontinued," press release, Apple Developer, January 15, 2016, https://developer.apple.com/news/?id=01152016a.

487 Ingrid Lunden, "Google Bought Waze For $1.1B, Giving A Social Data Boost To Its Mapping Business," *Techcrunch*, June 11, 2013, https://techcrunch.com/2013/06/11/its-official-google-buys-waze-giving-a-social-data-boost-to-its-location-and-mapping-business/.

488 Mark Rogowsky, "If Waze's CEO Is Right, Google Won't Be Allowed To Buy His Company," *Forbes*, June 9, 2016, https://www.forbes.com/sites/markrogowsky/2013/06/09/if-wazes-ceo-is-right-google-wont-be-allowed-to-buy-his-company/?sh=45d8f4e71461.

489 Ishveena Singh, "Insane, Shocking, Outrageous: Developers React to Changes in Google Maps API," *Geo Awesomeness*, May 3, 2018, https://www.geoawesomeness.com/developers-up-in-arms-over-google-maps-api-insane-price-hike/; Majority Staff Report and Recommendations, "Investigation of Competition in Digital Markets," 239-240, 239n1459.

490 "FTC to Re-examine Google's 2013 Waze Acquisition as Part of Its Antitrust Sweep," *Android Central*, October 21, 2020, https://www.androidcentral.com/ftc-re-examine-googles-2013-waze-acquisition-part-its-antitrust-sweep.

491 Brody Mullins, Rolfe Winkler, and Brent Kendall, "Inside the U.S. Antitrust Probe of Google," *The Wall Street Journal*, March 19, 2015, https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274.

492 "Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search," press release, Federal Trade Commission, January 3, 2013, https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc.

industry standards) on fair, reasonable, and nondiscriminatory terms, and allowing advertisers to manage ad campaigns on rival platforms in addition to Google's AdWords platform.

The FTC case was notable for three reasons. First was the failure to follow through on an assertive competition policy framework.[493] As FTC Commissioner J. Thomas Rosch stated in his concurrence, "[A]fter promising an elephant more than a year ago, the Commission instead has brought forth a couple of mice."[494] The second was the informal nonbinding commitment Google made to the FTC, instead of an enforceable consent decree normally used to settle cases, and this commitment helped the commission avoid a notice and comment period. As Rosch continued, this was a de facto creation of a new category for powerful firms, giving the public "the impression that well-heeled firms such as Google will receive special treatment at the Commission."[495] And third was the appearance of impropriety; the resolution of the case happened a little over a month after the reelection of President Obama, a campaign in which then-Google CEO Eric Schmidt was on election night, as *The Wall Street Journal* reported, "personally overseeing a voter-turnout software system for Mr. Obama."[496]

A similar failure to enforce took place as Google leveraged its dominance in desktop search to dominance of the mobile web. In 2008, Google launched the first Android phone; the corporation also decided to offer the Android operating system and Google Play for free to original equipment manufacturers (OEMs) like Samsung, conditioned on making Google the default search engine and on restricting the inclusion of competitors' software.[497] Disseminating their operating system at zero cost to the manufacturers was part of a strategy to dominate mobile search as the corporation had dominated desktop search. Five-hundred million Android devices were shipped in 2012, 1 billion were shipped in 2014, and 1.25 billion in 2017.[498] While U.S. enforcers did little, in 2015, the EU and Russia's Federal Antimonopoly Service opened an investigation into the tying of Google Play and Android operating system to Google's search engine. The EU investigation ended with an order for Google to change practices and pay a $5.1 billion fine, with the same competition violations verified by Russia.[499]

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493 Frank Pasquale, "Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias," *Harvard Journal of Law & Technology*, Occasional Papers Series, July 2013, https://jolt.law.harvard.edu/assets/misc/Pasquale.pdf.

494 "Concurring and Dissenting Statement of Commissioner J. Thomas Rosch," In the Matter of Google Inc., FTC File No. 111-0163, January 3, 2012, 1, https://www.ftc.gov/sites/default/files/documents/public_statements/concurring-and-dissenting-statement-commissioner-j.thomas-rosch-regarding-googles-search-practices/130103googlesearchstmt.pdf.

495 "Concurring and Dissenting Statement of Commissioner J. Thomas Rosch," 6.

496 Brody Mullins, "Google Makes Most of Close Ties to White House," *The Wall Street Journal*, March 24, 2015, https://www.wsj.com/articles/google-makes-most-of-close-ties-to-white-house-1427242076.

497 Matt Stoller, "How Russian Antitrust Enforcers Defeated Google's Monopoly," *BIG*, July 23, 2019, https://mattstoller.substack.com/p/how-russian-antitrust-enforcers-defeated; Sam Schechner and Douglas MacMillan, "Google Is Fined $5 Billion by EU in Android Antitrust Case," *The Wall Street Journal*, July 18, 2018, https://www.wsj.com/articles/google-to-be-fined-5-billion-by-eu-in-android-case-1531903470.

498 Schechner and MacMillan, "Google Is Fined $5 Billion."

499 Thomas Grove, "Russia Fines Google $6.75 Million in Antitrust Case," *The Wall Street Journal*, August 11, 2016, https://www.wsj.com/articles/russia-fines-google-6-75-million-in-antitrust-case-1470920410; Adam Satariano and Jack Nicas, "E.U. Fines Google $5.1 Billion in Android Antitrust Case," *The New York Times*, July 18, 2018, https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html.

Many lawyers and competitors analogized Google's position to that of Microsoft in the 1990s.[500] Samuel Miller, the prosecutor who led the federal antitrust case against Microsoft, was quoted in 2011 as saying, "Having prosecuted the Microsoft case, it seems to me that Google, as a monopoly, is engaging in the same tactics to keep its dominant position as Microsoft was engaging in ... Those are the same tactics that got Microsoft in trouble."[501] Similarly, the administration did not investigate a host of anticompetitive practices, such as relationships between technology platforms and ad-blocking services.[502]

Failure to Regulate the Use of Personal Data in Ad Markets

One surprising aspect of the administration was the extent to which officials chose self-regulatory models over public rules. For example, in 2012, the White House unveiled a "blueprint" for a "Privacy Bill of Rights" for users, publishing a draft bill three years later.[503] Instead of giving the FTC the power to set regulations or enforce principles, the proposal tasked the companies themselves to write the rules, which would then be approved by the FTC. Alvaro Bedoya, the executive director of the Center on Privacy and Technology at Georgetown University Law Center, described the bill as follows: "Since the 1800s, the right to privacy has included a simple right to say 'leave me alone.' This bill moves us to a world of 'take what you want—but try to behave.'"[504] The bill would have also preempted stronger state laws.[505]

The administration pursued this same stance with an FTC framework for a "Do Not Track" mechanism, originally released in 2010 to restructure online advertising markets.[506] The proposed technology would offer internet users an option to opt out of having data collected from browser searches, and have customized ads removed.[507] Such a shift would have radically curtailed the use of online behavioral advertising, or "targeted advertising," that has enabled third-party platforms to redirect advertising revenue from publishers to themselves.[508] The administration produced neither coherent regulation nor legislation. Arvind Narayana, an associate professor at Princeton who was part of an advocacy group initially fighting for Do

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500 Tony Romm, "The Justice Department is Preparing a Potential Antitrust Investigation of Google," *The Washington Post*, May 31, 2019, https://www.washingtonpost.com/technology/2019/06/01/justice-department-is-preparing-potential-antitrust-investigation-google/.

501 David Goldman, "DOJ's Microsoft Prosecutor: Google is a Monopoly," *CNN Money*, March 31, 2011, https://money.cnn.com/2011/03/31/technology/microsoft_google_antitrust_case/index.htm.

502 Dina Srinivasan, "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance In Spite of Consumers' Preference for Privacy," *Berkeley Business Law Journal* 16, no. 1 (2019): 76-81.

503 Paul Bischoff, "What is the Consumer Privacy Bill of Rights?," *Comparitech*, November 27, 2018, https://www.comparitech.com/blog/vpn-privacy/consumer-privacy-bill-of-rights/.

504 Brendan Sasso and National Journal, "Obama's 'Privacy Bill of Rights' Gets Bashed from All Sides," *The Atlantic*, February 27, 2015, https://www.theatlantic.com/politics/archive/2015/02/obamas-privacy-bill-of-rights-gets-bashed-from-all-sides/456576/.

505 Sasso and National Journal, "Obama's 'Privacy Bill of Rights.'"

506 Adi Robertson, "New FTC Online Privacy Framework Coming Monday," *The Verge*, March 23, 2012, https://www.theverge.com/2012/3/23/2897608/new-ftc-online-privacy-framework-coming-monday.

507 Tim Stevens, "FTC Wants to Fight Tracking Cookies with Other Cookies, Create Delicious Sugary Warfare," *Engadget*, December 3, 2010, https://www.engadget.com/2010-12-03-ftc-wants-to-fight-tracking-cookies-with-other-cookies-create-d.html.

508 Matt Stoller, Sarah Miller, and Zephyr Teachout, "Addressing Facebook and Google's Harms Through a Regulated Competition Approach," American Economic Liberties Project, Working Paper Series on Corporate Power #2, April 2020, https://www.economicliberties.us/wp-content/uploads/2020/04/Working-Paper-Series-on-Corporate-Power_2.pdf.

Not Track, explained that "the prolonged negotiations in fact proved useful to the industry to create the illusion of a voluntary self-regulatory process, seemingly preempting the need for regulation."[509]

Weak Policing of Unfair Trade Practice Violations

The administration was aware of the issues around privacy, data collection, and abuse, but continued to renege on enforcing rules against deceptive or unfair conduct. Instead, regulators imposed weak settlements that carried little weight.

In 2011, the FTC and Google arranged a consent decree to address the corporation's deceptive tactics and violation of its own privacy promises when it launched Google Buzz, a social network, in 2010. Regulators alleged that the deceptive tactics violated the FTC Act, and FTC Chairman Leibowitz stated that the settlement, which included no fines or changes in practices beyond accurately representing user privacy, "ensures that Google will honor its commitments to consumers and build strong privacy protections into all of its operations."[510]

In 2012, the Electronic Privacy Information Center sued the FTC over the commission's refusal to enforce this decree "when it became clear that Google was proposing to do precisely what the FTC said it could not—consolidate user data across various services that came with diverse privacy policies in order to build detailed individual profiles."[511] Despite the suit, the FTC did not act to stop these practices. The FTC did force Google to pay a paltry $22.5 million civil penalty to settle FTC charges that it "misrepresented to users of Apple Inc.'s Safari Internet browser that it would not place tracking 'cookies' or serve targeted ads to those users."[512]

In short, the Obama administration's approach to Google did little to limit the corporation's monopoly power, and further ratified an approach that assumed Google could self-regulate, relying on voluntary commitments and fines that the corporation could treat as a cost of business. According to Statcounter, in November 2009, Google had 96 percent of the U.S. mobile search engine market share and 83 percent when looking across all U.S. platforms.[513] By the end of the Obama administration, the company held the same 96 percent in the mobile search market share but was up to 88 percent of the U.S. search engine market share across all platforms.[514]

509 Glenn Fleishman, "How the Tragic Death of Do Not Track Ruined the Web For Everyone," *Fast Company*, March 17, 2019, https://www.fastcompany.com/90308068/how-the-tragic-death-of-do-not-track-ruined-the-web-for-everyone; Srinivasan, "The Antitrust Case Against Facebook."

510 "FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network," press release, Federal Trade Commission, March 30, 2011, https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz.

511 Marc Rotenberg, "How the FTC Could Have Prevented the Facebook Mess," *Techonomy*, March 22, 2018, https://techonomy.com/2018/03/how-the-ftc-could-have-avoided-the-facebook-mess/.

512 "Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browsers," press release, Federal Trade Commission, August 9, 2012, https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented.

513 "Search Engine Market Share United States Of America, Nov 2009-Nov 2016," Statcounter, October 2020, https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america#monthly-200911-201611.

514 "Search Engine Market Share United States Of America, Nov 2009-Nov 2016," Statcounter.

FACEBOOK

Unlike Google, Facebook was a relatively new company in 2009, and social networking platforms had yet to organize a coherent business model. Over the course of the Obama administration, Facebook morphed from a reasonably big and fast-growing social network without a clear revenue model to one of the largest communications networks and media corporations in history. In 2008, Facebook had 100 million monthly active users, roughly 800 employees, and annual revenue of $272 million.[515] By the end of 2016, the company had nearly 2 billion active users, more than 17,000 employees, and annual revenue of $27.64 billion.[516] Facebook's social media market share in the United States jumped from less than 13 percent when Obama took office to more than 70 percent when the administration left.[517]

In January 2009, just as President Obama was inaugurated, Facebook surpassed MySpace in terms of daily U.S. visitors in a social media sector that was quite competitive.[518] Core features of Facebook, like the Newsfeed and "Like" button, weren't launched until 2006 and 2009, respectively.[519] Facebook, which today generates more than 90 percent of its revenue from mobile advertising, had no mobile ad business.[520] Mark Zuckerberg was still seeking to position the corporation as a software platform for other apps, rather than an advertising company. In other words, social media advertising was a nascent industry, and the administration had an opportunity to prevent an incipient monopoly.

But the company was not without scandal, even before it garnered its massive size and power. Before Facebook developed its strategy to monopolize social media advertising, its privacy policies engendered major controversies. At the end of 2007, Facebook launched a feature called Beacon, a new advertising program in which Facebook automatically broadcast private shopping as public information to friends on the Newsfeed.[521] Users were given no advance warning of the program and could not opt out of the feature. One buyer of a diamond engagement ring had his surprise engagement ruined; another had his purchase of *Living with AIDS* broadcast on Facebook.

515 Esteban Ortiz-Ospina, "The Rise of Social Media," *Our World in Data,* September 18, 2019, https://ourworldindata.org/rise-of-social-media; Dan Frommer, "Zuckerberg: Facebook Revenue Growth 'Really Strong', Still Hiring," *Business Insider*, January 12, 2009, https://www.businessinsider.com/2009/1/zuckerberg-facebook-revenue; "Facebook's Revenue and Net Income from 2007 to 2019," Statista, January 2020, https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/.

516 "Number of Monthly Active Facebook Users Worldwide as of 3rd Quarter 2020," Statista, October 2020, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/; "Facebook: Number of Employees 2009-2020," *macrotrends*, accessed October 2020, https://www.macrotrends.net/stocks/charts/FB/facebook/number-of-employees; "Facebook Revenue 2009-2020," *macrotrends*, accessed October 2020.

517 "Social Media Stats United States of America: Mar 2009-Nov 2016," Statcounter, October 2020, https://gs.statcounter.com/social-media-stats/all/united-states-of-america#monthly-200903-201611.

518 Ben Parr, "How Facebook Dominated in 2009," *Mashable*, December 30, 2009, https://mashable.com/2009/12/30/facebook-2009/.

519 Issie Lapowsky, "15 Moments That Defined Facebook's First 15 Years," *Wired*, February 4, 2019, https://www.wired.com/story/facebook-15-defining-moments/.

520 Lapowky, "15 Moments."

521 Juan Carlos Perez, "Facebook's Beacon Ad System Also Tracks Non-Facebook Users," PCWorld, December 3, 2007, https://www.pcworld.com/article/140247/article.html. More than 40 third-party websites, including Travelocity.com and Fandango.com signed up for Beacon. Perez, "Facebook's Beacon Ad System"; Louise Story and Brad Stone, "Facebook Retreats on Online Tracking," *The New York Times*, November 30, 2007, https://www.nytimes.com/2007/11/30/technology/30face.html.

In early 2009, after having competed with MySpace over better privacy standards, the corporation changed its terms of service to allow it unfettered use of personal data. Facebook users revolted, with 150,000 joining a new group "Facebook Users Against the New Terms of Service." Facebook deleted the group and banned the use of "Facebook" in Facebook groups. Advocacy organizations continued to pressure regulators and Congress to act.[522] Facebook's abuse of its users' privacy to gather data (in some cases illegally), with little to no policy response from government officials, would become a pattern.

During the administration, Zuckerberg used an explicit strategy of monopolization. The House Antitrust Subcommittee uncovered a host of evidence unused by antitrust enforcers to this effect. In 2012, the Facebook CEO wrote in an email that Facebook "can likely always just buy any competitive startups"; a senior executive called the company's acquisition strategy a "land grab."[523] Despite these obvious pieces of actionable evidence on the monopolization strategy pursued by Facebook's top leadership, enforcers did nothing to block key mergers.[524]

The administration's handling of Facebook can be split into three main categories. First, as with Google, it failed to block mergers despite actionable evidence. Second, the administration refused to coherently structure online advertising markets through a strong Do Not Track rule. And third, it did not police privacy violations, as illustrated by the FTC's 2011 consent decree.

A Failure to Block Mergers and Enforce Anti-Monopolization Laws

Facebook acquired more than 50 companies throughout the Obama administration, many of which were direct competitors. The largest purchases included Instagram in April 2012 and WhatsApp in February 2014. As the House Antitrust Subcommittee uncovered, FTC merger policy was so lax, the commission did not even request additional materials for review in any merger except for that of Instagram.[525] Although the Instagram acquisition gave Facebook control of a direct rival and the fastest-growing mobile app, the FTC allowed the deal to proceed as proposed.[526] The agency's investigation, launched in May 2012, closed in August 2012 with unanimous approval.[527]

Two years later, Facebook acquired WhatsApp, which Zuckerberg viewed as a strong competitor to Facebook.[528] WhatsApp had competed with Facebook by offering strong privacy standards

522 Marc Rotenberg, remarks prepared for the Grand International Committee on Disinformation and Fake News, November 7, 2019, https://epic.org/testimony/congress/ROTENBERG-statement-GICDFN-Dublin.pdf.

523 "Investigation of Competition in Digital Markets," 12-13, 12-13n11.

524 Wu and Thompson, "The Roots of Big Tech" ("None of Facebook's [92] acquisitions [since 2007] has been challenged by the federal government.").

525 "Investigation of Competition in Digital Markets," 11.

526 Alexei Oreskovic, "FTC Clears Facebook's Acquisition of Instagram," *Reuters*, August 22, 2012, https://www.reuters.com/article/us-facebook-instagram/ftc-clears-facebooks-acquisition-of-instagram-idUSBRE87L14W20120823.

527 "FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program," press release, Federal Trade Commission, August 22, 2012, https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition.

528 "Investigation of Competition in Digital Markets," 150, 160.

and an advertising-free experience. At the time of the deal, Facebook's Messenger app had 200 million users, while WhatsApp had 450 million monthly active users and was growing at a rate of 1 million new users per day.[529] Facebook was able to claim ownership of the world's top two messaging companies in terms of market share by user numbers.[530] And yet, Facebook's tools carried zero monetary price to users, even as their surveillance expanded, reducing the quality of the product and harming rivals.[531] Because they were steeped in consumer welfare ideology equating bigness with efficiency, antitrust enforcers ignored non-price harms. Even as Sheryl Sandberg in 2012 made presentations to investors on Facebook's control of 95 percent of the social media market and its "enduring competitive advantage," enforcers remained inert.[532]

WhatsApp founder Jan Koum declared their privacy promises in a 2009 blog post to users. "We have not, we do not and we will not ever sell your personal information to anyone. Period. End of story."[533] Immediately after announcing the proposed deal with Facebook, Koum told users that nothing would change regarding WhatsApp's practices, saying that WhatsApp would "remain autonomous and operate independently."[534]

In response to various complaints, before allowing the deal to proceed, the FTC sent a letter to both companies stating that they must honor their promises to consumers. The commission explicitly told Facebook that, "if you choose to use data collected by WhatsApp in a manner that is materially inconsistent with the promises WhatsApp made at the time of collection, you must obtain consumers' affirmative consent before doing so ... Failure to take these steps could constitute a violation of Section 5 and/or the FTC's order against Facebook."[535] Four years later, WhatsApp announced that it would transfer users' personal information to Facebook to use for targeted advertising, and rather than getting affirmative consent, users had 30 days to opt out. The FTC received a number of complaints that pointed out the violation but did not act.[536]

Lesser-known acquisitions also went unchallenged. For instance, in 2010, Facebook acquired Divvyshot, a photo sharing service. Facebook immediately shut Divvyshot down, despite its 40,000 active users.[537] In 2013, Facebook acquired a mobile-analytics startup, Onavo. The app gave detailed information on how users spent time on their phone. For users, the app secures privacy by routing traffic through private servers, a VPN network, though many weren't aware

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529 Mark Glick and Catherine Ruetschlin, "Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook," Institute for New Economic Thinking, Working Paper no. 104, October 2019, 45, 43, https://www.ineteconomics.org/uploads/papers/WP-104-Glick-and-Reut-Oct-10.pdf.

530 Glick and Ruetschlin, "Big Tech Acquisitions and the Potential Competition Doctrine."

531 Srinivasan, "The Antitrust Case Against Facebook."

532 Facebook Investor Presentation, 2012, 2, https://judiciary.house.gov/uploadedfiles/00057113_picture.pdf.

533 "Just Wanted to Say a Few Things…," Whatsapp, November 19, 2009, https://blog.whatsapp.com/just-wanted-to-say-a-few-things.

534 "Facebook Privacy," EPIC.org, https://epic.org/privacy/facebook/#consent-order.

535 Letter from Federal Trade Commission to Facebook and WhatsApp, April 10, 2014, 3, https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

536 "Facebook Privacy," EPIC.org, https://epic.org/privacy/facebook/#consent-order.

537 Erick Schonfeld, "Facebook Buys Up Divvyshot To Make Facebook Photos Even Better," *TechCrunch*, April 2, 2010, https://techcrunch.com/2010/04/02/facebook-buys-up-divvyshot-to-make-facebook-photos-even-better/.

that Facebook ran those servers and used that information for its own gain. Data from the Onavo app became a critical tool that helped Facebook surveil competitors for new product ideas to mimic.[538]

Weak Privacy Policy

As described in the Google case study, the Obama administration allowed what could have been a strong proposal to structure online advertising markets, the so-called "Do Not Track" list, to dissolve into irrelevance. According to the FTC, the list was a "mechanism that would allow consumers to more easily control the tracking of their online activities."[539] However, come November 2015, nothing had changed.

Regulators failed to appreciate that in data-driven markets, privacy violations as well as contractual arrangements to coerce the acquisition of more data are also a competition harm that should bring antitrust scrutiny. Violating user privacy, as the FTC alleged Facebook did in 2011, when it brought an initial consent decree, gave Facebook an unfair competitive advantage in the targeted ad market, one that can't be justified on pro-competitiveness grounds. Nevertheless, Facebook violated that decree without penalty by regulators until 2020, when the FTC issued a fine roundly considered weak, as well as a new consent decree.[540]

Consumer Watchdog, a consumer rights group, wrote a petition to regulators asking that they require companies like Google, Facebook, Netflix, and LinkedIn to honor "Do Not Track" requests from consumers. Regulators denied the petition, prompting Consumer Watchdog's Privacy Project director, John Simpson, to offer that regulators have "authority to enforce Internet privacy protections far more broadly than they have opted to do."[541]

Weak Policing of Consumer Protection and Privacy Rules

Facebook carried out numerous business practices and technological developments that appeared unfair and deceptive or anticompetitive, most of which went unchallenged.

538 Betsy Morris and Deepa Seetharaman, "The New Copycats: How Facebook Squashes Competition From Startups," *The Wall Street Journal*, August 9, 2017, https://www.wsj.com/articles/the-new-copycats-how-facebook-squashes-competition-from-startups-1502293444?mod=article_inline; Kevin Carty, "1. Stop Facebook From Spying on Its Competitors," in Kevin Carty, Leah Douglas, Lina Khan, and Matt Stoller, "6 Ideas to Rein in Silicon Valley, Open Up the Internet, and Make Tech Work for Everyone," *New York*, December 11, 2017, https://nymag.com/intelligencer/2017/12/open-markets-institute-antitrust-for-silicon-valley.html.

539 "Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers," Federal Trade Commission, March 2012, 3, https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

540 "Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises," press release, Federal Trade Commission, November 29, 2011, https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep; Srinivasan, "The Antitrust Case Against Facebook"; Facebook, Inc., In the Matter of Facebook, Order Modifying Prior Decision and Order, April 23, 2020, https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc; Harper Neidig, "Critics Slam $5 Billion Facebook Fine as Weak," *The Hill*, July 16, 2019, https://thehill.com/policy/technology/453192-critics-slam-5-billion-facebook-fine-as-weak.

541 "Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests," Federal Communications Commission, June 15, 2015, https://www.consumerwatchdog.org/newsrelease/consumer-watchdog-vows-press-case-online-privacy-google-and-facebook-after-fcc-rejects-p.

For example, Facebook harmed competitors through aggressive surveillance. In 2013, it acquired surveillance application Onavo, which it used to copycat features like Snapchat's "Stories" in 2016. According to people familiar with internal conversations, Instagram representatives started pressuring influencers to stop adding Snapchat links to their profile and suggesting to some that they could take away influencers' "verified" status, which certifies that an account is legitimate and popular.[542] Beyond copying competitors' features, Onavo also informed Facebook of what companies should be targeted for future acquisitions.[543] In 2017, Ashkan Soltani, an independent researcher and former FTC technologist, explained that, "Instead of converting data for the purpose of advertising, they're converting it to competitive intelligence … Essentially this approach takes data generated by consumers and uses it in ways that directly hurts their interests—for example, to impede competitive innovation."[544] Despite the claims, the administration made no inquiries regarding Facebook's use of the app.

Another problematic practice were Facebook's use of deception to acquire the data of publishers. In 2010, Facebook developed what was known as "social plugins." The "Like" button was one of the first of such plugins. To add the feature, third parties added Facebook code to their backend, opening up even more visibility into user data than Facebook had with Beacon. The company would know when a person visited a site with the "Like" button, even if the user never clicked on it, meaning that publishers would effectively be handing over data about their customers and readers to Facebook.[545] The corporation assured publishers and users that it wouldn't use such data to track users, just for advertising purposes, "when a user clicks on a widget to share content with friends."[546] It also promised that such data was anonymized and deleted within 90 days.[547] Secure in the knowledge that Facebook would not misuse data about their own customers, within its first week of launching, more than 50,000 sites added the feature.[548]

Two years later, after social plugins had become necessary tools to drive traffic for publishers, Facebook publicly announced that those practices would change and that it would allow advertisers to target ads based on users' web-browsing data.[549]

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542 Georgia Wells and Deepa Seetharaman, "Snap Detailed Facebook's Aggressive Tactics in 'Project Voldemort' Dossier," *The Wall Street Journal*, September 24, 2019, https://www.wsj.com/articles/snap-detailed-facebooks-aggressive-tactics-in-project-voldemort-dossier-11569236404.

543 Wells and Seetharaman, "Snap Detailed Facebook's Aggressive Tactics"; Deepa Seetharaman and Betsy Morris, "Facebook's Onavo Gives Social-Media Firm Inside Peek at Rivals' Users," *The Wall Street Journal*, August 13, 2017, https://www.wsj.com/articles/facebooks-onavo-gives-social-media-firm-inside-peek-at-rivals-users-1502622003.

544 Seetharaman and Morris, "Facebook's Onavo Gives Social-Media Firm Inside Peek at Rivals' Users."

545 Amir Efrati, "'Like' Button Follows Web Users," *The Wall Street Journal*, May 18, 2011, https://www.wsj.com/articles/SB10001424052748704281504576329441432995616.

546 Efrati, "'Like' Button Follows Web Users."

547 Efrati, "'Like' Button Follows Web Users."

548 Srinivasan, "The Antitrust Case Against Facebook," 63. Facebook explained to advertisers that the button drove traffic: More "likes" meant people would return to the article, thus generating more ad revenue. All third parties had to do was install a line of HTML code into their app.

549 Reed Albergotti, "Facebook to Target Ads Based on Web Browsing," *The Wall Street Journal*, June 12, 2014, https://www.wsj.com/articles/facebook-to-give-advertisers-data-about-users-web-browsing-1402561120.

Facebook also deceived users. After years of frustration from users and advocates over Facebook's practices, the FTC and Facebook came to agreement in 2011 on a consent decree to resolve multiple allegations of consumer deception and other misrepresentations with regards to privacy and security. These allegations include misrepresentations of privacy promises, security verifications, and handling of personal data.[550] The FTC barred Facebook from making misrepresentations about privacy and security of consumers' personal information and required an annual privacy audit.

As the Electronic Privacy Information Center and Center for Digital Democracy said at the time, the FTC order was "insufficient to address the … findings established by the Commission."[551] Privacy advocates urged the agency to implement stronger restrictions and transparency measures, including allowing users access to all data Facebook keeps about them, stopping facial recognition profiles without users' affirmative consent, making privacy audits public, and stopping all tracking of users' activity once they have logged out of Facebook apps or services. None of these measures were adopted in the final consent order.[552]

The FTC compounded its choice of a weak consent decree with a refusal to enforce the decree. In 2013, the Center for Digital Democracy warned the FTC that Facebook was violating the consent decree, but the FTC took no action.[553] In 2018, *The Guardian* exposed the Cambridge Analytica scandal.[554] In 2019, spurred by public pressure, the FTC fined Facebook $5 billion for violating the agreement.[555]

Facebook today is a dominant and powerful corporation that has enabled a multitude of harms, not the least of which are allegations that its power and reach have subverted democratic institutions. But the tactics it used to become so dominant could have been arrested by an administration that followed through on its promises to protect privacy, block anticompetitive acquisitions, and aggressively police consumer protection violations.

Instead, the Obama administration was hamstrung by enforcers' ideological vision, in which the only or principal harms were explicit price hikes. As a result, enforcers chose to passively watch, allowing Facebook to perform what many now realize was an abuse of market power. In 2017, as the multitude of Facebook's harms emerging from its dominant market share became evident, not the least of which was the misuse of social media to manipulate electoral outcomes,

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550 "Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises," press release, Federal Trade Commission.

551 "Comments of the Electronic Privacy Information Center to the Federal Trade Commission In the Matter of Facebook, Inc.," FTC File No. 092 3184, December 27, 2011, 2, https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf.

552 "Facebook's 2011 FTC Consent Order," EPIC.org, https://epic.org/privacy/facebook/2011-consent-order/.

553 Jeff Chester, "CDD Memo to FTC on Facebook Consent Decree Violations—2013," August 2, 2019, https://www.democraticmedia.org/article/cdd-memo-ftc-facebook-consent-decree-violations-2013.

554 Carole Cadwalladr and Emma Graham-Harrison, "Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach," *The Guardian*, March 17, 2018, https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election.

555 "FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook," press release, Federal Trade Commission, July 24, 2019, https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

policymakers began to see Facebook as a good example of why the ideological blinders of consumer welfare adherents carry a high cost.

HEALTH CARE

The early Obama years were devoted to passing a monumental piece of health legislation, the likes of which hadn't been attempted since the 1990s. The finished product, the Affordable Care Act, encouraged consolidation as a positive outcome.

In 2010, three of the framers of the Affordable Care Act—Bob Kocher, Zeke Emanuel, and Nancy-Ann DeParle—laid out their plan to "unleash forces that favor integration across the continuum of care." In an article in *Annals of Internal Medicine*, a major medical journal, they called for physicians to "organize themselves into increasingly larger groups," and predicted more efficiency, reliability, and accessibility across the industry.[556]

Six years later, Kocher penned a *Wall Street Journal* op-ed entitled "How I Was Wrong About ObamaCare." He had come to realize, he wrote, that "having every provider in health care 'owned' by a single organization is more likely to be a barrier to better care."[557] As hospitals merged, doctors turned from independent practitioners with trusted relationships to employees of big organizations pushed to operate, a New Jersey doctor said, "more like an assembly line to get the patient in and out."[558] In other words, consolidation, far from unleashing promised efficiency and reliability, had instead unleashed monopoly power on patients, raising prices while harming quality of care.

Industry took up the mantle of consolidation that the ACA incentivized. Not all subsequent mergers were directly linked to the passage of the ACA; in some cases, acquisitions were driven by market participants emulating consolidation in other sectors of the industry. As former FTC antitrust official Thomas Greaney remarked in 2015 regarding the health care space, "Mergers are not always driven by efficiency considerations; sometimes a merger 'cascade' occurs simply because the other guy is doing it, hubris, or even 'empire-building.'"[559]

556 Robert Kocher, Ezekiel J. Emanuel, and Nancy-Ann M. DeParle, "The Affordable Care Act and the Future of Clinical Medicine: The Opportunities and Challenges," *Annals of Internal Medicine*, October 19, 2010, https://www.acpjournals.org/doi/10.7326/0003-4819-153-8-201010190-00274.

557 Bob Kocher, "How I Was Wrong About ObamaCare," *The Wall Street Journal*, July 31, 2016, https://www.wsj.com/articles/i-was-wrong-about-obamacare-1469997311.

558 Elaine Howley, "Is the Independent Doctor Disappearing?" *USA News and World Reports*, June 13, 2018, https://health.usnews.com/health-care/patient-advice/articles/2018-06-13/is-the-independent-doctor-disappearing.

559 Thomas L. Greaney, "Examining Implications Of Health Insurance Mergers," *Health Affairs*, July 16, 2015, 10.1377/hblog20150716.049355.

Hospitals got bigger during the Obama era, as did insurers, pharmacies, medical device companies, pharmaceutical manufacturers, group purchasing organizations, and pharmacy benefit managers. While the FTC and other regulatory agencies reviewed some of these mergers, they let many of them pass unhindered. Regulators accepted the consolidation-as-efficiency argument, especially because it seemed obvious to them that larger health organizations would provide better outcomes and cheaper prices.

Now, academics, medical personnel, and some lawmakers and regulators are having the same awakening that Kocher did several years after the passage of the ACA. Consolidation has had few, if any, positive effects on patients' health and hospitals' efficiency. Instead, the industry is more powerful and freer to charge monopoly prices than ever before. Although the ACA expanded health insurance coverage and allowed more people to access care, the concentrated health industry has extracted unnecessarily high costs—both in dollars and in well-being—in return.

As costs continue to rise, families are less able to afford basic coverage. In 2018, health care spending represented 17.7 percent of GDP, an increase from 16.4 percent in 2010.[560] These are high numbers compared to other OECD countries; Germany, for example, spent 11.2 percent of its GDP on health expenditures in 2017, and France spent 11.3 percent.[561] High U.S. costs have real impacts on individuals and families, reducing both access to care and economic security.

Health care workers also suffered as a result of this consolidation. While CEO compensation rose by 93 percent from 2005-2015, the average health care worker wage rose only 8 percent.[562] When the COVID-19 pandemic shut off the financial valve of elective surgeries, some hospitals furloughed or laid off hundreds of these workers.[563]

Physician burnout and suicide rates, linked to the lack of autonomy found in corporate hospital work, also continue to rise.[564] While physician output rose by nearly 41 percent from 2012 to 2015, physician compensation rose only 27 percent over the same time period.[565]

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560 "National Health Expenditures 2018 Highlights," Centers for Medicare and Medicaid Services, 2018, https://www.cms.gov/files/document/highlights.pdf; "Current health expenditure (% of GDP) – United States," The World Bank, accessed October 2020, https://data.worldbank.org/indicator/SH.XPD.CHEX.GD.ZS?locations=US&name_desc=true.

561 "Current Health Expenditure (% of GDP) – United States, Germany," The World Bank, accessed October 2020, https://data.worldbank.org/indicator/SH.XPD.CHEX.GD.ZS?locations=US-DE&name_desc=false.

562 Jerry Y. Du, Alexander Rascoe, and Randall E. Marcus, "The Growing Executive-Physician Wage Gap in Major US Nonprofit Hospitals and Burden of Nonclinical Workers on the US Healthcare System," *Clinical Orthopaedics and Related Research* 476, no. 10 (2018): 1910-1919.

563 Shane Harris, Justin Sondel, and Gregory S. Schneider, "Cash-starved Hospitals and Doctor Groups Cut Staff Amid Pandemic," *The Washington Post*, April 9, 2020, https://www.washingtonpost.com/health/starved-for-cash-hospitals-and-doctor-groups-cut-staff-amid-pandemic/2020/04/09/d3593f54-79a7-11ea-a130-df573469f094_story.html.

564 "Physician Burnout in 2019, Charted," *Advisory Board*, January 18, 2019, https://www.advisory.com/daily-briefing/2019/01/18/burnout-report.

565 "2018 Survey of America's Physicians Practice Patterns & Perspectives," *Merritt Hawkins*, September 2018, https://www.advisory.com/daily-briefing/2019/01/18/burnout-report.

Moreover, any gains in quality of patient care have failed to materialize. If anything, evidence suggests that quality of care has declined in heavily concentrated markets.[566] And if hospitals are realizing efficiency gains, the rising costs of hospital care suggest that savings from those efficiencies are not being shared with patients.[567]

HOSPITALS

One of the ways that the Obama administration incentivized hospital consolidation was through the HITECH Act, a part of the 2009 recovery package, and its meaningful use requirements. These requirements mandated that hospitals integrate electronic health record software and e-prescription software within a certain timeline.[568] There was a rapid increase in EHR adoption across the country.[569] But implementing EHRs is an expensive proposition, and many smaller medical practices were forced to merge into larger systems to afford the capital investment.

Since the 1930s, hospitals have slowly become a more financialized business. Hospital revenues have been plowed into capital expenditures and fancier patient accommodations, and the number of hospitals run by physicians has declined 90 percent since 1935.[570] This is despite the fact that hospitals run by physician-CEOs tend to have higher quality scores.[571] Hospitals also began to merge and acquire other hospitals, slowly consolidating health care services in many geographic areas.

The ACA furthered the merger and acquisition trend in this already consolidating industry. The number of mergers grew nearly every year between 2009 and 2016, from 50 in 2009 to 112 in 2015 and 102 in 2016.[572]

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566 Melanie Evans, "Hospitals Merged. Quality Didn't Improve," *The Wall Street Journal*, January 1, 2020, https://www.wsj.com/articles/hospitals-merged-quality-didnt-improve-11577916000; Martin Gaynor, "Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets," remarks prepared for the Subcommittee on Antitrust, Commercial, and Administrative Law, March 7, 2019, https://docs.house.gov/meetings/JU/JU05/20190307/109024/HHRG-116-JU05-Bio-GaynorM-20190307.pdf.

567 Elisabeth Rosenthal, "Helps To Drive Up Health Care Costs," *Kaiser Health News*, September 5, 2019, https://khn.org/news/analysis-how-your-beloved-hospital-helps-to-drive-up-health-care-costs/.

568 "Public Health and Promoting Interoperability Programs," Centers for Disease Control and Prevention, https://www.cdc.gov/ehrmeaningfuluse/introduction.html.

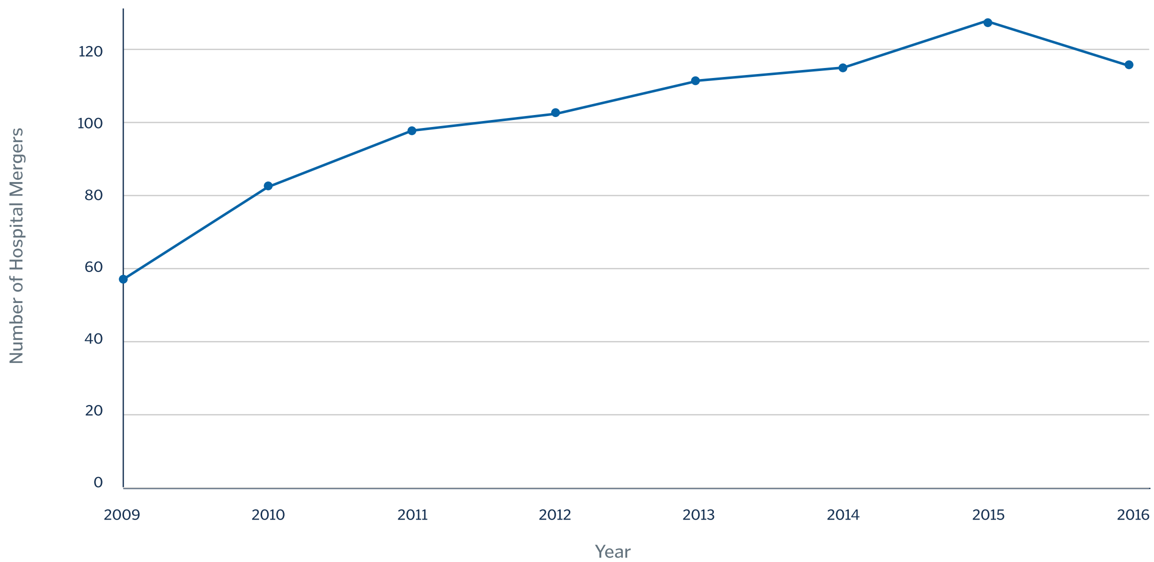
569 "Adoption of Electronic Health Records System," Peterson-KFF Health System Tracker, accessed October 2020, https://www.healthsystemtracker.org/indicator/quality/adoption-electronic-health-records-system/.

570 Richard Gunderman and Steven Kanter, "Educating Physicians to Lead Hospitals," *Academic Medicine* 84, no. 10 (2009): 1348-1351.

571 Amol Gupta, "Physician Versus Non-physician CEOs: The Effect of a Leader's Professional Background on the Quality of Hospital Management and Health Care," *Journal of Hospital Administration* 8, no. 5 (2019), http://www.sciedupress.com/journal/index.php/jha/article/view/15813.

572 Melanie Evans, "Hospitals Merged. Quality Didn't Improve," *The Wall Street Journal*, January 1, 2020, https://www.wsj.com/articles/hospitals-merged-quality-didnt-improve-11577916000.

CHART 11: NUMBER OF HOSPITAL MERGERS PER YEAR



The FTC had a more robust strategy of challenging hospital mergers than it did mergers in other industry sectors, but it ultimately allowed many of these hospital acquisitions to proceed without challenge. There are several possible explanations for this strategy. First, the FTC typically only reviews mergers above the Hart-Scott-Rodino reporting threshold, which many hospital mergers do not reach. In 2020, for example, transactions had to reach $94 million before the businesses involved were required to report.[573] Second, in the early 2000s, the FTC lost several hospital challenges in court, forcing the agency to rework its strategy—and likely making it less willing to risk the embarrassment of losing.[574] Finally, there was the ideology of many health policy scholars at the time, including the framers of the ACA, who believed that hospital consolidation led to greater efficiency.

During the Obama years, the FTC blocked few hospital mergers relative to consolidation in the space. According to the FTC's annual health care highlights from 2009 to 2016, the agency brought 11 cases where a hospital acquired another hospital; six were called off or blocked. Of the remainder, four were called off, one was dismissed, one was forced to divest, and two were litigated. Of the litigated entities, one settlement required the acquiring hospital to divest its acquisition, and one settlement instituted reporting requirements for future acquisitions. One final case, of two hospitals in Boston seeking to affiliate, proceeded after several years.

573 "HSR Threshold Adjustments and Reportability for 2020," Federal Trade Commission, January 31, 2020, https://www.ftc.gov/news-events/blogs/competition-matters/2020/01/hsr-threshold-adjustments-reportability-2020.

574 Rebecca Kelly Slaughter, "Antitrust and Health Care Providers Policies to Promote Competition and Protect Patients," remarks prepared for Center for American Progress, May 14, 2019, https://www.ftc.gov/system/files/documents/public_statements/1520570/slaughter_-_hospital_speech_5-14-19.pdf.

In this milieu, the hospital industry achieved a new level of consolidation. By 2017, a *Politico* analysis estimated that two-thirds of all hospitals in the country were part of a chain.[575]

PROVIDERS AND CLINICAL SITES

The ACA encouraged integration between hospitals and physicians, who have historically remained separately employed despite working in hospitals. This integration, as the framers of the ACA explicitly mentioned, was purposeful. The law's regulations around Accountable Care Organizations (ACOs), entities geared toward improving care efficiency while achieving cost savings, pushed physicians to employment by hospitals.

The FTC provided minimal enforcement to the rapidly consolidating space. The agency publicly investigated approximately six different health system-physician group mergers over the eight years of the Obama administration. Of these, three were settled, one was called off, one proceeded with divestments, and one was blocked in court.

Once acquired by a hospital, physicians lose much of the autonomy they once enjoyed, and they are often expected to meet increasingly higher patient quotas; the loss of control over their labor has driven some physicians to call for physician strikes.[576] By the end of the Obama administration, for the first time in American history, a majority of physicians did not own the place where they practiced.[577]

The growing integration of the industry had downstream effects for another kind of health care entity: non-hospital clinics. These clinics, especially ambulatory surgical centers (ASCs) and dialysis clinics, also consolidated. ASCs were largely bought up by hospitals, while independent dialysis clinics merged into existing dialysis giants DaVita and Fresenius.

For minor outpatient surgeries, ASCs are often the cheapest option for patients. They offer all the staffing and equipment normally present for a minor outpatient surgery but detached from a hospital and its incumbent overhead costs. Because Medicare pays ASCs slightly more than half the amount paid to hospital outpatient departments, however, ASCs represent a threat to hospital bottom lines, and a key target to acquire or shutter. An analysis by the Ambulatory Surgery Center Association found that, of the 179 ASCs that closed between 2009 and 2015, one-third closed following purchase by a hospital.[578] The consolidation of ASCs into hospital

575 Dan Diamond, "A Nation of McHospitals?," *Politico*, November 8, 2017, https://www.politico.com/agenda/story/2017/11/08/hospital-chains-dominate-health-care-000574/.

576 Olivia Webb, "Solidarity Is The Best Medicine," *Current Affairs*, January 8, 2020, https://www.currentaffairs.org/2020/01/solidarity-is-the-best-medicine.

577 Brendan Murphy, "For First Time, Physician Practice Owners are Not the Majority," American Medical Association, May 31, 2017, https://www.ama-assn.org/practice-management/economics/first-time-physician-practice-owners-are-not-majority.

578 Stephen Barlas, "Health Care Consolidation Continues Apace," *Pharmacy and Therapeutics* 40, no. 12 (2015): 823-824, 858.

outpatient departments represents a cost increase for patients and a decrease in practice options for physicians.

Dialysis, a treatment for end-stage kidney disease, is often performed in dedicated clinics. Increasingly, those clinics are controlled by two entities that together dominated 92 percent of the market in 2018, up from 84 percent in 2013 and 31 percent in 1997.[579] The FTC and DOJ allowed the continued consolidation of dialysis clinics during the Obama administration, publicly investigating only two proposed mergers and allowing both to move forward with minor divestment conditions.[580]

INSURERS

The Obama administration also stood by while insurers merged, with the largest five insurance companies buying 17 insurance and health information technology firms.[581] By 2014, five years into the administration, the FTC and DOJ had only challenged four different insurer mergers. Of these, two were settled, one proceeded with a divestment, and one proceeded with minor changes.

Then, in 2015, four of the five largest insurers announced mergers, planning to consolidate into only three.[582] The DOJ filed lawsuits to block those mergers. It succeeded in blocking both the Anthem-Cigna merger and the Aetna-Humana merger.

The ACA's individual marketplace created another form of insurance monopoly. The marketplace was a key feature of the ACA, allowing individuals to buy insurance apart from an employer. The marketplaces have been volatile, with some insurers pulling back and few efforts to ensure insurer participation. Some markets were left with only one monopolist insurer offering individual plans. In 2018, marketplaces with only one insurer had premiums that were an average of 50 percent, or $180 a month, more expensive.[583]

PHARMACEUTICAL MANUFACTURERS

Pharmaceutical manufacturers, a villain long before the Obama presidency, is the area in which the Obama administration dedicated substantial resources. The FTC brought 36 cases against

579 "Dialysis Centers," Concentration Crisis, Open Markets Institute, accessed November 2020, https://concentrationcrisis.openmarketsinstitute.org/industry/dialysis-centers/.

580 In the matter of Rangers Renal Holding, LP; U.S. Renal Care, Inc; Dialysis Parent, LLC, and Dialysis HoldCo, LLC (2016), the U.S. Renal settled by agreeing to divest three clinics. In the matter of Fresenius Medical Care AG and Liberty Dialysis Holdings, Inc. (2012), the FTC required Fresenius to sell 60 outpatient dialysis clinics in 43 local markets.

581 Catherine Ho, "Affordable Care Act Driving Health Care Mergers," *The Washington Post*, August 26, 2012, https://www.washingtonpost.com/business/capitalbusiness/affordable-care-act-driving-health-care-mergers/2012/08/24/95d5601c-ec9d-11e1-a80b-9f898562d010_story.html. Also, see Table 2 in Appendix.

582 Olga Oksman, "Why Pulling The Plug on Health Insurance Mergers Was Bound To Happen," *The Guardian*, July 24, 2016, https://www.theguardian.com/business/2016/jul/24/health-insurance-mergers-lawsuit-antitrust-concerns.

583 Jessica Van Parys, "ACA Marketplace Premiums Grew More Rapidly In Areas With Monopoly Insurers Than In Areas With More Competition," *Health Affairs* 37, no. 8 (2018), https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2018.0054.

drugmakers during the Obama presidency. All but six, however, ended in settlements, usually in merger cases where the commission sought product overlap divestitures.[584] Between 2009 and 2016, the top 10 pharmaceutical firms made at least 25 major acquisitions.[585]

Moreover, the post-Chicago School framework contributed to the consolidation by shaping the FTC's actions towards ineffective remedies. Instead of blocking mergers outright, the commission often defined markets so narrowly that pharmaceutical corporations could merge by divesting just a few products, often to another pharmaceutical corporation with a broad spectrum of products, but without those specific drugs in its portfolio or in the research lab. As economist John Kwoka noted, "This practice has resulted in a remedy policy that is little more than a constant rearranging of products among the portfolios of the same limited set of drug companies." It is unlikely, he concluded, that "this kind of rearrangement of assets and capabilities in the industry in the guise of merger remedies has preserved, much less strengthened, competition in the industry."[586]

Industry consolidation helped drive drug prices higher. Insulin is an important example. Only three firms hold patents to manufacture insulin in the U.S.: Sanofi, Novo Nordisk, and Eli Lilly. From 2010 to 2015, these three firms raised their insulin prices by 168 percent, 169 percent, and 325 percent, respectively.[587] Similarly, EpiPens, which deliver lifesaving epinephrine to people with severe food allergies, saw price increases of about 400 percent between 2008 and 2016.[588] Because EpiPens have to be replaced yearly, and Mylan is the only drug company that manufactures them, Mylan "has been able to pursue price increases with near carte blanche."[589]

Pay-for-delay perhaps represents the Obama-era FTC's most notable attempt to redress anticompetitive behavior in the health care space. Pay-for-delay occurs when a pharmaceutical manufacturer cuts a deal with a potential generic competitor, paying them to withhold their generic medication for months to years or to put out the generic medication but not market its availability. The FTC conducted a study in 2010 that put the cost of these collusive agreements to U.S. consumers at $3.5 billion per year.[590] During the Obama years, the FTC repeatedly declared pay-for-delay among its "top priorities."[591]

584 See: Table 3 in Appendix.

585 Margaret Visnji, "Pharma Industry Merger And Acquisition Analysis 1995 to 2015," *Revenues and Profits*, February 11, 2019, https://revenuesandprofits.com/pharma-industry-merger-and-acquisition-analysis-1995-to-2015/.

586 John Kwoka, "You Say You Want an Antitrust Revolution? The Paradox of Modern Merger Control," *The Antitrust Bulletin* 65, no. 4 (2020): 568-578.

587 Kasia Lipska, "Break Up the Insulin Racket," *The New York Times*, February 20, 2016, https://www.nytimes.com/2016/02/21/opinion/sunday/break-up-the-insulin-racket.html.

588 Sy Mukherjee, "How Mylan Got Away With Its Enormous Price Hike for the EpiPen," *Fortune*, August 22, 2016, https://fortune.com/2016/08/22/mylan-epipen-price-hike-monopoly/.

589 Mukherjee, "How Mylan Got Away With Its Enormous Price Hike for the EpiPen."

590 "Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions," Federal Trade Commission, January 2010, 2, https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf.

591 "FTC: Recent Supreme Court Decision Puts Agency in Stronger Position to Protect Consumers From Anticompetitive Pay-for-Delay Drug Settlements," press release, Federal Trade Commission, July 23, 2013, https://www.ftc.gov/news-events/press-releases/2013/07/ftc-recent-supreme-court-decision-puts-agency-stronger-position.

The agency considered two options for addressing pay-for-delay practices. The first was to use the FTC's Section 5 rule-writing authority to define the practice as an unfair method of competition, and the second was a litigation strategy to find the practice anticompetitive through the courts.[592] It opted for the latter, and in 2009, the FTC sued a group of drugmakers in an instance of pay-for-delay involving AndroGel, a testosterone supplement gel. But rather than argue that pay-for-delay agreements are straightforward collusion and thus illegal "per se" (meaning automatically illegal if it happens), the FTC argued that courts should judge pay-for-delay agreements under a different standard: the "quick look" rule of reason.[593] This meant that the FTC argued that the practice was "presumptively," and not per se, unlawful, meaning that pharmaceutical companies could still engage in the practice if they proved that doing so provided benefits that outweighed the costs.[594] This stance was consistent with the Bush administration's position for judging these agreements.[595] The suit eventually reached the Supreme Court in 2013 as *FTC v. Actavis*.

The Supreme Court, in a 5-3 opinion by Associate Justice Stephen Breyer, rejected even the "quick look" approach and held that pay-for-delays would be judged under an even weaker standard, the "rule of reason."[596] Under this standard, enforcers must not only show a pay-for-delay agreement but prove the firms had market power, demonstrate particular harms, and establish that those harms outweighed supposed benefits.[597] Recent scholarship has criticized the rule of reason and observed that it overwhelmingly favors corporate defendants.[598] In his dissent, Chief Justice John Roberts would have immunized drug companies from the antitrust laws in pay-for-delay cases.[599] But he rightly criticized the majority's choice to use the rule of reason, writing, "Good luck to the district courts that must, when faced with a patent settlement, weigh the 'likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances.'"[600]

592 See comments by former FTC official Michael Kades at "Restoring Competition in the United States: A Vision of Antitrust Enforcement for the Next Decade," Washington Center for Equitable Growth, November 19, 2020.

593 Federal Trade Commission v. Actavis, Inc., 570 U.S. 136 (2013), 158-159.

594 570 U.S., 159, citing California Dental Association v. Federal Trade Commission, 526 U.S. 756, 775n12 (1999).

595 See Brief for the United States as Amicus Curiae, Andrx Pharmaceuticals, Inc. v. Kroger Company, et al. (2004), 8 (arguing for judging pay-for-delay agreements under the rule of reason not as per se illegal). See also In re Schering-Plough Corp., 136 F.T.C. 956, 991 (2003) ("[W]e are not now prepared to say that all such [pay-for-delay] payments should be viewed as per se illegal or 'inherently suspect.'").

596 570 U.S. at 159.

597 To be even more precise, Actavis established a "structured" rule of reason. 570 U.S. at 159-160. Scholarship has pointed out that this "structured rule of reason" is not quite "quick-look" but allows plaintiffs to establish market power through an unjustified, "large reverse payment" in exchange for delayed market entry. See Brief of Amicus Curiae Open Markets Institute in Support of Respondent, *Impax Laboratories v. Federal Trade Commission*, 2019, 17-23, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea3792408057d30b40001c5/1587771757795/OMI-Brief-in-Impax-v.-FTC-FILED.pdf. Regardless of whether pay-for-delay agreements are judged under the full or "structured" rule of reason, the concerns over the standard's administrability and favorability to deep-pocketed pharmaceutical defendants remain.

598 Maurice E. Stucke, "Does the Rule of Reason Violate the Rule of Law?," *University of California, Davis Law Review* 42, no. 5 (2009); Michael A. Carrier, "The Rule of Reason: An Empirical Update for the 21st Century," *George Mason Law Review* 16, no. 4 (2009): 829-830 ("[P]laintiffs almost never win under the rule of reason. In 221 of 222 cases [involving a final determination in a rule of reason case] ... , the defendant won.").

599 570 U.S. at 162 ("If [a patent holder's] actions are within the scope of the patent, they are not subject to antitrust scrutiny, with two exceptions concededly not applicable here: (1) when the parties settle sham litigation; and (2) when the litigation involves a patent obtained through fraud on the Patent and Trademark Office.") (internal citations omitted).

600 570 U.S. at 174.

Despite the FTC's commitment to ending pay-for-delay, pharmaceutical companies simply changed their tactics. And without a per se illegality standard or a clear rule, the FTC had backed itself into a corner of litigating new pay-for-delay tactics as they appeared. Pharmaceutical manufacturers soon began offering payment in the form of business deals, rather than monetary compensation, for delayed drugs.[601] As a result, the FTC still spends years litigating pay-for-delay settlements and only investigated a handful more during the entire Obama administration.[602] One such ongoing investigation and case against drugmaker Impax started before the Trump administration and appears set to end *after* it. Drugmakers also began "product-hopping," or replacing branded drugs with slightly different branded drugs, switching customers from a drug reaching the end of its patent to one freshly protected from competition.[604] The Obama FTC did little on product hopping beyond an amicus brief, while New York state litigated against the practice.[605]

The FTC continued to fight pharmaceutical companies over the pay-for-delay issue; in 2016, the Supreme Court declined to hear a case in which the FTC won a case with the argument that cash is not the only form of compensation that comprises a pay-for-delay deal.[606] Nevertheless, it is a game of whack-a-mole that drains commission resources to address case-by-case a practice that is costly to consumers. Current FTC Commissioner Rebecca Kelly Slaughter has warned that the current approach to policing pay-for-delay agreements likely does not adequately deter pharmaceutical companies from using them and that some drugmakers "may still determine [pay-for-delay agreements are] worth the risk."[607]

GROUP PURCHASING ORGANIZATIONS

Group purchasing organizations, or GPOs, represent one of the greatest failures of the Obama era. GPOs purchase bulk medical supplies and drugs for hospitals and providers. They were originally billed as a cost-saving device for hospitals and hospital pharmacies to negotiate cheaper contracts for supplies and drugs.

601 Lisa Schencker, "'Pay-for-Delay' Deals Protecting Branded Drugs are Falling," *Modern Healthcare*, January 14, 2016, https://www.modernhealthcare.com/article/20160114/NEWS/160119926/pay-for-delay-deals-protecting-branded-drugs-are-falling.

602 Terrell McSweeny, remarks prepared for 2015 Annual Antitrust Spring Seminar, April 28, 2015, 6 (listing three pay-for-delay cases the FTC was bringing at the time), https://www.ftc.gov/system/files/documents/public_statements/639981/mcsweeny_-_2015_annual_antitrust_spring_seminar_remarks_4-28-15.pdf.

603 "Endo Pharmaceuticals Inc. Agrees to Abandon Anticompetitive Pay-for-Delay Agreements to Settle FTC Charges; FTC Refiles Suits Against Generic Defendants," press release, Federal Trade Commission, January 23, 2017, https://www.ftc.gov/news-events/press-releases/2017/01/endo-pharmaceuticals-inc-agrees-abandon-anticompetitive-pay-delay.

604 Lisa Schencker, "'Pay-for-Delay' Deals Protecting Branded Drugs are Falling."

605 New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015); Mylan Pharmaceuticals, Inc., et al., v. Warner Chilcott Public Limited Company, et al., Federal Trade Commission as Amicus, Civil Action No. 12-3824 (E.D. Pa. November 21, 2012); Brief for Amicus Curiae Federal Trade Commission Supporting Plaintiff-Appellant, No. 12-3824-PD (3d. Cir. September 30, 2015).

606 Ed Silverman, "Supreme Court Lets Pay-to-Delay Ruling Against Pharma Stand," *STAT News*, November 7, 2016, https://www.statnews.com/pharmalot/2016/11/07/supreme-court-pay-delay-glaxo-teva/.

607 Rebecca Kelly Slaughter, "Antitrust at a Precipice," remarks prepared for the GCR Interactive: Women in Antitrust, November 17, 2020, 7, https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

Today, there are two types of GPOs in the health care space, with blurred lines between. Both are heavily consolidated. GPOs that buy medical supplies largely consolidated from the mid-1990s to the early 2000s, after regulators exempted them from antitrust scrutiny except for "extraordinary circumstances."[608] GPOs that buy generic drugs for hospital pharmacies consolidated much more recently, with the bulk of acquisitions occurring during the Obama years.

The generic drug GPOs, also known as power buyers, consolidated under the nose of the Obama-era FTC. From 2013 to 2017, this power buyer consolidation brought entities as large as CVS, Target, OptumRx, Walgreens, and Walmart under just four umbrellas; by 2017, the four consolidated power buyers controlled 90 percent of all U.S. generic drug purchases from manufacturers.[609]

The power buyers bolster their massive purchasing power through a variety of abuses. There is limited evidence that power buyers secure cheaper prices for hospitals, but hospitals do receive "share-backs" from GPOs, which *The American Prospect* described as "a kind of payoff to keep them quiet" about price increases.[610] Power buyers also use sole-source contracts, prohibiting hospitals from sourcing through other, competing power buyers.

Drug power buyers and medical supply GPOs have also had upstream consequences for supply chains. The concentrated purchasing power of these entities has crushed manufacturers' profit margins, driving them to seek cheaper labor and materials, often abroad. Manufacturers lose the ability to maintain backup inventory, the supply chain becomes "just-in-time," and the fragile system is at risk of disruption from natural or human disaster.[611]

Ironically, the consolidation of power buyers had negative effects on merging generic pharmaceutical companies. In 2015, Teva, a major generics firm, announced a planned acquisition of Allergan's generic drug business. The FTC required a number of divestments, with which Teva complied. As the deal was going through, though, the GPO space was rapidly consolidating. By 2018, Teva was financially struggling as consolidated GPOs forced generic pharma prices down, and industry publications were calling the Allergan purchase a "disastrous $40.5 billion buy."[612] While power buyers may have the ancillary benefit of quashing generic manufacturer consolidation, power buyers have become so large that they may force manufacturers to seek out cheaper methods of production, including offshoring.

608 David Dayen, "Behind the Coronavirus Threat, a Middleman Destroying Prescription Drug Markets," *The American Prospect*, February 25, 2020, https://prospect.org/health/behind-the-coronavirus-threat-a-middleman-destroying-prescription-drug-markets/.

609 Adam Fein, "Meet The Power Buyers Driving General Drug Deflation," *Drug Channels*, February 1, 2018, https://www.drugchannels.net/2018/02/meet-power-buyers-driving-generic-drug.html.

610 David Dayen, "Behind the Coronavirus Threat, a Middleman Destroying Prescription Drug Markets."

611 Olivia Webb, "Moving Our Pharmaceutical Factories Overseas Was A Huge Mistake," *BuzzFeed News*, March 13, 2020, https://www.buzzfeednews.com/article/oliviawebb/coronavirus-why-cant-america-make-its-own-medicine.

612 Carly Helfand, "Settling a Post-buyout Hangover, Allergan Gives Teva a $700M remedy," *Fierce Pharma*, February 1, 2018, https://www.fiercepharma.com/pharma/teva-to-reap-700m-debt-easing-cash-from-allergan-post-deal-settlement.

RETAIL PHARMACIES

At the same time CVS was undergoing initial merger talks with Aetna and joining forces with power buyers, the corporation was aggressively destroying the independent pharmacy space. In 2014, CVS announced it had purchased all 33 locations of the Miami-based Navarro Discount Pharmacy, then the largest Hispanic-owned drug chain in the U.S.[613] CVS also acquired Navarro Health Services, a specialty pharmacy serving patients with complex drug needs.[614]

The following year, CVS acquired Omnicare, a provider of pharmaceuticals to long-term care facilities.[615] Also in 2015, CVS announced a deal to own and rebrand all of major chain store Target's 1,672 pharmacies and 79 clinics.[616] Other chain pharmacies were similarly acquiring as many independent pharmacies as possible; Walgreens acquired the New York-based chain Duane Reade in 2010 and the British pharmaceutical retail and wholesale group Alliance Boots from 2012-2014.[617]

The FTC largely stepped aside as massive retail pharmacy conglomerates bought up independent pharmacies and subjected the remainder to costs intended to sink them. However, regulator hesitancy played a role in Walgreens' ultimate abandonment of its plan to acquire all of Rite Aid's locations.[618]

Consolidation has been harmful. Recent reporting from *The New York Times* found that pharmacists working for the largest chains are held to such high quotas that they can sometimes make dangerous mistakes with prescriptions.[619] A *Consumer Reports* survey found that consumers may be charged as much as nine times the price for the same basket of generic drugs from conglomerate retail pharmacies compared to independent pharmacies.[620] By allowing CVS and Walgreens to make aggressive acquisitions, regulators have made worse the simple act of picking up a prescription.

613 "CVS Health Completes Purchase of Navarro Discount Pharmacy," press release, CVS Health, September 8, 2014, https://cvshealth.com/newsroom/press-releases/cvs-health-completes-purchase-navarro-discount-pharmacy.

614 "CVS Health Completes Purchase of Navarro Discount Pharmacy."

615 "CVS Health and Omnicare Sign Definitive Agreement for CVS Health to Acquire Omnicare," press release, CVS Health, May 21, 2015, https://cvshealth.com/newsroom/press-releases/cvs-health-and-omnicare-sign-definitive-agreement-cvs-health-acquire.

616 "CVS Health and Target Announce Completed Acquisition of Target's Pharmacy and Clinic Businesses," press release, CVS Health, December 16, 2015, https://cvshealth.com/newsroom/press-releases/cvs-health-and-target-announce-completed-acquisition-targets-pharmacy-and.

617 "Walgreens to Acquire New York-based Drugstore Chain Duane Reade," *Business Wire*, February 17, 2010, https://www.businesswire.com/news/home/20100217005827/en/Walgreens-Acquire-York-based-Drugstore-Chain-Duane-Reade; "Walgreens and Alliance Boots Complete Step 2 of Merger to Form First Global Pharmacy-Led, Health and Wellbeing Enterprise," press release, Walgreens Boots Alliance, December 31, 2014, https://www.walgreensbootsalliance.com/news-media/press-releases/2014/walgreens-and-alliance-boots-complete-step-2-merger-form-first#:~:text=Walgreens%20and%20Alliance%20Boots%20announced,ownership%20stake%20in%20Alliance%20Boots.

618 Sharon Terlep and Brent Kendall, "Walgreens, Rite Aid End $9.4 Billion Merger," *The Wall Street Journal*, June 29, 2017, https://www.wsj.com/articles/walgreens-rite-aid-end-9-4-billion-merger-walgreens-to-buy-half-of-rite-aid-stores-1498735324. Ultimately, Walgreens acquired only about 2,200 Rite Aid locations.

619 Ellen Gabler, "How Chaos at Chain Pharmacies Is Putting Patients at Risk," *The New York Times*, January 31, 2020, https://www.nytimes.com/2020/01/31/health/pharmacists-medication-errors.html.

620 Lisa L. Gill, "Shop Around for Lower Drug Prices," *Consumer Reports*, April 5, 2018, https://www.consumerreports.org/drug-prices/shop-around-for-better-drug-prices/.

PHARMACY BENEFIT MANAGERS

Pharmacy benefit managers, or PBMs, are GPOs that negotiate drug prices between manufacturers, insurers, and retail pharmacies. A PBM is a middleman in the drug market. Its business is to handle pricing and offerings of prescription drugs on behalf of insurance companies. A PBM keeps a list of drugs that an insurance company will need to offer for patients, as well as prices for those drugs, and the amounts that pharmacies get reimbursed for filling prescriptions. When a doctor prescribes a drug for a patient, the PBM takes the payment from the insurance company, sends money to the drug company, and reimburses the pharmacy. PBMs make money off the difference between the amount the insurer pays the PBM for the drug and the amount the PBM pays the pharmacy, known as the "spread." They also make money from rebates from manufacturers, which use the rebates to incentivize which drugs are included on the insurer's "formulary," or preferred drug list.[621]

CVS Caremark is the PBM for CVS-Aetna, for example, and Express Scripts is owned by Cigna. They originally formed with the business proposition of driving down costs for insurers and patients by providing group negotiation for drug reimbursement, but today they often serve as another tollbooth in the complicated drug purchasing process.

The failure of the FTC to regulate PBM consolidation is another mark against the Obama administration. The lack of enforcement allowed existing large PBMs, such as Express Scripts, to acquire smaller entities like Medco in 2011, and Optum Rx (which is owned by UnitedHealth Group) to acquire Catamaran in 2015. There were at least five mergers in this already concentrated sector.[622] The FTC did not publicly review any mergers in the PBM space during the Obama administration.

Today the industry is dominated by just a few PBMs, which have almost all been purchased by insurers or pharmacy chains. In other words, PBMs, originally intended to negotiate on behalf of health insurers, have been integrated into the insurer business. Pharmacies and patients have little insight into PBMs' cost and profit, and typically must pay whatever the PBM asks.

By allowing the PBM industry to consolidate, regulators put patients at risk for schemes like the one uncovered in Ohio in 2018 by *The Columbus Dispatch*. CVS Caremark and Optum Rx were found to be overcharging patients and Ohio's Medicaid program for drugs—charging Ohioans three to six times the normal rate—and reimbursing CVS pharmacies more than independent pharmacies.[623]

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621 Brian Feldman, "Big Pharmacies are Dismantling the Industry that Keeps US Drug Costs Even Sort-of Under Control," *Quartz*, March 17, 2016, https://qz.com/636823/big-pharmacies-are-dismantling-the-industry-that-keeps-us-drug-costs-even-sort-of-under-control/.

622 Stephen Barlas, "Health Care Consolidation Continues Apace," *Pharmacy and Therapeutics* 40, no. 12 (2015): 823-824, 858. Major PBM mergers during this period include UnitedHealth Group/Catamaran (2015), Rite Aid/EnvisionRx (2015), Catamaran/Healthcare Solutions (2015), Express Scripts/Medco (2012), and SXC Health Solutions/HealthTrans (2012).

623 "Side Effects: An Ongoing Investigation On the Rising Costs of Prescription Drugs," *The Columbus Dispatch*, https://stories.usatodaynetwork.com/sideeffects/.

Moreover, vertical integration of insurers, pharmacies, and PBMs creates a powerful mechanism to enable yet more consolidation. CVS has been accused of using its purchasing and retail power in multiple states to squeeze independent pharmacies out of business, by using its PBM to change what independent pharmacies are reimbursed so as to make such businesses uncompetitive, then swooping in to buy them out.[624]

MEDIA AND TELECOMMUNICATIONS

The broad goal of regulators in media and telecommunications under the Obama administration was to restore America's tradition of free expression and ensure its continuation into the 21st century. This was an especially important goal in 2009, as the movie, television, telecommunications, and broadcast industries sat at a pivot point, with traditionally siloed industries converging into a broader battle over the production and distribution of media content.

In many ways, this policy framework seemed to have succeeded. Over-the-top video (OTT), or the delivery of video content via the internet without traditional cable or satellite service, exploded. Today, Hulu, Peacock, Disney Plus, Netflix, HBO, YouTube TV, Amazon Prime, Sling TV, and CBS All Access are just some of the options for consumers.

Yet behind the screens, by the end of the administration, the media and telecom industry had consolidated, leading to the same set of harms that resulted in other concentrated areas, such as lower wages for workers. As the Writer's Guild of America West noted, "the median weekly compensation of writer-producers on television and online series has declined over the past several years—23% between 2014 and 2016," despite record profits in the industry and peak demand for programming.[625] Moreover, Disney, toward the end of the administration and increasingly after the purchase of Fox under the Trump administration, began extending and expanding its coercive contracts with theater owners, dominating the movie exhibition business.

These dynamics represent a continuation of the trend since the 1990s, when media deregulation hit full swing after the passage of the Telecommunications Act of 1996. Disney purchased Capital Cities/ABC, Time Warner bought Turner Broadcasting, and AOL merged with Time Warner in the biggest media-internet merger of all time. Vertical integration in broadcasting and content production began in force; in the early 1990s, "the major broadcast TV networks produced

624 Linette Lopez, "What CVS is Doing to Mom-and-pop Pharmacies in the US Will Make Your Blood Boil," *Business Insider*, March 30, 2018, https://www.businessinsider.com/cvs-squeezing-us-mom-and-pop-pharmacies-out-of-business-2018-3.

625 "Writers Guild of America West Comment on DOJ-FTC Draft Vertical Merger Guidelines," Writers Guild of America West, 2020, 10, https://www.wga.org/uploadedfiles/news_and_events/public_policy/wgaw_comment_on_draft_vertical_merger_guidelines.pdf.

between 18 percent and 34 percent of their primetime hours, but by the early 2000s, this had increased to between 49 percent and 67 percent, with a lot of productions made through sister studios."[626] Meanwhile, financiers rolled up the theater industry into large chains dominated by multiplexes with stadium seating and multiple screens.

During the Bush administration, consolidation continued. And as America began hooking up to broadband, there was increasing "convergence" between telecommunications, cable, TV and movie production, and internet access.

By 2015, concentration in distribution and content creation had become so extreme that foreign entities could control American filmmakers by manipulating giant companies like Disney and Comcast.[627] China, according to the U.S.-China Security Review Commission, was able to require filmmakers "to cut out any scenes, dialogue, and themes that may be perceived as a slight to the Chinese government," merely by threatening to block film imports. "With an eye toward distribution in China, American filmmakers increasingly edit films in anticipation of Chinese censors' many potential sensitivities," the commission said.[628] Because of this export dependence, only independent studios or distributors without business in China can make or sell content likely to displease the Chinese government, but such smaller corporations are choked out of the American market by monopolization. In other words, the Chinese government has taken advantage of monopolization in Hollywood to impose censorship across the West.

What explains the paradox of concentration paired with consumer choice? The answer is that the large number of consumer options is a temporary manifestation of a battle for market power, a recognition that, under the current trajectory, there will be a few global winners, and massive investment is worthwhile for a chance to be one of them.

While enforcers and regulators during the Obama administration largely ignored the dangers of corporate power, an important exception is the use of nondiscrimination rules against telecom providers and ISPs under Tom Wheeler's leadership at the FCC.

In 2015, in contrast to his predecessors at the FCC and his counterparts at the slothful FTC—and against vehement opposition from phone and cable corporations—Wheeler enacted open internet rules, better known as "net neutrality," a strong set of anti-discrimination regulations on telecommunications networks. Similarly, Wheeler pursued policies to expand municipal broadband and constrain the use of personal data by internet service providers.[629] Wheeler's

626 "Television Production in the US," IBISWorld Industry Report 51211b, July 31, 2008.

627 Matt Stoller, "The Slow Death of Hollywood," *BIG*, July 9, 2019, https://mattstoller.substack.com/p/the-slow-death-of-hollywood.

628 "Directed by Hollywood, Edited by China: How China's Censorship and Influence Affect Films Worldwide," U.S.-China Economic and Security Review Commission, October 28, 2015, https://www.uscc.gov/research/directed-hollywood-edited-china-how-chinas-censorship-and-influence-affect-films-worldwide.

629 Tom Wheeler, "Protecting Privacy for Broadband Consumers," Federal Communications Commission, October 6, 2016, https://www.fcc.gov/news-events/blog/2016/10/06/protecting-privacy-broadband-consumers.

colleague Mignon Clyburn, in her brief tenure as chair, used public utility rules in an attempt to block price gouging by private equity-owned prison-phone monopolists.[630] These policies led to the explosion of streaming options, and prevented telecommunications networks from discriminating against internet content from rivals.

Otherwise, Obama-era media and antitrust enforcers oversaw a merger boom. From 2009 to 2017, there were 109 mergers in the broadcasting industry, 273 in the telecommunications sector, and 48 in the "motion picture and sound recording" industries. The regulatory choices of the agencies, as well as five significant merger transactions, largely defined the media policy framework. These mergers were Comcast-NBC, Disney-Lucasfilm, Disney-Marvel, Charter-Time Warner, and Comcast-Time Warner. The administration allowed four to proceed, while blocking Comcast-Time Warner. These mergers enabled the consolidation of media into vertically integrated conglomerates with substantial market power across multiple sectors. New entrants into video, such as Netflix and Amazon, mimicked the vertical structure of the industry this policy framework enabled.

DISNEY'S MERGERS

During the Obama administration, entertainment, media, and telecommunications industry players tested the boundaries of policy. Disney, Comcast, and Netflix did so most aggressively.

In 2009, Disney was in the midst of a series of acquisitions to establish market power across the entertainment industry. This began under CEO Michael Eisner in 1996, who used the end of the FCC's Financial Syndication Rules to buy Capital Cities/ABC, which included a significant broadcaster and key content like ESPN. His successor, Bob Iger, acquired Pixar in 2006. Iger's strategy was twofold. He acquired competitive power through acquisitions of expensive brands, since, as he put it, "great brands would become even more powerful tools for guiding consumer behavior."[631] He also sought to establish power in distribution, as he observed that "modern distribution would be an essential means of maintaining brand relevance."[632] Iger's competitive framework was oriented around recreating a vertically integrated studio with global market power in content production and distribution.

Part of the leverage gained in these mergers was power over suppliers and workers. In 2017, for example, Disney settled a $100 million class action antitrust suit by animators and visual effects workers alleging it had colluded with Lucasfilm and Pixar to suppress wages years earlier, before

630 Cecilia Kang, "Court Strikes Obama-era Rule Capping Cost of Phone Calls from Prison," *The New York Times*, June 13, 2017, https://www.nytimes.com/2017/06/13/technology/fcc-prison-phone-calls-regulations.html.

631 GMA Team, "Book Excerpt: Bob Iger's 'The Ride of a Lifetime: Lessons Learned from 15 Years as CEO of the Walt Disney Company,'" *ABC News*, September 23, 2019, https://abcnews.go.com/GMA/News/book-excerpt-bob-igers-ride-lifetime-lessons-learned/story?id=65791448.

632 GMA Team, "Book Excerpt: Bob Iger's 'The Ride of a Lifetime.'"

the three companies merged. As explained earlier, one irony of this settlement is that collusion was no longer necessary, because all three companies had become part of one conglomerate, and wage-fixing within one company with market power is not a violation of antitrust laws.[633] Iger also oversaw the acquisition of Marvel Entertainment in 2009, Lucasfilm in 2012, UTV Software Communications in 2012, Maker Studios in 2014, and BAMTech streaming technology in 2016 and 2017.

Disney's branded content, combined with the need to release films on thousands of screens at once, gave it the ability to dictate to theater owners "a set of top-secret terms that numerous theater owners say are the most onerous they have ever seen," as *The Wall Street Journal* wrote in 2017.[634] By that year, Disney had become so dominant at the box office, it was able to demand 65 percent of ticket revenue from its *Star Wars* films and require "theaters to show the movie in their largest auditorium for at least four weeks."[635] One film buyer said, "They're in the most powerful position any studio has ever been in, maybe since MGM in the 1930s."[636] And yet, Disney was releasing fewer films, just 13 in 2017 versus an average of 24 in the 1990s, even while accounting for 26 percent of total domestic box office.

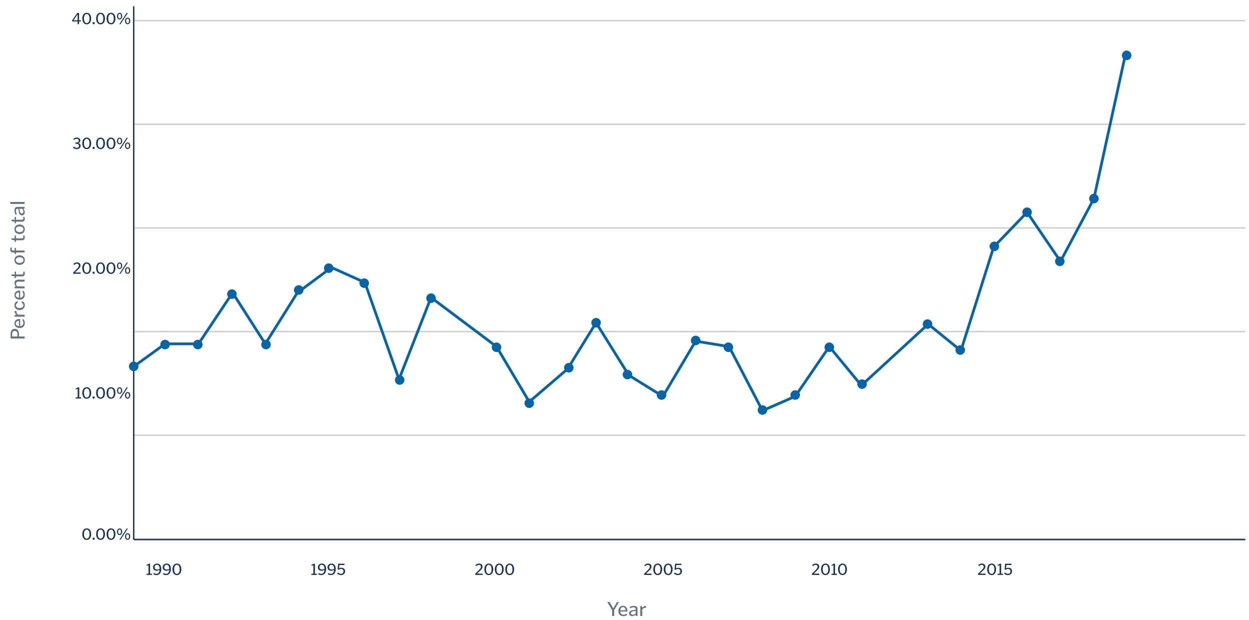
633 Ashley Milano, "Disney, Pixar, Lucasfilm Settle Animation Workers' Antitrust Litigation for $100M," Top Class Actions, February 2, 2017, https://topclassactions.com/lawsuit-settlements/employment-labor/462278-disney-pixar-lucasfilm-settle-animation-workers-antitrust-litigation-100m/.

634 Erich Schwartzel, "Disney Lays Down the Law for Theaters on 'Star Wars: The Last Jedi,'" *The Wall Street Journal*, November 1, 2017, https://www.wsj.com/articles/disney-lays-down-the-law-for-theaters-on-star-wars-the-last-jedi-1509528603.

635 Schwartzel, "Disneys Laws Down the Law for Theaters."

636 Schwartzel, "Disneys Laws Down the Law for Theaters."

CHART 12: WALT DISNEY CORPORATION'S SHARE OF DOMESTIC BOX OFFICE SALES



Source: Boxofficemojo.com

COMCAST AND NBC

Similarly, Comcast had been acquiring power in the cable industry for decades, largely through acquisitions. CEO Brian Roberts oversaw the $47.5 billion purchase of AT&T Broadband in 2002.[637] It also bought the E! Entertainment Television in 2004, International Channel Networks in 2004, and assets from Adelphia Communications in 2005, Susquehanna Communications in 2005, Patriot Media in 2007, Plaxo in 2008, DailyCandy in 2008, and Movies.com in 2008.[638] At the beginning of the Obama administration, Comcast was already the biggest internet service provider and one of the biggest pay-TV providers in the country.

In 2009, Comcast bought control of NBC Universal from General Electric. This merger gave Comcast the power and incentive to discriminate in two places. Comcast's cable network now had an incentive to privilege its own NBC content over rival and independent programming, and its NBC division had an incentive to withhold content from rival and independent cable systems. Failure to block the NBC-Comcast merger illustrated that the Obama administration approved of vertically integrated content, advertising, and distribution goliaths. Only corporations with substantial scale would have sufficient bargaining leverage to produce and sell content, leading to the erosion of independent production houses and cable systems.

637 "Timeline," Comcast, accessed November 2020, https://corporate.comcast.com/press/timeline.

638 "Timeline," Comcast.

The NBC-Comcast merger went through extensive antitrust scrutiny at both the Antitrust Division and the Federal Communications Commission, which cleared it in 2010 with a set of requirements to increase broadband service and media diversity, with Comcast pledging to launch 10 independent television networks, signing deals in 2013 with Magic Johnson's ASPiRE and Sean "Diddy" Combs' REVOLT.[639] The merger conditions on NBC were largely a failure; Combs, as well as multiple black and Latino entrepreneurs who launched channels with Comcast, claimed Comcast never gave the channels sufficient carriage to be financially viable. Since the merger, Comcast has squeezed out independent programmers FUSE, beIN Sports, the Tennis Channel, Starz, and Altitude TV, primarily doing deals with a small cartel that includes Disney, Viacom-CBS, Netflix, and AT&T-Time Warner.[640] Even powerful corporations like Bloomberg have struggled to get FCC provisions enforced against Comcast.[641]

In 2014, enforcers with the Antitrust Division and the FCC blocked Comcast's attempted merger with Time Warner Cable. FCC Chair Wheeler's rationale was that the potential of Comcast's power over broadband and content posed an "unacceptable risk to competition and innovation" in the online video and content markets.[642] In 2016, Comcast bought Dreamworks Animation, the major independent competitor to Disney's consolidated animation business.

NETFLIX, STREAMING, AND CUTTING WORKER PAY

The consolidation of power in the hands of content producers and distributors structured the streaming market, especially how the Hollywood workforce, one of the last remaining unionized workforces in the country, would be compensated.

Netflix first launched a streaming service in early 2007. After enforcers allowed Comcast to buy NBC, Netflix realized that its days of being able to license content from studios were numbered, and it began to buy exclusive content. Netflix's Ted Sarandos explained that the company was betting that "there would come a day when the studios and networks may opt not to license us content in favor of maybe creating their own services."[643] In 2013, Netflix launched its first series, *House of Cards*, and now spends billions of dollars a year on original content.[644]

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639 Matt Stoller, "Remote Control," *The American Prospect*, March 26, 2020, https://prospect.org/power/remote-control-comcast-monopoly-crushes-diversity/.

640 Matt Stoller, "Remote Control."

641 Eriq Gardner, "Bloomberg Again Accuses Comcast of Favoring NBCUniversal's News Networks," *The Hollywood Reporter*, April 10, 2012, https://www.hollywoodreporter.com/thr-esq/bloomberg-again-accuses-comcast-favoring-310052.

642 "Statement from FCC Chairman Tom Wheeler on the Comcast-Time Warner Cable Merger," Federal Communications Commission, 2015, https://www.fcc.gov/document/chairmans-statement-comcast-twc-merger.

643 Netflix (NFLX) Q4 2018 Earnings Conference Call Transcript, https://www.fool.com/earnings/call-transcripts/2019/01/18/netflix-nflx-q4-2018-earnings-conference-call-tran.aspx.

644 Todd Spangler, "Netflix Projected to Spend More Than $17 Billion on Content in 2020," *Variety*, January 16, 2020, https://variety.com/2020/digital/news/netflix-2020-content-spending-17-billion-1203469237/.

Netflix initially undercharged consumers to build a large customer base, selling bonds to raise money for producing content instead of charging what it would take to break even. Once it acquired a large market share, the corporation began exhibiting classic signs of market power. It raised prices to consumers, while restructuring compensation with directors, actors, and writers. Traditionally, artists had been paid based on fees for shows distributed in secondary markets, through syndication or DVD sales. Netflix effectively ended this model, which had been the underpinning of the Hollywood economy.[645] There simply were no more secondary markets, no more syndication, and no way to even tell how popular something had been. A Netflix show streamed on Netflix, and that's it. Netflix's aggressive tactics in reducing the pay of artists has caused tension within the creative community. As actress Allison Becker put it in a tweet targeted at Netflix, "you really have to start paying your actors better wages. You have the money. Make your numbers public. Treat artists better."[646]

Netflix's strategy is increasingly catalytic across the industry. Disney has followed Netflix in pursuing a loss-leading strategy for its online service, and in reducing labor compensation.

CONSEQUENCES

In the second half of the Obama administration, there was dramatic investment in new content to acquire market power by establishing relationships with customers, what John Landgraf of FX Networks dubbed "Peak TV." This immense investment in new shows masked the increasing centralization of power in the hands of Comcast-NBC, Disney, Fox, Netflix, CBS, Viacom, and Time Warner. There were no longer markets for independent content production, as distributors increasingly distributed their own products.[648]

When the Trump administration took over, it inherited a highly centralized and concentrated media apparatus. The Trump administration's track record is poor, losing its challenge to the AT&T-Time Warner merger through bad lawyering and shoddy expert testimony, clearing an illegal merger between Disney-Fox, repealing open internet rules, and repealing the Paramount Consent Decrees that prohibited vertical integration of theaters and movie studios.

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645 Jessica Toonkel, Tom Dotan, and Beejoli Shah, "Netflix Plays New Role: Budget-Conscious," *The Information*, July 1, 2019, https://www.theinformation.com/articles/netflix-plays-new-role-budget-conscious.

646 Nicole LaPorte, "The Death of Hollywood's Middle Class," *Fast Company*, October 25, 2018, https://www.fastcompany.com/90250828/the-death-of-hollywoods-middle-class.

647 Adam Epstein, "Thanks to Streaming, We May Never Reach the Peak of 'Peak TV,'" *Quartz*, January 10, 2020, https://qz.com/1783165/thanks-to-streaming-we-may-never-reach-the-peak-of-peak-tv/.

648 In 2016-2017, Disney, Fox, ViacomCBS, Time Warner, and Comcast-NBC all supplied over 70 percent of their own content for television and online scripted series. "Writers Guild of America West Comment on DOJ-FTC Draft Vertical Merger Guidelines," Writers Guild of America West, 3, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/wgaw_comment_on_draft_vertical_merger_guidelines_2262020.pdf.

NEWS PUBLISHING

In a 2009 speech at the White House Correspondents' Dinner, President Obama spoke about the importance of the newspaper industry, which was already in free fall. "A government without newspapers, a government without a tough and vibrant media of all sorts, is not an option in the United States of America," he said.[649] Over the next eight years, the Obama administration permitted the industry to fall apart.

From 2010 to 2016, the news industry shed approximately 113,000 jobs.[650] Advertising revenue in the newspaper industry peaked at more than $49.4 billion in 2005, collapsing to an estimated $14.3 billion in 2018.[651] The collapse was especially pronounced at a local level; Google and Facebook control 77 percent of local advertising revenue.[652] Accompanying the advertising collapse was a merger wave, with 109 transactions in publishing reported during the administration.[653] The results are stark and frightening. In 2018, researchers found that swaths of America increasingly resemble a news desert; 2,000 out of 3,143 counties now have no daily newspaper. Many of the remaining newspapers are "ghost newspapers" with a shell staff and drastically reduced news value.[654]

There were two main causes of this transformation of the newspaper industry. The first was the concentration of advertising into the hands of Google and Facebook, and the second was the purchase of newspapers by predatory financiers who strip-mined the industry for whatever assets remained, preventing possible investments in new business models. There was little policy response to either trend.

THE MONOPOLIZATION OF ONLINE ADVERTISING

The business models of both Facebook and Google rely on advertising revenue that previously flowed to newspapers. Traditionally, advertisers bought ads directly from trusted branded news outlets, or through third parties like ad agencies. Starting in 2006, the market for buying and selling ads online underwent a radical shift toward targeted personalized advertising, bought instantly through a complex set of intermediaries.

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649 President Barack Obama, White House Correspondents' Dinner Speech, 2009, https://www.c-span.org/video/?c4487306/user-clip-2009-obama-journalism.

650 Derek Thompson, "The Print Apocalypse and How to Survive It," *The Atlantic*, November 3, 2016, https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429/.

651 "Newspapers Fact Sheet," Pew Research Center, July 9, 2019, https://www.journalism.org/fact-sheet/newspapers/.

652 "Local Journalism: America's Most Trusted News Sources Threatened," U.S. Senate Committee on Commerce, Science, and Transportation, October 2020, 3, https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf; Matt Stoller, "Ad Tech and the News: Background on the Rise of Surveillance Advertising and Its Effects on Journalism," Open Markets Institute, Center for Journalism & Liberty, 2020, https://static1.squarespace.com/static/5efcb64b1cf16e4c487b2f61/t/5f75107ef21702786068d8a3/1601507762535/adtech-cjl-sept2020.pdf.

653 See: Table 4 in Appendix.

654 Tom Stites, "About 1,300 U.S. Communities Have Totally Lost News Coverage, UNC News Desert Study Finds," *Poynter*, October 15, 2018, https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds/.

Today, 86 percent of online display advertising space is bought and sold where these intermediaries gather, in electronic stock market-like "advertising exchanges."[655] In these markets, middlemen gather highly detailed personal data and then allow advertisers to bid on the right to advertise specific messages to specific people as they move around the web.[656] No longer does an advertiser have to advertise on *The Wall Street Journal* to reach the paper's readers. The advertiser can instead pay to reach that reader wherever it is cheapest to do so, anywhere from ESPN to Candy Crush.

In most cases, advertisers no longer know where their advertising is showing up, and fraud is rampant.[657] This change in market structure broke the relationship between publisher and audience and allowed intermediaries to take an increasing share of the advertising dollar.

Starting in 2007, but accelerating into the Obama administration, Google (with a secondary but important role for Facebook) began taking control of this financialized advertising industry, which is known as "ad tech."

Both corporations bought up competitors, with Google alone purchasing 145 companies from 2004-2014. These purchases, as well as the lack of privacy and antitrust rules, allowed Google to gather highly personal data profiles on users across the web. Google used a host of tactics to gather data from users and business partners, including its control of the Chrome browser and other key lines of business, its ability to set widely adopted standards that privilege its control of content and data, contractual restrictions on partners, and its control of the flow of search results. Google forced publishers to provide content for free or below cost, and effectively hand over newspapers' own valuable data.[658]

Google's control of vast swaths of user data, as well as search and online video, gave the corporation enormous advantages when it was buying companies involved in the technology of buying and selling advertising. As Google increasingly gained control over ad tech intermediaries, it shifted more revenue from publishers to itself. According to antitrust scholar and former advertising executive Dina Srinivasan, Google "simultaneously operates the leading trading venue, as well as the leading intermediaries that buyers and sellers go through to trade. At the same time, Google itself is one of the largest sellers of ad space globally."[659]

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655 "The Programmatic Supply Chain: Deconstructing the Anatomy of a Programmatic CPM," Interactive Advertising Bureau, March 2016, 1, https://www.iab.com/wp-content/uploads/2016/03/Programmatic-Value-Layers-March-2016-FINALv2.pdf.

656 Stoller, "Ad Tech and the News," 8.

657 "Local Journalism," U.S. Senate Committee on Commerce, 15; Stoller, "Ad Tech and the News."

658 "How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism," ***News Media Alliance*****, June 18, 2020, https://www.newsmediaalliance.org/copyright-white-paper/; Dina Srinivasan, "Why Google Dominates Advertising Markets,"** ***Stanford Technology Law Review*****, forthcoming 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500919.**

659 Srinivasan, "Why Google Dominates Advertising Markets," 1-2.

Today, publishers and advertisers buy and sell ads in an opaque market controlled by Google. Of every dollar put into advertising, middlemen take 30 to 50 cents.[660] By way of contrast, credit card payment networks take roughly 2 to 3 percent of purchase fees, and stock market intermediary fees are less than that. The net effect of this monopolization is that publishers are starved of revenue generated from the content they create. As one publisher put it in an investigation conducted by Senate Commerce Committee staff: “Technology partners are out there, with many wanting a heavy revenue share (40 to 50 percent) for the technology … while we still have to do the heavy lifting … content creation to capture the audience, sales expense, etc.”[661]

This online ad exchange model is a result of the specific regulatory model chosen by the FTC. Not only did the commission fail to challenge any mergers by Google, but it pursued a policy of encouraging self-regulation by industry stakeholders instead of implementing rules such as “Do Not Track” lists. Data regulation would have reduced the ability of intermediaries like Google to misappropriate the valuable subscriber and reader data from publishers, then use that data to target ads to the publishers’ audiences.[662] Instead, the agencies allowed Google to take control of the main revenue source for American journalism.

PRIVATE EQUITY STEPS IN

The second body blow to newspapers was the dominance of a new set of financiers in newspaper ownership over the past 15 years. Distressed businesses, including newspapers, became a target for buyout-focused private equity funds and hedge funds.[663]

As the number of owners fell, especially among independent family-owned papers, consolidation reshaped the industry. By 2014, the largest 25 companies owned 2,199 papers, which accounted for more than half of the country’s daily newspapers and one-fifth of non-dailies.[664] The next largest 25 companies owned only 631 papers total.[665] UNC published a detailed report on the nature of these owners, who were not traditional media corporations with well-established lines of business publishing content and selling ads, but private equity funds and hedge funds focused on distressed assets.[666]

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660 Dr. Augustine Fou, “Marketers And Publishers Are Making More Money By Using Less Adtech,” *Forbes*, August 7, 2020, https://www.forbes.com/sites/augustinefou/2020/08/07/marketers-and-publishers-are-making-more-money-by-using-less-adtech/?sh=30cba4c05898; Alex Barker, “Half of Online Ad Spending Goes to Industry Middlemen,” *Financial Times*, May 5, 2020, https://www.ft.com/content/9ee0ebd3-346f-45b1-8b92-aa5c597d4389.

661 “Local Journalism,” U.S. Senate Committee on Commerce, 16.

662 See “FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising,” Federal Trade Commission, 2009, https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf.

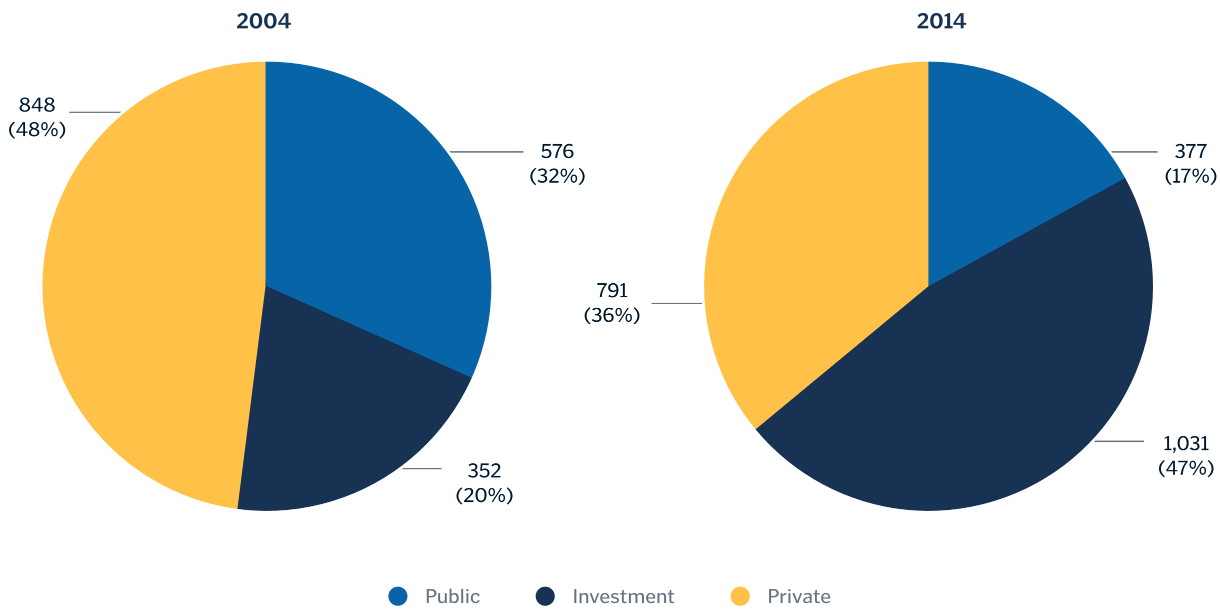
663 “Private Equity: Recent Growth in Leveraged Buyouts Exposed Risks That Warrant Continued Attention,” U.S. Government Accountability Office, GAO-08-885, September 2008, https://www.gao.gov/new.items/d08885.pdf.

664 Penelope Muse Abernathy, “The Rise of a New Media Baron and the Emerging Threat of News Deserts,” University of North Carolina, Center for Innovation & Sustainability in Local Media, 2016, 15, https://www.usnewsdeserts.com/wp-content/uploads/2016/09/07.UNC_RiseOfNewMediaBaron_SinglePage_01Sep2016-REDUCED.pdf.

665 Abernathy, “The Rise of a New Media Baron and the Emerging Threat of News Deserts,” 15.

666 Abernathy, “The Rise of a New Media Baron and the Emerging Threat of News Deserts.”

CHART 13: NEWSPAPERS OWNED BY LARGEST 25 COMPANIES: 2004 & 2014



By 2014, investment companies owned almost half of the newspapers owned by the largest 25 companies.

Source: UNC Database

One example of such an acquirer is Alden Global Capital. In 2012, the New York-based hedge fund acquired the newspaper chain Digital First Media, among many other media acquisitions. Alden soon laid off many of Digital First Media's reporters, forcing the remaining employees to double or triple the number of stories they were writing. Reporters had to buy their own office supplies, and the newspaper's new owners shut off hot water in the bathrooms. Finally, Alden dismantled the newspapers that were part of Digital First Media; while technically still in existence, they have limited original content.[667]

Along with Alden Global Capital, Versa Capital Management played a major role in the newspaper industry between 2008 and 2016. Versa Capital entered the industry in 2011, when it acquired 44 papers from Ohio Community Media.[668] In 2012, it created Civitas Media, a subsidiary that managed all of Versa Capital Management's newspapers, which, by 2012, included

667 Julie Reynolds, "A Hedge Fund Stripped My Newspaper for Parts. Now, Elizabeth Warren Has a Plan to Fight Back," *Newsweek*, July 18, 2019, https://www.newsweek.com/hedge-fund-stripped-my-newspaper-parts-now-elizabeth-warren-has-plan-fight-back-opinion-1450049.

668 Abernathy, "The Rise of a New Media Baron and the Emerging Threat of News Deserts," 56.

The Lima News and Heartland Publications, a bankrupt newspaper chain in the South.[669] Just two years later, Civitas Media owned 98 newspapers.[670]

Ostensibly, Alden and Versa Capital were saving newspapers in the face of Big Tech ad dominance. In reality, they and other financiers simply pillaged what capital was left in the enterprises. These funds saw money in the industry, even as print media began to collapse. The distressed-debt deals proved to be attractive because, in general, private equity owners don't have the same commitment to building a reputable paper. Their commitment is to their investors, who want a return on capital, often without considering the cost. To drive up revenue, private equity firms laid off large percentages of staff, froze wages, and reduced benefits.[671] And instead of using the profits to reinvest in the longevity of the paper, they used them to fund management fees and shareholder dividends, and pay back loans.

As one media industry analyst from the research company Ibis World put it, "A lot of these companies are ... looking for underperforming assets. They'll acquire the local newspapers and they'll go in and slash operations to where these newspapers are profitable. It's kind of like flipping houses."[672] This sentiment was echoed by an editor at *The Mount Airy News*, a newspaper that private equity firm Versa Capital acquired and later sold. "I think it's safe to say our previous ownership was an investment group, whose primary function was to maximize short-term profits while setting up the sale of its assets, without too much regard for what happens two or three or five years down the road," he said.[673] This dynamic was especially pronounced in smaller communities.

The response of policymakers to this collapse was limited or nonexistent. The administration and Congress largely ignored the problem of private equity asset-stripping of newspapers. The Federal Trade Commission has special authority to conduct "wide-ranging studies that do not have a specific law enforcement purpose," with subpoena-like power, in order to educate Congress and the policymakers on changes in important industries and make recommendations.[674] Previous FTC reports include studies on meatpacking, public utilities, and cigarettes, leading to substantial changes in statutes and regulations. Despite the wholesale reorganization of this fundamental American industry, the FTC did no such studies on online advertising or private equity.

Several policies might have blocked particularly predatory business models. An antitrust regime with a stronger focus on worker bargaining power ("monopsony") may have allowed agencies to block private equity acquisitions of newspapers where the intent was to drive down wages

669 Abernathy, "The Rise of a New Media Baron and the Emerging Threat of News Deserts," 56.

670 Abernathy, "The Rise of a New Media Baron and the Emerging Threat of News Deserts," 33.

671 Abernathy, "The Rise of a New Media Baron and the Emerging Threat of News Deserts."

672 Tanzina Vega, "Online Ambitions, and a Dash of Real Estate, Drive Newspaper Deals," *The New York Times*, January 29, 2012, https://www.nytimes.com/2012/01/30/business/media/online-ambitions-fuel-newspaper-deals.html?_.

673 John Peters, "A Change for the Better," *The Mount Airy News*, July 2, 2017, https://www.mtairynews.com/opinion/52312/a-change-for-the-better.

674 "A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority," Federal Trade Commission, October 2019, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

and initiate layoffs. Another approach, outlined in the Stop Wall Street Looting Act, introduced in 2019 by Senators Sherrod Brown, Elizabeth Warren, and Tammy Baldwin, would have made it unprofitable to buy a company just to lay off workers.[675] What was notable about the Obama administration's approach to the collapse of newspapers was not just the lack of policy emphasis in blocking the centralization of advertising or private equity's control of the business of journalism. It was that Obama-era enforcers did not even try to structure policy to enact Obama's desire to save journalism in America.

***For more information see: Airlines for America, "Part One," 34 of Appendix A.**

675 "Warren, Baldwin, Brown, Pocan, Jayapal, Colleagues Unveil Bold Legislation to Fundamentally Reform the Private Equity Industry," press release, Elizabeth Warren, July 18, 2019, https://www.warren.senate.gov/newsroom/press-releases/warren-baldwin-brown-pocan-jayapal-colleagues-unveil-bold-legislation-to-fundamentally-reform-the-private-equity-industry.

PART III

RECOMMENDATIONS FOR ADDRESSING AMERICA'S CONCENTRATION CRISIS

At the end of the Obama-Biden administration, policymakers began recognizing that monopoly power is a systemic problem with the American economy. This new consensus was soon reflected in policy. In April 2016, President Obama signed Executive Order 13,725, stating that efforts to maintain, encourage, and support a "fair, efficient, and competitive marketplace is a cornerstone of the American economy," and directing federal agencies to use their authorities to foster competition.[676]

With a few exceptions, most notably the Google and Facebook antitrust cases, the Trump administration has radically exacerbated America's concentration crisis. It's allowed dozens of significant mergers to occur, including at least 65 valued at $10 billion or more. Just five of these mergers—between CVS Health Corp. and Aetna, Bristol-Myers Squibb and Celgene Corp., Anthem-Cigna and Express Scripts Holding, United Technologies Corp. and Raytheon, and Walt Disney and Twenty-First Century Fox—are valued at a total of more than $400 billion.[677]

But more important than their size is the effect Trump-era mergers have had on the broader political economy. The AT&T-Time Warner deal, which the Trump DOJ rightly challenged, combined the nation's largest wireless provider with one of the most powerful media companies, creating a corporation that—contrary to merger promises and AT&T economist Dennis Carlton's projections—raised prices on consumers, reduced choices, foreclosed on rivals, laid off 41,000 employees, and also took on more debt than many industrialized nations.[678] The combined CVS-Aetna conglomerate, meanwhile, is driving independent pharmacies out of the market, using its market power to crush competition and raise prescription drug prices.[679]

The COVID-19 pandemic has also revealed America's concentration crisis, while the government's policy response has amplified it. Large corporations, private equity firms, and banks are expanding their economic and political power at the same time that small businesses are failing at record rates, businesses are engaging in mass layoffs, and broad swaths of the American population face grinding economic insecurity.

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676 "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy," Exec. Order No. 13,725, 81 Fed. Reg. 23417 (Apr. 15, 2016), https://www.federalregister.gov/documents/2016/04/20/2016-09346/steps-to-increase-competition-and-better-inform-consumers-and-workers-to-support-continued-growth-of.

677 "America's Biggest Mergers 2016-2020," American Economic Liberties Project, https://www.economicliberties.us/merger-wave-2016-2020/; Doug Cameron, "Investors Approve UTC-Raytheon Merger," *The Wall Street Journal*, October 11, 2019, https://www.wsj.com/articles/investors-approve-utc-raytheon-merger-11570801608.

678 Josh Kosman, "DirecTV Monthly Rates Spike After AT&T's Time Warner Buy," *New York Post*, December 15, 2019, https://nypost.com/2019/12/15/directv-monthly-rates-spike-after-atts-time-warner-buy/; Karl Bode, "AT&T Fires Hundreds of DC, JBO Execs In Latest Example of 'Merger Synergies,'" *Techdirt*, August 13, 2020, https://www.techdirt.com/articles/20200811/07375045088/att-fires-hundreds-dc-hbo-execs-latest-example-merger-synergies.shtml; Tim Wu, "The Dangerous 'Bigness' of the AT&T-Time Warner Merger," *The New York Times*, June 14, 2018, https://www.nytimes.com/2018/06/14/opinion/time-warner-att-merger.html.

679 David Dayen, "Why the Aetna and CVS Merger Is So Dangerous," *The American Prospect*, October 12, 2018, https://prospect.org/economy/aetna-cvs-merger-dangerous/.

But the last four years have also been marked by a snowballing increase in congressional, business, academic, and popular interest focused on the problem of monopoly power.[680] Today, there is growing recognition that corporate consolidation is a political and economic threat that sits upstream from the nation's most severe social and economic challenges.[681]

This shift is fostering a constellation of efforts at the local, state, and federal level to address monopoly power. Most notably, the House Antitrust Subcommittee recently completed a 16-month investigation into competition in digital markets, the most significant investigation into monopoly power in 50 years, signifying a potential reassertion of congressional authority over questions of corporate power.[682] A bipartisan consortium of federal and state antitrust enforcers is bringing cases against Google and Facebook and raising structural solutions as remedies.[683] States, led by New York, are considering whether to strengthen their own antitrust laws.[684] Cities across the country are banding together to fight back against food delivery platforms that are extorting independent restaurants.[685] And a growing number of businesses and workers are seeking justice through private antitrust enforcement where public officials have failed to step in.[686]

Even some consumer welfare adherents are taking tentative steps to reject their previous ideological framework. Bill Baer, for instance, seemed to question the consumer welfare standard before the American Bar Association Antitrust Section in November 2020, saying, "If we really care about the welfare of consumers—as opposed to adherence to something called the consumer welfare standard—maybe it is time to rethink the paradigm that regulation never works."[687] And judges are listening. Judge Amit Mehta, overseeing the Google antitrust suit,

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680 Austan Goolsbee, "Big Companies are Starting to Swallow the World," *The New York Times*, September 30, 2020, https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html; Miles Kruppa and James Fontanella-Khan, "Big Tech Goes on Pandemic M&A Spree Despite Political Backlash," *Financial Times*, May 27, 2020, https://www.ft.com/content/04a62a26-42aa-4ad9-839e-05d762466fbe.

681 Diane Schanzenbach and Abigail Pitts, "How Much Has Food Insecurity Risen? Evidence from the Census Household Pulse Survey," *Institute for Policy Research*, June 10, 2020, https://www.ipr.northwestern.edu/documents/reports/ipr-rapid-research-reports-pulse-hh-data-10-june-2020.pdf; Ben Casselman, "Small-Business Failures Loom as Federal Aid Dries Up," *The New York Times*, September 1, 2020, https://www.nytimes.com/2020/09/01/business/economy/small-businesses-coronavirus.html; Christine Idzelis, "The Pandemic Prompted a Record Decline in GDP. A Large Part of Private Equity Portfolios Had No Symptoms," *Institutional Investor*, October 7, 2020, https://www.institutionalinvestor.com/article/b1nq2q0q7x619d/The-Pandemic-Prompted-a-Record-Decline-in-GDP-A-Large-Part-of-Private-Equity-Portfolios-Had-No-Symptoms; Hiatt Woods, "How Billionaires Saw Their Net Worth Increase by Half a Trillion Dollars During the Pandemic," *Business Insider*, October 30, 2020, https://www.businessinsider.com/billionaires-net-worth-increases-coronavirus-pandemic-2020-7.

682 "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations," US House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

683 Complaint, 57, United States v. Google LLC, No. 20-cv-03010, (D.D.C. Oct. 20, 2020); Leah Nylen, "FTC Likely to Sue Facebook on Antitrust Violations by End of November," *Politico*, November 6, 2020, https://www.politico.com/news/2020/11/06/ftc-sue-facebook-antitrust-violations-434810.

684 "New York State Antitrust: Senate, Assembly Bills Seen Having Good Chance to Pass in 2021; Policymakers and Big Businesses Across the Country are Watching," *The Capitol Forum*, September 2, 2020, https://www.nysenate.gov/newsroom/in-the-news/michael-gianaris/capitol-forum-new-york-state-antitrust-senate-assembly-bills.

685 Alicia Kelso, "New York, Los Angeles Extend Delivery Commission Fee Caps," *Restaurant Dive*, August 31, 2020, https://www.restaurantdive.com/news/new-york-los-angeles-extend-delivery-commission-fee-caps/584385/; "Protect Our Restaurants," American Economic Liberties Project, Institute for Local Self-Reliance, and American Sustainable Business Council, https://www.protectourrestaurants.com/learn.

686 See, e.g., Kim Lyons, "Epic Says Apple 'Has No Right to the Fruits of Epic's Labor' in Latest Filing," *The Verge*, October 24, 2020, https://www.theverge.com/2020/10/24/21531873/epic-apple-fortnite-app-store-lawsuit; Coalition for App Fairness, https://appfairness.org/; Josh Eidelson, "UFC Wants You To Watch Brawls, Not Its $5 Billion Lawsuit," *Bloomberg*, May 8, 2020, https://www.bloomberg.com/news/features/2020-05-08/as-ufc-pushes-may-mma-event-fighters-say-deals-are-getting-worse.

687 Leah Nylen, "Biden Transition Official Laments 'Under-Enforcement' in Antitrust," *Politico Pro*, November 12, 2020.

cautioned litigators against excessive reliance on economics experts. "Federal judges aren't economists," he said. Instead, judges are going to "look at how the economists' formulas match up with real-world evidence."[688]

THE BIDEN ADMINISTRATION'S RESPONSIBILITY

During his campaign, President-elect Biden acknowledged the need for stronger antitrust enforcement and the harm corporate concentration has caused to workers, families, consumers, and communities. Biden has pledged to "check the abuse of corporate power over labor," including by modifying antitrust law as part of a broader effort to extend organizing rights to independent contractors.[689] He has taken a hard line against the coercive contracts corporations use to control workers, promising to work to eliminate non-compete and no-poaching arrangements.[690] And he has made strong antitrust enforcement a core plank of his plan for rural America, blaming increasing market concentration for hurting farmers and producers.[691]

Just as the Trump administration has used these laws to consolidate power in the economy, the next administration has the ability to do the opposite. The antitrust laws are some of the more powerful economic tools any president has to help workers, consumers, and small businesses, without Congress having to pass new laws.

Biden has also been critical of Big Tech, particularly Facebook, critiquing the corporation's "concentration of power," its privacy violations, and special privileges received under Section 230 of the Communications Decency Act.[692] "Many technology giants and their executives have not only abused their power but misled the American people, damaged our democracy, and evaded any form of responsibility," said a spokesperson for the campaign. "That ends with a President Biden."[693]

688 Alexandra S. Levine, "Where Biden's New Chief of Staff Stands on Tech," *Politico: Morning Tech*, November 13, 2020, https://www.politico.com/newsletters/morning-tech/2020/11/13/where-bidens-new-chief-of-staff-stands-on-tech-791639.

689 "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions," Biden for President, https://joebiden.com/empowerworkers/#.

690 "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions."

691 "The Biden-Harris Plan to Build Back Better in Rural America," Biden for President, https://joebiden.com/rural-plan/.

692 Editorial Board, "Joe Biden," *The New York Times*, January 17, 2020 ("I've been in the view that not only should we be worrying about [Facebook's] concentration of power, we should be worried about the lack of privacy and them being exempt, which you're not exempt. [The *Times*] can't write something you know to be false and be exempt from being sued. But [Facebook CEO Mark Zuckerberg] can. The idea that [Facebook is] a tech company is that Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms."), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html. In this same interview Biden referred to Silicon Valley leaders as "little creeps."

693 Cecilia Kang, David McCabe, and Jack Nicas, "Biden is Expected to Keep Scrutiny of Tech Front and Center," *The New York Times,* November 10, 2020, https://www.nytimes.com/2020/11/10/technology/biden-tech-antitrust-privacy.html.

The 2020 Democratic platform memorializes the Biden administration's commitment to addressing corporate power. It includes a pledge to tackle "runaway corporate concentration," both by reconsidering mergers and acquisitions that took place under the Trump administration and by directing regulators to consider the justice and equity effects of future mergers. It even directs regulators to "consider breaking up corporations if they find they are using their market power to engage in anticompetitive activities."[694]

Far more important, however, is the House Antitrust Subcommittee's detailed, deeply researched roadmap for addressing concentration in digital markets and reorienting antitrust back toward structuralism. In concert with a Biden administration committed to restoring fair competition, Congress can advance remedies to arrest and reverse the concentration of corporate power, strengthen antitrust law, and reinvigorate enforcement.

RECOMMENDATIONS

ENFORCE FAIR COMPETITION GOALS AT THE FTC AND DOJ

The Department of Justice's Antitrust Division and the Federal Trade Commission should immediately reinvigorate antitrust enforcement by rejecting the consumer welfare standard and embracing an approach that seeks to promote fair competition through a more structuralist analytical approach. Both agencies are essential to forming strong economic policy that empowers workers and supports small business. While the enforcement agencies should use every available tool to make markets serve democratic ends, two measures are of paramount importance:

- **Continuing and Expanding the Google and Facebook Cases:** During the first days of the Biden administration, the DOJ must make clear that it will continue its antitrust litigation against Google.[695] Vigorously prosecuting Google will send a clear signal to corporate America that the new administration will not tolerate abuses of dominance. DOJ should expand the litigation beyond search to areas such as maps, travel, the app store, and video and online display advertising markets.
- **Appointing Enforcers Who Reject the Consumer Welfare Standard:** The Biden transition and administration must take care to appoint aggressive enforcers to lead the

694 "2020 Democratic Party Platform," Democratic National Committee, 25, https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf.

695 "Justice Department Sues Monopolist Google For Violating Antitrust Laws," press release, Department of Justice, October 20, 2020, https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

DOJ Antitrust Division and FTC. The administration should only appoint individuals who endorse the House Antitrust Subcommittee's Digital Markets report and reject the idea that consumer welfare is the goal of antitrust policy. Potential appointees should be screened according to these criteria.

Additional, immediate priorities for the DOJ and FTC under the Biden administration should include:

Enforcing the Antitrust Laws to Break Corporate Power

The DOJ and FTC should enforce the law vigorously and build on ongoing cases to break monopoly power. They should resurrect structural presumptions, review consummated mergers for possible breakups, and demonstrate throughout their enforcement efforts that they will punish corporate wrongdoing with aggressive remedies. Initial enforcement efforts should include:

- **Seeking Structural Remedies in Ongoing Antitrust Litigation:** When challenging unfair practices, the FTC and DOJ should look for structural remedies. This can be done through both direct cases and through encouraging private antitrust action with amicus briefs. The FTC should continue litigating its ongoing monopolization case against Surescripts and seek to limit the applicability of American Express' "two-sided market" concept, and the DOJ should begin exploring structural separation for Google through roundtables and external signaling. Biden's attorney general nominee should publicly commit to seeking a Google breakup. In addition, through amicus briefs, statements of interest, filing cases, or other guidance, the agencies should encourage courts to push back on problematic precedent, such as recent case law asserting that harms in one antitrust market can be offset by purported gains in another.[696]
- **Bringing Additional Cases Against Dominant Corporations:** Building upon DOJ's antitrust litigation against Google and the FTC's antitrust litigation against Facebook, DOJ and the FTC should investigate and charge unfair conduct by the dominant tech platforms, as well as corporations in other sectors of the economy, such as meatpacking, seeds, and pharmaceuticals.[697] To start, the FTC should bring a case against Amazon for antitrust violations or consumer protection violations. The platform appears, at the very least, to be tying certain services to other dominant services.[698] Similarly, the government needs to bring cases aimed at helping farmers who face exorbitant seed prices or coercive meatpacking arrangements, as well as consumers who can't afford high-price generic medicine.

696 Ohio v. American Express Co., 138 S. Ct. 2274 (2018); In re Nat'l Collegiate Athletic Ass'n. Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F.Supp.3d 1058, 1102 (N.D. Calif. 2019).

697 Open Markets Institute, American Economic Liberties Project, et al., "Petition for Rulemaking to Prohibit Exclusionary Contracts," July 21, 2020, 14-47, https://www.openmarketsinstitute.org/publications/petition-federal-communications-commission-ban-exclusionary-contracting.

698 Open Markets Institute, "Open Markets Files Amicus Brief Laying Out Harms From Tying and Urging Court to Affirm Good Law on Practice," August 3, 2020 (articulating potential tying by Google (using its dominance in Google Search to require hardware phone makers to also pre-install other Google services), Facebook (using its dominance in social network games to require users to use its virtual currency), Amazon (among other charges, using its dominance in Amazon search results to force third-party sellers to also purchase Amazon's logistics service), and Microsoft (using its dominant Office software to favor its Microsoft Teams product at the expense of other collaboration software makers such as Slack)), https://www.openmarketsinstitute.org/publications/open-markets-files-amicus-brief-laying-out-harms-from-tying-and-urging-court-to-affirm-good-law-on-practice.

The FTC should also consider adjudicating more cases through its administrative procedures. In other words, the FTC could try cases, including those seeking breakups, before its administrative law judges and then before the commission itself.[699] This process would not completely cut federal courts out, but would allow the agency to shape the record and case more directly before it reaches a federal appellate court.

- **Targeting Concentrated Power Among Employers:** The antitrust agencies should develop and bring cases challenging mergers or conduct involving a monopsonist, or powerful buyer. Powerful buyers are ubiquitous in labor markets and agricultural markets.[700] Yet the antitrust agencies appear to have rarely if ever stopped a merger for illegally concentrating power over a labor market.[701] They should bring such a case, perhaps leveraging the private suit against the owners of the Ultimate Fighting Championship for suppressing the compensation of fighters.[702] They should also seek to bring cases against wage-fixers and other buy-side colluders, which should be straightforward per se cases. Through amicus briefs, statements to the public and Congress, speeches, official guidance, and case filings, the antitrust agencies should also limit Supreme Court precedents that allow antitrust harms to workers to be offset or justified by lower prices or other pecuniary gains to consumers.[703] They could limit monopoly-friendly case law by limiting the law's applicability to the case's specific industry, type of conduct, or law. Both agencies should also refrain from prosecuting, investigating, or weighing in on licensing or organizing efforts by workers and professionals and instead defer to the Department of Labor and local governments. Finally, the DOJ should revisit aspects of its 1996 guidance on health care antitrust safe harbors, which may facilitate collusion among employers over wages in the health care industry.[704]

- **Reviewing and Enforcing Consent Decrees:** The FTC and DOJ frequently enter into consent decrees or settlements with corporations for potential legal violations without requiring any admission of wrongdoing. They should end this practice. In addition, when the FTC enters into consent decrees, it should make sure that it holds wrongdoers and

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699 As it did in the matter of McWane, Inc. See *McWane, Inc.*, and Star Pipe Products, Ltd., In the Matter of, FTC (last updated Apr. 17, 2015), https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter.; ALJ's Decision and Order, RAG Emerald Res., Docket No. 2002-MSA-3 (Dep't of Labor May 16, 2003).

700 José Azar, Ioana E. Marinescu, and Marshall Steinbaum, "Labor Market Concentration," *Journal of Human Resources* (2020): 1218-9914R1; Claire Kelloway and Sarah Miller, "Food and Power: Addressing Monopolization in America's Food System," Open Markets Institute, March 2019, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea9fa6c2c1e9c460038ec5b/1588198002769/190322_MonopolyFoodReport-v7.pdf.

701 Suresh Naidu, Eric A. Posner, and Glen Weyl, "Antitrust Remedies for Labor Market Power," *Harvard Law Review* 132 (2018): 542 ("Relying, we suspect, on the traditional assumption of economists that labor markets are competitive, the agencies have never blocked a merger because of its effect on labor market – or, even, as far as we know, given the labor market effects of a potential merger more than cursory attention."); but see Federal Trade Commission, "Federal Trade Commission Staff Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System," September 11, 2020 (arguing that the merger between two hospitals would likely hurt compensation for health care workers), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhsccopacomment.pdf.

702 Michael McCann, "UFC Fighters' Pay Lawsuit Nears Class Action Stage With Long Road Ahead," October 27, 2020, *Sportico*, https://www.sportico.com/law/analysis/2020/ufc-fighters-lawsuit-1234615470/.

703 Sandeep Vaheesan and Matthew Buck, "Antitrust's Monopsony Problem," *Pro Market*, February 3, 2020 (discussing monopsony in antitrust law and explaining how a federal court has sanctioned harms to collegiate athlete-workers by justifying collusive pay caps as serving sports viewer-consumers' ostensible preference for amateur, unpaid sports), https://promarket.org/2020/02/03/antitrusts-monopsony-problem/.

704 See Department of Justice, Antitrust Division and Federal Trade Commission, "Statement 6 – Provider Participation in Exchanges Of Price And Cost Information," in Statements of Antitrust Enforcement Policy in Health Care, 49-50, 1996, https://www.justice.gov/atr/page/file/1197731/download.

recidivists accountable, and that consequences for companies and executives deter future wrongdoing.[705] The FTC, for example, has a consent decree with Uber, preventing the ride-hailing corporation from misrepresenting how it uses and protects people's personal information.[706] If corporations such as Uber violate consent decrees, then the FTC should seek serious punishments, including by issuing meaningful fines, holding executives and other management responsible, and even banning operating adjacent business practices or engaging in certain lines of business.[707] The FTC and DOJ should review and police all existing consent decrees for noncompliance. In addition, for consent decrees related to mergers, when merging parties seem to violate consent decrees, such as in the case of Northrop Grumman-Orbital ATK, the FTC should reverse those mergers.[708]

- **Cracking Down on Interlocking Directorates:** Though less enforced today, Section 8 of the Clayton Act forbids an officer or director of one large company from also being an officer or director at a competing large company.[709] Prosecuting and monitoring so-called "interlocking directorates" would be a straightforward way to make sure that executives and financiers do not collude and engage in stealth quasi-mergers. The antitrust agencies should also monitor the board memberships and directorates of any person with ties to the largest private equity firms. The FTC should set up a system to monitor major corporations' boards on an ongoing basis.

- **Resurrect Robinson-Patman Enforcement:** The Robinson-Patman Act prohibits price discrimination, or the charging of different prices to different classes of buyers or sellers, for the purpose of fostering monopoly. Such discriminatory pricing often takes the form of secret or illegal kickbacks or rebates, sometimes in the form of "category manager services" by large food producers to manage retail shelves for large chains.[710] Enforcers experienced four decades of success, starting in 1936, with using Robinson-Patman to protect independent manufacturers, farmers, and retailers, but they stopped enforcing the law in the 1970s.[711] The DOJ and FTC should resurrect this legal tool and begin litigation to block the use of price discrimination to create monopoly power.

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705 Rohit Chopra, Commissioner, Dissenting Statement, Your Therapy Source, LLC, Neeraj Jindal, and Shery Yarbray, FTC File No. 1710134, Oct. 31, 2019, https://www.ftc.gov/public-statements/2019/10/dissenting-statement-commissioner-rohit-chopra-matter-your-therapy-source; Rohit Chopra, Dissenting Statement Joined by Commissioner Rebecca Kelly Slaughter, In the Matter of Pfizer Inc./Mylan N.V., October 30, 2020, 2 (criticizing the FTC's status quo acceptance of pharmaceutical mergers and expressing concern that Mylan, Pfizer, and their executives "have been accused of a wide-ranging price fixing and market allocation conspiracy in the generic drug industry. With an expanded empire of generic drug products, these alleged antitrust crimes may be even easier to perpetrate by the new entity."), https://www.ftc.gov/public-statements/2020/10/dissenting-statement-commissioner-rohit-chopra-joined-commissioner-rebecca.

706 "Uber Agrees to Expanded Settlement with FTC Related to Privacy, Security Claims," press release, Federal Trade Commission, April 12, 2018, https://www.ftc.gov/news-events/press-releases/2018/04/uber-agrees-expanded-settlement-ftc-related-privacy-security.

707 Memorandum from Commissioner Rohit Chopra on Repeat Offenders to Commission Staff and Commissioners, May 14, 2018, 1, 3 ("FTC orders are not suggestions."), https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

708 Sandra Erwin, "Northrop's strong grip on solid rocket motor market crippled Boeing in ICBM competition," *Space News*, July 25, 2019, https://spacenews.com/northrops-strong-grip-on-solid-rocket-motor-market-crippled-boeing-in-icbm-competition/.

709 15 U.S.C. § 19.

710 Leo S. Carameli Jr., "The Anti-Competitive Effects and Antitrust Implications of Category Management and Category Captains of Consumer Products," *Chicago-Kent Law Review* 79, no. 3 (2004), https://scholarship.kentlaw.iit.edu/cklawreview/vol79/iss3/35.

711 Deborah A. Garza et al, "Antitrust Modernization Commission: Report and Recommendations," Antitrust Modernization Commission, April 2007, 316, https://digital.library.unt.edu/ark:/67531/metadc1228317/.

Exerting Regulatory Authority at the FTC

The FTC, as a regulatory agency, has the power not just to enforce antitrust and consumer protection laws but to make and shape them by passing rules that have the force of law. It should use this power by:

- **Prohibiting Coercive Contracts:** The FTC should issue rules defining "unfair methods of competition" that would be outlawed under its power under Section 5 of the FTC Act of 1914, consistent with the Administrative Procedure Act. The FTC should, for example, issue rules outlawing non-compete clauses in work arrangements.[712] The FTC should also immediately ban exclusive dealing clauses, tying arrangements, and unilateral modification clauses, as well as prohibit equipment and device makers from restricting users' "right to repair" their own products.[713] Some of these are already illegal under different legal standards. FTC rulemaking could make these practices illegal per se, meaning if they occur, regardless of their effects.[714]
- **Resurrecting the FTC's Penalty Offense Authority:** Section 5(m)(1)(B) of the FTC Act allows the agency to fine companies for unfair or deceptive practices if the FTC has already formally issued a cease-and-desist order against that unfair or deceptive practice and the company knows that that practice is unfair or deceptive. According to FTC Commissioner Rohit Chopra and FTC Attorney Advisor Samuel A.A. Levine, the FTC could begin using its Penalty Offense Authority immediately to crack down on a variety of unfair or deceptive practices, such as for-profit college fraud, false earnings claims targeting workers, online disinformation, deceptive data harvesting, and illegal targeted marketing.[715]
- **Ending Conflicts of Interest Through Structural Separations:** The FTC's regulatory authority can be used to mitigate conflicts of interest and unfair advantages companies acquire by rolling up multiple markets. Specifically, the agency could issue rules under Section 5 of the FTC Act to mandate structural separations by prohibiting corporations from:
    - Operating a platform and competing on it. For market operators, the FTC could make it illegal to both operate and also participate in either side of the market.[716]

712 "Open Markets Institute, Open Markets, AFL-CIO, SEIU, and Over 60 Signatories Demand the FTC Ban Worker Non-Compete Clauses," press release, Open Markets Institute, March 20, 2019, https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses#.

713 Daniel A. Hanley, "The First Thing a Biden FTC Should Tackle," *Slate*, November 18, 2020, https://slate.com/technology/2020/11/biden-ftc-right-repair-exclusive-contracts.html.

714 Open Markets, "Restoring Antimonopoly Through Bright-Line Rules," *ProMarket*, April 26, 2019, https://promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/; Sandeep Vaheesan, "Resurrecting 'A Comprehensive Charter of Economic Liberty': The Latent Power of the Federal Trade Commission," *University of Pennsylvania Journal of Business Law* 19, no. 3 (2017).

715 15 U.S.C. § 45(m)(1)(B); Rohit Chopra and Samuel A.A. Levine, "The Case for Resurrecting the FTC Act's Penalty Offense Authority," October 29, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256.

716 This rule would counteract the Supreme Court's ruling in Ohio v. American Express, 138 S. Ct. 2274, which legitimated the concept of "two-sided markets" or markets that inextricably connect two different groups of trading partners. Open Markets Institute, "Open Markets Files Amicus Brief in State of Ohio v. American Express," December 15, 2017, https://www.openmarketsinstitute.org/publications/state-of-ohio-v-american-express-omi-amicus-briefing.

- Operating an essential facility, core internet function, or service that collects personal or proprietary information while also benefiting from monetizing that information directly or through resale. This could include licensing a standard essential patent and participating in the market for which it is standard.
- Leveraging monopoly power in one market to enter into a nascent or dependent market.
- Vertically integrating in markets that tend toward monopoly, including markets with network effects or patent monopolies.
- Operating both a pharmacy benefit manager and any business that it negotiates with, such as an insurance company, pharmacy, or drug manufacturer.
- Making any acquisition if the corporation is under investigation, consent order, deferred prosecution agreement, or in ongoing litigation for violating federal law for 10 years after resolution of the claim.

Shaping Antitrust Law Through Antimonopoly Guidance and Policy Statements

DOJ and the FTC have significant authority to shape antitrust law by issuing guidance and policy statements. They should use this authority to arrest and reverse monopoly power, including by:

- **Instituting New Merger Guidelines:** The antitrust agencies should begin drafting new merger guidelines covering all types of mergers and acquisitions, using the 1968 Merger Guidelines as a template.[717] Specifically, agencies should announce strict market share, size, or actual competitor thresholds beyond which companies may not consolidate. The agencies should also consider guidelines and enforcement policies toward mergers with a heightened scrutiny toward corporate size, and challenge additional mergers that may entrench corporate power despite not fitting neatly into horizontal, vertical, or conglomerate merger categories. Purported efficiencies should not factor into merger review decisions. Agencies should also think creatively about new ways to address the bargaining power elements of mergers. For example, the DOJ and FTC may clear a merger that may reduce labor bargaining power on the condition that the merged company allow workers to unionize

717 Open Markets, "Restoring Antimonopoly Through Bright-Line Rules"; Robert H. Lande and Sandeep Vaheesan, "Preventing the Curse of Bigness Through Conglomerate Merger Legislation," *Arizona State Law Journal* 52 (2020): 75; Robert H. Lande and Sandeep Vaheesan, "Can COVID-10 Get Congress to Finally Strengthen U.S. Antitrust Law?," *Washington Monthly*, May 21, 2020, https://washingtonmonthly.com/2020/05/21/can-covid-19-get-congress-to-finally-strengthen-u-s-antitrust-law/.

through a “card-check” process rather than a private vote.[718] The 2020 Trump Vertical Merger Guidelines, which improperly laud corporate concentration, should be rescinded.[719]

- **Increasing Transparency and Scrutiny of the Merger Review Process:** When an agency brings a challenge, it offers a complaint and public trial, creating a useful public record. A refusal to bring a challenge brings no such public accounting, though such a decision can be equally meaningful, if not more so. The antitrust agencies should begin issuing closing statements on all mergers that they review, or at the very least those that trigger the Hart-Scott-Rodino filing requirement. They should also solicit and respond to public comments for all forthcoming merger reviews.

- **Reversing or Repealing Agency Initiatives That Hamper Enforcement:** Under the Trump administration, the DOJ changed its policy to credit companies at both the charging and sentencing stage for having preexisting antitrust compliance programs in place.[720] This policy change makes it easier for lawbreaking companies to avoid prosecution and should be rescinded through speeches, briefs, filings, or other official statements. Similarly, the Trump DOJ hamstrung itself by seeking to expedite merger review timelines by “aim[ing] to resolve most [merger] investigations within six months of filing.”[721] The DOJ should clarify in speeches, press releases, or other official statements that it will not attempt to make investigations fit arbitrary, predetermined timetables. The FTC should disband initiatives like its Economic Liberty Task Force, which is used to peddle anti-worker policies such as occupational licensing reform, as well as its Working Groups on Agency Reform and Efficiency that weaken or fail to promote assertive enforcement against corporate monopoly power.

- **Issuing Stronger Bank Merger Guidelines:** The DOJ is currently reviewing its bank merger guidelines with a goal of facilitating bank mergers.[722] The Justice Department should reverse course. Instead of exacerbating the damage caused by deregulation and lax merger enforcement, the division should enact stricter limits on banking activities and ownership.[723]

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718 Sanjukta Paul, Twitter post, November 22, 2020, 2:40 pm, https://twitter.com/sanjuktampaul/status/1330597094235676672.

719 Open Markets Institute and American Economic Liberties Project, “The Federal Trade Commission and the Department of Justice Should Abandon the Proposed Vertical Merger Guidelines and Embrace the Framework of the 1968 Guidelines,” February 2020, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf; Rebecca Kelly Slaughter, “Dissenting Statement of Commissioner Rebecca Kelly Slaughter: In re FTC-DOJ Vertical Merger Guidelines,” June 30, 2020, https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf; Rohit Chopra, “Dissenting Statement of Commissioner Rohit Chopra: Regarding the Publication of Vertical Merger Guidelines,” June 30, 2020, https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

720 Department of Justice, “Antitrust Division Announces New Policy to Incentivize Corporate Compliance,” July 11, 2019, https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

721 Makan Delrahim, “It Takes Two: Modernizing the Merger Review Process,” remarks prepared for the 2018 Global Antitrust Enforcement Symposium, September 25, 2018, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust.

722 “Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis,” press release, Department of Justice, September 1, 2020 (“The purpose of [reviewing bank mergers] is to identify proposed merger that do not have significantly adverse effects on competition and to allow them to proceed quickly.”), https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.

723 Letter from American Economic Liberties Project, Washington Center for Equitable Growth, and Open Markets Institute on Antitrust Division Banking Guidelines Review to Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 11-12, October 16, 2020 (calling for “more stringent enforcement of chartering and restrictions on banking activities,” “revisiting bank ownership limitations,” and “more stringent limitations on concentration, tying, and management interlocks”), https://www.justice.gov/atr/page/file/1330256/download.

- **Endorsing the House Antitrust Subcommittee Report:** The antitrust agencies should formally adopt and endorse the findings in the House Antitrust Subcommittee's October 2020 digital markets report. Agency leadership should commit to using all of their authorities to implement the report's recommendations.

- **Adopting Antimonopoly Legal Interpretations:** The DOJ and FTC have adopted numerous pro-corporate and pro-employer legal interpretations in recent decades. The agencies should halt ongoing amicus briefs and reorient their efforts to replacing these interpretations and challenging unfavorable court decisions that limit their enforcement power. This includes:

    - *No-poach agreements:* DOJ leadership should argue that worker no-poach agreements, even when initiated by a franchisor in contracts with franchisees, should be judged as a per se offense, not under the rule of reason as DOJ argued in 2019.[724] DOJ should formally declare its new position in legal briefs that repudiate past filings and expand on this position in speeches, testimony, or other public declarations.

    - *Standard essential patents:* DOJ should clarify through speeches, briefs, testimony, or official guidance that antitrust law can and should be used to police standard essential patentholders' abuse of dominance, rescinding the Trump administration's "New Madison" interpretation.[725]

    - *Unfair methods of competition:* The FTC should withdraw its 2015 Statement of Principles unnecessarily limiting its ability to address "unfair methods of competition" under Section 5 of the FTC Act.[726]

    - *Cancel pending amicus briefs:* The FTC and DOJ should immediately review all planned, pending, or draft amicus briefs. The agencies should cancel all briefs that do not advance antimonopoly or pro-worker legal interpretations and, where necessary, file motions to withdraw as amicus curiae from ongoing cases.

Studying Market Power

A major obstacle to challenging corporate power is that relatively little public information is widely available to understand either industry-specific sectors or the systemic nature of the

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724 The Justice Department has argued that if a franchising company includes clauses forbidding poaching rival franchise employees ("no-poaching" agreements) in its contracts with franchisees, then these no-poaching agreements should be judged under the rule of reason and not the per se standard. The DOJ should reverse its position and argue that all no-poaching arrangements for workers be judged per se illegal. This would dispose of the need for market definition and disallow efficiency defenses. See Corrected Statement of Interest of the United States, Harris v. CJ Star, LLC, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, Richmond v. Bergey Pullman Inc., 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, Stigar v. Dough Dough, Inc., 2:18-cv00244 (E.D. Wash. Mar. 8, 2019).

725 Makan Delrahim, "The Future of Standard Essential Patents: The 'New Madison' Approach to Antitrust and Intellectual Property Law," remarks prepared for the University of Pennsylvania Law School Conference, March 16, 2018, https://www.justice.gov/opa/speech/file/1044316/download.

726 Federal Trade Commission, "FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute," August 13, 2015, https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

problem. Fortunately, the antitrust agencies can collect such data and provide it to the public and other policymakers, including by:[727]

- **Reviewing Recently Completed Significant Mergers:** The antitrust agencies should begin systematically conducting post-merger reviews of completed mergers. They should require companies to submit post-merger data, which the agencies could use to study markets and their enforcement record. The antitrust agencies should begin by conducting a review of all substantial mergers and acquisitions since President Trump took office, including the flagrantly illegal merger of Uber and Postmates.[728] Researchers should especially investigate essential industries and how corporate consolidation contributes to productive resiliency or fragility. They should also closely scrutinize data from mergers and acquisitions made by Alphabet, Amazon, Apple, Facebook, and Microsoft.[729] For each merger, agencies should at a minimum assess:
    - The claims merging companies made before completing their merger;
    - The predictions that experts and agencies made before approving the merger;
    - The effectiveness of remedies used, including divestitures and carve-outs;
    - The economic consequences for consumers, workers, and productive resiliency;
    - Any common characteristics and patterns to harmful mergers; and
    - The theoretical, methodological, empirical, or ideological bases for mistaken predictions.
- **Seeking to Understand Businesses and Markets:** Research offices at the FTC and DOJ should restart the FTC's "line-of-business" study. They should also initiate a program of routine data collection of pricing, wage, and other relevant data from merged corporations.
- **Empowering Litigators and Researchers Other Than Economists:** The agencies should reorganize internally so that economists and economics offices are subordinate to enforcement. The lead economists at the antitrust agencies should not be on the same institutional level as, for example, the FTC's director of the Bureau of Competition. Alternatively, the agencies could reorganize their economics offices into research offices and introduce methodological diversity. This could mean incorporating research and tools from labor economists, accountants, sociologists, historians, statisticians, anthropologists, and

727 See Open Markets Institute, America's Concentration Crisis, 2019 ("Locating data on how few companies control individual markets, though, has been difficult, and not by accident."), https://concentrationcrisis.openmarketsinstitute.org/.

728 Maureen Tkacik, "Restaurants are Barely Surviving, Delivery Apps Will Kill Them," *The Washington Post*, May 29, 2020, https://www.washingtonpost.com/outlook/2020/05/29/delivery-apps-restaurants-coronavirus/?arc404=true; "Uber-Postmates Merger Will Only Serve Monopolists," press release, American Economic Liberties Project, September 29, 2020, https://www.economicliberties.us/press-release/uber-postmates-merger-will-only-serve-monopolists/.

729 "FTC to Examine Past Acquisitions by Large Technology Companies," press release, Federal Trade Commission, February 11, 2020, https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

technologists, and placing less emphasis on research from industrial organization economists focused on theoretical and speculative notions.

- **Identifying Legislative Recommendations for Congress:** If antitrust agencies bring cases and fail to stop a merger or challenge dominant abuses of power, then they should tell Congress and publicly discuss how and why better law or guidance to strengthen antitrust law is necessary.

STRENGTHEN ANTITRUST ENFORCEMENT THROUGH STATUTORY CHANGES TO ANTIMONOPOLY LAW

Congress can and should take an active role in shaping and defining antitrust and antimonopoly law. The recent report from the House Subcommittee on Antitrust, Commercial, and Administrative Law recommended Congress "revive its long tradition of robust and vigorous oversight of the antitrust laws and enforcement, along with its commitment to ongoing market investigations and legislative activity."[730] Antitrust law itself has many doctrinal areas that legislation could fix.

Strengthening Antitrust Law

Congress should amend substantive antitrust law to make it conducive to checking corporate power. This includes overruling recent judicial precedents that have eroded substantive antitrust laws and made public and private enforcement more difficult. For example:

- Congress could clarify that the purpose and goal of the antitrust laws are not to maximize consumer welfare but to disperse private power and foster small business and worker power.
- Congress should enact a no-fault monopolization and no-fault oligopolization law, which would allow enforcers to break up or obtain other remedies against persistent monopolies and oligopolies without showing exclusionary conduct.[731]
- Congress should enact structural separations, preventing large and powerful corporations from using their power in one market to gain an unfair advantage in another. (See sector-by-sector reforms below.)
- Congress should pass bright-line and per se standards for courts to use in judging a merger challenge. This means that if a merger violates certain objective standards, it should be illegal, regardless of (often speculative) benefits promised by the corporations. Congress

730 Majority Staff Report and Recommendations, "Investigation of Competition in Digital Markets," 7.

731 This idea surfaced in the 1960s and 1970s with widespread agreement on its usefulness, culminating in Senator Philip Hart's 1973 Industrial Reorganization Act to "implement the Neal Commission's recommendations of breaking up most large corporations" in the United States, Matt Stoller, *Goliath* (Simon & Schuster, 2019), 318. Others have argued that no-fault monopolization rules would more faithfully enact the original understanding and meaning of the Sherman Act's prohibition on monopolization and could boost various measures of efficiency, Robert H. Lande and Richard O. Zerbe, "The Sherman Act is a No-Fault Monopolization Statute: A Textualist Demonstration" *American University Law Review* 70 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3580841&download=yes.

should distinguish between large, medium, and small companies and put them under different levels of antitrust scrutiny. Senator Amy Klobuchar's Consolidation Prevention and Competition Promotion Act of 2019, though it does not accomplish this full objective, does distinguish legal standards for large "mega-mergers," and it does make mergers by large corporations past a certain threshold illegal.[732]

- Congress should pass bright-line standards to establish rules defining fair and unfair competition. One such example is the petition before the Federal Trade Commission, co-signed by Economic Liberties, calling on the agency to use its authority to pass rules on "unfair methods of competition" to outlaw exclusive dealing by dominant corporations.[733]
- Congress should enact a national Right to Repair law that guarantees farmers and consumers generally the ability to repair their own equipment. Monopolies today in agribusiness, electronics, and other industries have forbidden farmers and consumers from repairing or adjusting their devices without going through the manufacturer, wasting users' time and money.[734]
- Congress should make pay-for-delay agreements—schemes in which a company pays a future competitor to "delay" their entry into a market—and product-hops by pharmaceutical monopolies per se illegal.[735]
- Congress should overturn the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis Trinko, LLP*, which allowed and even encouraged telecommunications giants like Verizon and AT&T to monopolize the telecom market.[736] At the same time, the decision's praise of monopoly power gives circuit courts persuasive authority to undermine monopolization cases in other markets. The FCC should push Congress to reverse *Trinko* to check communications monopolists' power and send a broader signal to monopolists that the legal system will not tolerate concentrated power.

Removing Barriers to Private Enforcement

Congress should overrule Supreme Court precedents that make it harder for government agencies and private parties to check corporate power. As an immediate first step, Congress should prohibit practices depriving workers, consumers, small businesses, and people generally of their right to have their day in court. These include:

732 Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. § 1 (2019).

733 Open Markets Institute, American Economic Liberties Project, et al., "Petition for Rulemaking."

734 Daniel A. Hanley, Claire Kelloway, and Sandeep Vaheesan, "Fixing America: Breaking Manufacturers' Aftermarket Monopoly and Restoring Consumers' Right to Repair," Open Markets Institute, April 2020, https://www.openmarketsinstitute.org/publications/fixing-america-breaking-manufacturers-aftermarket-monopoly-restoring-consumers-right-repair#:~:text=Open%20Markets%20Institute%20released%20Fixing,Repair%20on%20April%2013%2C%20 2020.&text=Fortunately%2C%20lawmakers%2C%20antitrust%20enforcers%2C,that%20can%20reopen%20repair%20markets.

735 Protecting Consumer Access to Generic Drugs Act of 2019, H.R. 1499, 116th Cong., § 1 (2019).

736 In Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004), the Supreme Court limited firms' duty to deal with competitors and suggested that antitrust law should not be applied where sector-specific regulations could instead be enforced.

- Non-compete clauses in work arrangements;
- Mandatory pre-dispute arbitration clauses in all contracts;
- Class action waivers;
- Forum selection clauses;
- Confessions of judgment;
- Unilateral modification clauses; and
- Other coercive contractual terms.

Congress should also exercise its power to shape and amend judicial procedural rules, many of which serve as barriers to justice. In addition to making it easier for antitrust plaintiffs to have their day in court, procedural changes will contribute significantly to broader judicial reform efforts. They include the following:

- Congress should overrule judge-made law that makes it more difficult for antitrust and other plaintiffs to seek redress for their injuries. Specifically, Congress should overrule 2007's *Twombly* and 2009's *Iqbal* Supreme Court decisions, which made it easier for corporate defendants to get their cases dismissed, and 1986's *Matsushita* decision, which made it easier for corporate defendants to get their cases thrown out at the summary judgment stage of litigation.[737]
- Congress should repeal Rule 23(f) of the Federal Rules of Civil Procedure, which lets parties appeal class certification decisions in the middle of litigation. These "interlocutory" appeals make it far more difficult for plaintiffs to bring class actions; they hinder lawsuits in unnecessarily protracted litigation, allow appellate courts to apply unusual scrutiny to class actions, and force plaintiffs to incur the time and expense of winning on class certification twice.[738]
- Congress should restore its role in writing the rules of federal civil procedure by amending the Rules Enabling Act of 1934 to curb the Supreme Court's usurpation of legislative power.[739] At minimum, Congress should exert its authority to reject or modify proposed rules to ensure access to justice for all litigants.

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737 Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

738 Joshua P. Davis and Brian J. Devine, "Procedural Self-Inflicted Wounds," *Lewis & Clark Law Review* 24 (2020): 501-502, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3613836.

739 Diane P. Wood, "Back to the Basics of Erie," *Lewis & Clark Law Review* 18, no. 3 (2014): 680 citing Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (Yale University Press, 2000), 135-136.

- Congress should overrule precedents requiring plaintiffs to show antitrust injury and antitrust standing to bring a case and instead permit all injured by an antitrust violation to sue in court, as laid out in the Clayton Act.[740]
- Congress should give the FTC the ability to seek civil penalties when enforcing its standalone authority to police unfair methods of competition.

Finally, Congress should build on the momentum created by the House Investigation of Competition in Digital Markets, as well as similar efforts, including by using congressional oversight to supplement federal enforcement. While Congress can and should collaborate with the White House and executive branch agencies on sector-specific reforms, it should also work independently to reverse and arrest corporate concentration across American industries:

- As part of the confirmation process, the Senate should ask all appointees to economic policy positions—including the attorney general nominee—for their views on corporate concentration. This includes questions on the House digital markets report, including whether they agree with the report's conclusions, how they will use the report to inform their responsibilities should they be confirmed, and their understanding of concentration and corporate power in their area of responsibility.
- Congress should use the House digital markets investigation as a model for effective oversight, conducting similar investigations across the entire U.S. economy. Sector-by-sector investigations, each led by a relevant subcommittee with jurisdiction, are important for demonstrating how corporations exert and exploit market power in different markets. Understanding how corporate power weaves itself into the particular landscape of each economic sector is essential to creating effective policies to combat it, and recognizing common threads and tactics used by bad actors. During these investigations, Congress should not hesitate to exercise and strengthen its subpoena power when necessary to gather information from uncooperative corporations.

Addressing Corporate Power in Future Recovery Legislation

Antimonopoly measures must be incorporated into strategies to rebuild the American economy. Without speaking to the particular details, another round of COVID-19 relief and recovery funding is likely necessary. The next legislative package should provide direct assistance to people, small businesses, schools, and state and local governments; speed the recovery by rebuilding infrastructure and supply chains; and ensure equitable distribution of effective treatments, testing, and vaccines. But without complementary measures to constrain corporate power, additional aid to workers, consumers, and small businesses will ultimately end up in the

740 15 U.S.C. § 15 ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States … ").

hands of banks, private equity firms, and corporate landlords.[741] To speed economic recovery, Congress and the Biden administration must prevent and address these kinds of corporate abuses. Future recovery packages should include:

- A temporary merger moratorium to prevent big corporations from further consolidating their economic and political power.[742]
- A requirement that the Federal Reserve place conditions on corporations accessing its credit facilities related to stock buybacks, executive compensation, and worker retention.[743]
- Protections included in the Stop Wall Street Looting Act, which will ensure that private equity firms share responsibility for the companies under their control, preventing them from capturing all the rewards of their investments while insulating themselves from risk.[744]
- Measures that strengthen and elevate antitrust scrutiny to roll back concentration already fueled by the pandemic.

EXERCISE SHARED SECTOR-BY-SECTOR ENFORCEMENT AUTHORITY TO ATTACK MONOPOLY POWER

Nearly every federal agency has authority that can be used to arrest and reverse the consolidation of corporate power, either independently or in concert with DOJ and the FTC.[745] Antimonopoly regulation can encourage beneficial corporate conduct and set proactive baseline rules of fair competition to complement antitrust enforcement of unfair actions. The Biden administration should exercise the full extent of these authorities and work with Congress to attack monopoly power sector by sector.

Agriculture

The American food supply is increasingly controlled by monopolists. Farmers are being squeezed on both sides. Giant agribusiness monopolies like Bayer keep charging higher prices for seeds, fertilizer, and other inputs, while meat and grain processing monopolies pay them

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741 "What You Need to Know About the CARES Act Bailouts," American Economic Liberties Project, Corporate Power Quick Take, April 2020, https://www.economicliberties.us/our-work/what-you-need-to-know-about-the-cares-act-bailouts/; Sarah Miller, "End Monopoly Power," *Democracy*, July 14, 2020 ("Trying to address wealth inequality without addressing monopoly power is like trying to stop a boat with a hole in the bottom from sinking by bailing out the water, but not plugging up the hole."), https://democracyjournal.org/magazine/end-monopoly-power/.

742 Leah Nylen and Betsy Woodruff Swan, "House Antitrust Chairman Proposes Merger Ban During Pandemic," *Politico*, April 23, 2020, https://www.politico.com/news/2020/04/23/house-antitrust-chairman-proposes-merger-ban-during-pandemic-203467.

743 "Warren to Fed, Treasury: Your New $1.45 Trillion Dollar Bailout Loan Program for Businesses Fails to Protect Workers, Taxpayers and the Economy," press release, Senator Elizabeth Warren, April 16, 2020, https://www.warren.senate.gov/newsroom/press-releases/warren-to-fed-treasury-your-new-145-trillion-dollar-bailout-loan-program-for-businesses-fails-to-protect-workers-taxpayers-and-the-economy.

744 Stop Wall Street Looting Act, S. 2155, 116th Cong. § 1 (2019).

745 Sandeep Vaheesan, "Unleash the Existing Anti-Monopoly Arsenal," *The American Prospect*, September 24, 2019, https://prospect.org/day-one-agenda/unleash-anti-monopoly-arsenal/; Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, Exec. Order No. 13,725, 81 *Federal Register* 23417 (Apr. 15, 2016), https://www.federalregister.gov/documents/2016/04/20/2016-09346/steps-to-increase-competition-and-better-inform-consumers-and-workers-to-support-continued-growth-of.

less for their products and labor. Meanwhile, power buyers in the form of large supermarket chains and food service giants put pricing pressure on the entire production system.[746] Fair competition policies, such as banning exclusive dealing and predatory pricing, will help address grocery retail consolidation and improve choices and access for consumers and emerging and alternative food businesses. The Biden administration and Congress can arrest and reverse this consolidation, including by:[747]

- **Breaking Up Agribusiness Monopolies:** Congress or officials at the DOJ and FTC should impose an immediate moratorium on further consolidation among big agribusinesses.[748] They should also open investigations into recent mergers and acquisitions, like Bayer's purchase of Monsanto, that allowed the prices of seeds and fertilizer to rise. And Congress and enforcers should also use all of their authorities to unwind the consolidated agricultural supply chain by, for example, breaking corporations like Tyson and Smithfield up into separate livestock breeding, feedlot, and meat processing companies. Recent guilty verdicts in chicken price-fixing cases should help offer mechanisms for the Department of Agriculture to make structural fixes through administrative means.[749]
- **Holding the Meatpacking Industry Accountable:** Congress should restructure the industry to reduce the power any one packer has over farmers and workers. The USDA should strengthen inspections, slow line speed, and pay inspectors more, and the Department of Labor should promulgate strong occupational health and safety standards, especially for meat and poultry processors.[750]
- **Restoring the Grain Inspection, Packers and Stockyards Administration:** The Grain Inspection, Packers and Stockyards Administration (GIPSA) was, until recently, an independent agency charged with enforcing competition policy in the meatpacking industry. The USDA should reinstate the agency and propose new rules to ban price discrimination, prohibit packers from using short-term contracts they can terminate at will, outlaw retaliation against growers for airing grievances or cooperating with other producers, grant producers an effective right to decline arbitration of legal disputes, and create clear criteria for unfair

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746 Claire Kelloway, "Big Food Paybacks to Cafeteria Operators Spark Controversy," *Food & Power*, September 13, 2018. https://www.foodandpower.net/latest/2018/09/13/big-food-paybacks-to-cafeteria-operators-spark-controversy?rq=kickbacks.

747 Kelloway and Miller, "Food and Power," 12-15. The proposals in this section are adapted from Claire Kelloway and Sarah Miller's 2019 "Food and Power" report.

748 Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019, S. 1596, 116th Cong, § 1 (2019).

749 One possible mechanism would be to have the Department of Agriculture use its authority under the Packers and Stockyards Act to issue cease and desist orders against unlawful acts and include fencing-in relief to bar corporations from certain lines of business. See 7 U.S.C. § 192. Courts have traditionally offered a wide berth for regulators in allowing such fencing-in discretion to address similar legal authority to bar unfair practices. See Lesley Fair, "Federal Trade Commission Advertising Enforcement," Federal Trade Commission, March 1, 2008, https://www.ftc.gov/sites/default/files/attachments/training-materials/enforcement.pdf.

750 Open Markets Institute, Family Farm Action Alliance, Food & Water Action, American Economic Liberties Project, et al., "Restructuring America's Meat Industry for Worker and Consumer Safety and Farmer Prosperity," May 1, 2020, https://www.openmarketsinstitute.org/publications/open-markets-allies-demand-antitrust-enforcement-meat-industry-protect-workers-farmers; Claire Kelloway, "USDA Continues to Lift Meat Processing Line Speed Limits During Pandemic, Threatening Frontline Workers and Consumers," *Food & Power*, April 9, 2020, https://www.foodandpower.net/latest/2020/04/09/usda-continues-to-lift-meat-processing-line-speed-limits-during-pandemic-threatening-frontline-workers-and-consumers; Claire Kelloway, "Workers Fear Injury as Administration Clears Way for Faster Chicken Slaughter," *Civil Eats*, November 7, 2018, https://civileats.com/2018/11/07/workers-fear-injury-as-administration-clears-way-for-faster-chicken-slaughter/.

and discriminatory practices in each livestock sector.[751] Congress or the USDA should also strengthen the Packers & Stockyards Act to give GIPSA additional strength. Specifically, it should be updated to ban meatpackers from owning livestock, abolish abusive payment systems, and grant farmers greater legal standing to sue meatpackers, among other reforms.

- **Addressing Consolidation Through the Farm Bill:** Congress primarily sets agricultural policy through the Farm Bill, which is updated every four to five years. Unfortunately, members have long used the bill to help big agribusinesses. They should reverse this trend in the next Farm Bill, using programs like grain reserves and price floors to stabilize prices and discourage overproduction, capping subsidy payouts to the largest corporate farms, and expanding loan programs that support underserved farmers and ranchers, among other key reforms.[752]

- **Reforming the Checkoff Program:** Farmers of milk, wheat, beef, potatoes, pecans, and many other commodities are legally required to pay fees intended to be used by the U.S. government to research and promote their products. Industry trade groups routinely use this funding, however, to lobby for policies that benefit the largest agribusinesses and further disadvantage smaller farmers.[753] Congress should prohibit these "checkoff funds" from being used for lobbying, rein in conflicts of interest, and otherwise reform federal checkoff programs by passing the Opportunities for Fairness in Farming Act and Voluntary Checkoff Act.[754]

- **Protecting Farmworkers:** In many cases, federal labor protections, including overtime, minimum wage, and rights to collective action, do not apply to farmworkers. Congress should amend the National Labor Relations Act and Fair Labor Standards Act to eliminate exemptions that hurt farmworkers. It should also reform the H-2A agricultural guest worker visa program and provide greater protections for undocumented farmworkers by, for example, passing the bipartisan Farm Workforce Modernization Act.[755]

Big Tech

Facebook and Google are more than technology companies: They are 21st-century communication networks that are just as vital to our communities and commerce as roads or phone lines. Amazon, too, is far more than an online retailer: It is a movie and television studio, a supermarket chain, a logistics company, an electronics manufacturer, a cloud-computing provider, and a middleman for much of the U.S. economy. Yet Google, Facebook, and Amazon are almost completely unregulated, and their consolidation of power undermines democracy

751 "Packers and Stockyards Act Reform," Organization for Competitive Markets, https://competitivemarkets.com/gipsa/.

752 Claire Kelloway and Sarah Miller, "Food and Power," 13.

753 Siddhartha Mahanta, "Big Beef," *Washington Monthly*, January/February 2014, https://washingtonmonthly.com/magazine/janfeb-2014/big-beef/.

754 Opportunities for Fairness in Farming Act of 2019, S. 935, 116th Cong. § 1 (2019); Voluntary Checkoff Program Participation Act, S. 740, 115th Cong. § 1 (2017).

755 Farm Workforce Modernization Act of 2019, H.R. 5038, 116th Cong., § 1 (2019).

and makes the economy less competitive, less innovative, and less equal. The only way to reduce these corporations' dominance is to change their business models. Policymakers should do so by:

- **Breaking Up Dominant Platforms:** Congress should break up Facebook, Google, and Amazon, reducing their scale and scope so they are no longer too big to regulate.[756] One way to do this is through structural separations: for instance, by separating out Google's general search from mapping, Android, and YouTube. Federal regulators should also pursue structural separations through antitrust litigation, including by continuing and expanding on DOJ's Google case and the FTC's Facebook case. Policymakers should also prohibit platforms from selling competitive products on any marketplace whose rules they control.

- **Implement Nondiscrimination Rules:** The House Antitrust Subcommittee recommended a variety of nondiscrimination rules for digital platforms, such as prohibitions on self-preferencing and equal treatment for terms and pricing, as well as interoperability and open-access requirements. A robust set of rules would dramatically reduce the power of these platforms to undermine competitors. They would, for instance, prevent Amazon from self-preferencing its own products. Such rules can be achieved through legislation, regulation, or litigation.[757]

- **Banning Targeted Ads:** Banning dominant platforms from engaging in targeted advertising, or marketing to users based on their individual traits and data, would dramatically reduce their incentives to collect and store user information.[758] They should instead be allowed to engage only in "contextual advertising," e.g., placing ads on websites that are relevant to the content of the site.

- **Making Facebook and Google Liable for Commercial Activity:** Section 230 of the Telecommunications Act of 1996 allows "interactive computer services"—platforms including Facebook and Google—to avoid being held liable for what users do or say on the platform and often for the consequences of commercial activities they facilitate. This distinguishes digital publishers from newspapers, which are legally responsible for the content they publish, as well as ordinary retailers, who are liable for the commerce they enable. Stripping Section 230 protections from companies that make money selling targeted advertising and from online

756 John Kwoka and Tommaso Valletti, *Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms* (forthcoming) (on file with author).

757 Majority Staff Report and Recommendations, "Investigation of Competition in Digital Markets"; Lina M. Khan, "The Separation of Platforms and Commerce," *Columbia Law Review* 119, no. 4 (2019), https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/.

758 David Dayen, "Ban Targeted Advertising," *The New Republic*, April 10, 2018, https://newrepublic.com/article/147887/ban-targeted-advertising-facebook-google; Gilad Edelman, "Why Don't We Just Ban Targeted Advertising?," *Wired*, March 22, 2020, https://www.wired.com/story/why-dont-we-just-ban-targeted-advertising/; Matt Stoller, Sarah Miller, and Zephyr Teachout, "Addressing Facebook and Google's Harms Through a Regulated Competition Approach," American Economic Liberties Project, Working Paper Series on Corporate Power #2, April 2020, https://www.economicliberties.us/our-work/addressing-facebook-and-googles-harms-through-a-regulated-competition-approach/.

retail middlemen would encourage Facebook, Google, and Amazon to change their harmful business models and create a level playing field with other publishers or retailers.[759]

- **Restricting or Banning Acquisitions by Dominant Platforms:** Ending Amazon's, Facebook's, and Google's acquisition sprees would limit their ability to increase their power and hurt other industry participants. It would also encourage venture capitalists to finance their competitors; currently, financiers have an incentive not to do so for fear of being unable to sell unrelated portfolio companies to the platforms.

- **Strengthening Predatory Pricing Law:** Amazon uses predatory pricing to lower prices below cost to drive rivals from the market. Supreme Court decisions in the 1980s and 1990s, however, have made it very difficult for the government or private parties to bring the predatory-pricing lawsuits that would stop this cycle.[760] Congress should overturn them.

- **Banning Tying by Dominant Platforms:** Amazon uses connections between different parts of the business to extract more money from small businesses. Local businesses that sell on Amazon Marketplace are given preferential treatment in search results if they use Fulfillment by Amazon, even when doing so is more expensive than using alternative shipping options. Though the case law is still reasonable, Congress should explicitly codify that tying is per se illegal for dominant platforms.

- **Ban Platforms From Entering Financial Services:** Despite public and political opposition, Facebook and its roughly two dozen partners are continuing to develop their Libra, now Diem, payment system.[761] Google has also begun attempting to offer financial services through Citibank.[762] Congress and regulators should prevent the anticompetitive threat and potential systemic risk that Facebook's reach into payment systems introduces into both finance and commerce. One such vehicle is to pass the Keep Big Tech Out of Finance Act by House Financial Services Chairwoman Maxine Waters.[763]

- **Stop the Granting of State and Local Subsidies to Platform Facilities:** Congress has the power to institute a national ban on company-specific state and local tax incentives. Short of that, states can band together to prevent tax abuse: Legislation introduced in 14 states in

759 American Economic Liberties Project, "Statement of the American Economic Liberties Project: Replying to the Comments of Carrie A. Goldberg," In the Matter of Petition for Rulemaking of the National Telecommunications and Information Administration to Clarify the Provisions of Section 230 of the Communications Act of 1934, RM-11862, September 17, 2020, https://ecfsapi.fcc.gov/file/109170620228328/American%20Economic%20Liberties%20Project%20Reply%20Comment.pdf.

760 Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126, no. 3 (2017): 722-730.

761 Saule Omarova and Graham Steele, "There's a Lot We Still Don't Know About Libra," *The New York Times*, November 4, 2019; Matt Stoller, "Launching a Global Currency Is a Bold, Bad Move for Facebook," *The New York Times*, June 19, 2019, https://www.nytimes.com/2019/06/19/opinion/facebook-currency-libra.html; Americans for Financial Reform Education Fund and Demand Progress Education Fund, "Banking on Surveillance: The Libra Black Paper," June 2020, https://ourfinancialsecurity.org/wp-content/uploads/2020/06/Libra-Black-Paper-FINAL-2.pdf; "Libra Basics: What is Facebook's Currency Project?," Open Markets Institute, July 15, 2019, https://www.openmarketsinstitute.org/publications/open-markets-submits-brief-congress-facebook-libra-currency-risks-calls-congress-block-libra.

762 Cherlynn Low, "Google Teams Up with Citibank on Mobile-First Accounts," *Engadget*, November 18, 2020, https://www.engadget.com/google-citi-plex-bank-accounts-180802372.html.

763 Americans for Financial Reform Education Fund and Demand Progress Education Fund, "Banking on Surveillance," 65-68; Keep Big Tech Out of Finance Act, H.R. 4813, 116th Cong., § 1 (2019).

2020 would form a compact against using incentives to poach businesses from other states; a bolstered version could be crafted to disallow the incentivizing of new business facilities.[764]

Defense

The United States increasingly cannot produce or maintain vital systems upon which our economy, military, and allies rely. This destruction of America's industrial capacity has become the single biggest unacknowledged threat to national security. The United States is now reliant on an adversarial country, China, for materials and components for nearly every military end item. For many others, only a sole supplier remains. And competition for defense contracts is at its lowest point in history. The Biden administration and Congress must take immediate steps to rebuild America's defense industrial capacity, including by:

- **Breaking Up Defense Contractors:** Congress and federal enforcers should address concentration that inhibits defense sector competition by unwinding mergers, spinning off companies, funding competitors, cloning companies, and opening IP/patent vaults. DOD should have more accountability and authority to prevent consolidation by blocking defense sector mergers and acquisitions, promoting competition, breaking up defense conglomerates, restricting excess defense contractor profits, and blocking private-equity takeovers of suppliers. One acquisition Congress or enforcers should reverse is Northrop Grumman's 2018 purchase of dominant rocket motor producer Orbital ATK. Specifically, Congress or enforcers should confirm that Northrop violated its 2018 consent decree with the FTC, requiring it to sell Orbital ATK products on a nondiscriminatory basis, during the DOD's call for proposals to produce its new intercontinental ballistic missile system called the Ground Based Strategic Deterrent.[765]
- **Ensuring Access to Markets:** Congress and DOD should assess the effect of antitrust and competition policy on America's national security innovation base with a particular focus on new entrants, vertical foreclosure, supply chain analysis, and vendor lock-in. They should study whether security clearance and cyber security requirements act as barriers to entry for smaller firms and, if so, how to ensure they do not inhibit competition.
- **Expand the Defense Innovation Base:** DOD should strictly limit the use of other transaction authority contracting to nontraditional contractors.
- **Establishing a Right to Repair:** Due to misguided military procurement reform and military-industrial base consolidations beginning in the 1990s, the military is often restricted

764 Pat Garofalo, Matt Stoller, and Olivia Webb, "Understanding Amazon: Making the 21st-Century Gatekeeper Safe for Democracy," American Economic Liberties Project, Working Paper Series on Corporate Power #5, July 2020, 42, https://www.economicliberties.us/wp-content/uploads/2020/07/Working-Paper-Series-on-Corporate-Power_5-FINAL.pdf; Coalition to Phase Out Corporate Tax Giveaways, https://endtaxgiveaways.org/.

765 Modified Decision and Final Order, In the Matter of Northrop Grumman Corporation and Orbital ATK, 7-8, December 4, 2018, https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk. Erwin, "Northrop's Strong Grip on Solid Rocket Motor Market Crippled Boeing in ICBM Competition."

from repairing its own equipment under warranties and design restrictions. Repair restrictions have significant implications for DOD's ability to achieve its mission. The DOD investigator general should initiate investigations into maintenance lock-in, right-to-repair, and other contractual practices that undermine military operations and national security.[766]

- **Appointing Bold Enforcers at DOD:** The Biden administration should be especially careful to appoint individuals who are dedicated to public service and independent from corporate power as Under Secretary of Defense for Acquisition and Sustainment, Deputy Assistant Secretary of Defense Industrial Policy, and Administrator for the Office of Federal Procurement Policy.

Health Care

In America's monopolized health care system, corporations charge patients more for medicine, drugs, supplies, and hospital visits than anywhere else in the world.[767] Health care monopolies have also slashed capacity to boost their own profits, closing hospitals, weakening our supply chains, and moving drug and medical equipment factories overseas. By reversing consolidation and fostering competition within the industry, the Biden administration and Congress can increase resiliency, lower costs, and expand access to quality, local care. They should begin by:

- **Breaking Up Health Care Monopolies:** The best way to address the costs corporate consolidation imposes on our health care system is to reverse it. Congress and federal regulators at the FTC and FDA should launch investigations into concentrated drug, medical device, and hospital industries to determine how to restructure them. Enforcers or regulators should also prevent insurers and providers from integrating, which unfairly excludes unintegrated rivals from covering or treating patients. They should aggressively review future mergers, unwind recent mergers like that between CVS and Aetna, and carefully police anticompetitive practices throughout the industry.
- **Protecting Community and Independent Medical Practices From Consolidation:** Corporate consolidation was already devastating community hospitals and medical practices before COVID-19; the pandemic worsened the situation by leaving these institutions unable to generate revenue from elective procedures and patient visits.[768] Smaller, independent facilities are the lifeblood of community health care, and they are often the cheapest option

766 Comment Submitted by Major Lucas Kunce and Captain Elle Ekman Posted by the Federal Trade Commission on Sep 16, 2019 in Docket (FTC-2019-0013), https://beta.regulations.gov/document/FTC-2019-0013-0074. Shaoul Sussman, "How Amazon Uses Lending to Control Small Businesses," *The American Prospect*. February 26, 2020. https://prospect.org/economy/how-amazon-uses-lending-to-control-small-businesses/

767 Roosa Tikkanen and Melinda K. Abrams, "U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?," *The Commonwealth Fund*, January 30, 2020, https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/us-health-care-global-perspective-2019.

768 Olivia Webb, "The Avoidable Tragedy of Low Hospital Capacity in New York City," American Economic Liberties Project, Working Paper Series on Corporate Power #3, April 2020, https://www.economicliberties.us/our-work/the-avoidable-tragedy-of-low-hospital-capacity-in-new-york-city/.

available.[769] Congress must act to save community and rural hospitals and medical practices, including by ensuring that any future COVID-19 relief measures target assistance directly to them. The Centers for Medicare & Medicaid Services should also increase funding for individual providers and community hospitals to encourage them not to join larger systems or private-equity partnerships.

- **Capping Hospital Rates:** Congress should pass the Hospital Competition Act of 2019 to freeze the practice of large companies buying smaller hospitals and then raising their prices to increase their profits.[770] Requiring that monopolistic hospitals charge the same prices paid by Medicare would reduce the cost of health care for the median family by one-third in the first year.[771]
- **Allowing Medicare to Negotiate for Lower Drug Prices:** Congress should make passage of the Lower Drug Prices Now Act an immediate priority.[772]
- **Implementing Patent Reform:** Pharmaceutical manufacturers exploit the existing patent system to foreclose competition and keep prices high. While patent protections are necessary to encourage research and development, the patent system should be reformed to allow only "one-and-done" pharmaceutical patents. This would grant manufacturers a single patent period, barring them from filing a flood of patents on a single drug. Pay-for-delay arrangements should be per se illegal.[773]
- **Fostering Competition in Generics Markets:** Pharmaceutical companies manipulate the markets for generic drugs, suppressing competition in ways that lead to shortages or skyrocketing prices. Federal and state governments should play a stronger role in ensuring affordable access to generic medications, both through the procurement process—by contracting directly with manufacturers to address shortages—and by setting price caps for drugs like insulin, for which there is limited competition but great need.[774]
- **Reforming Anti-Kickback Legislation:** Congress should repeal the federal anti-kickback safe harbor rule that applies to group purchasing organizations (GPOs) as well as pharmacy

769 Katie Bo Williams, "Rural Health Care: Efficient, Safe, and a Lot Cheaper," *Healthcare Dive*, May 8, 2014, https://www.healthcaredive.com/news/rural-health-care-efficient-safe-and-a-lot-cheaper/260313/.778 Jessica Silver-Greenberg, Jesse Drucker, and David Enrich, "Hospitals Got Bailouts and Furloughed Thousands While Paying C.E.O.s Millions," *The New York Times*, June 8, 2020, https://www.nytimes.com/2020/06/08/business/hospitals-bailouts-ceo-pay.html.

770 Jim Banks, "Rep. Jim Banks Introduces Bill to Lower Hospital Costs," January 11, 2019, https://banks.house.gov/news/documentsingle.aspx?DocumentID=444; Hospital Competition Act of 2019, H.R. 506, 116th Cong., § 1 (2019).

771 Paul S. Hewitt and Phillip Longman, "The Case for Single-Price Health Care," *Washington Monthly*, April/May/June 2018, https://washingtonmonthly.com/magazine/april-may-june-2018/the-case-for-single-price-health-care/.

772 Elijah E. Cummings Lower Drug Costs Now Act, H.R. 3, 116th Cong., § 1 (2019).

773 Michael Bluhm, "The Role of Monopoly in America's Prescription Drug Crisis," Open Markets Institute, December 2019, 41-42, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea4d29f9bc8f31a1117feec/1587860128096/WhitePaper_DrugPrices_Bluhm.pdf citing Robin Feldman, "May Your Drug Price Be Evergreen," *Journal of Law and the Biosciences* 5, no. 3 (December 2018): 640-643.

774 Affordable Drug Manufacturing Act of 2018, S. 3775, 115th Cong., § 2 (2018); Elizabeth Warren, "Elizabeth Warren: It's Time to Let the Government Manufacture Generic Drugs," *The Washington Post*, December 17, 2018, https://www.washingtonpost.com/opinions/elizabeth-warren-its-time-to-let-the-government-manufacture-generic-drugs/2018/12/17/66bc0fb0-023f-11e9-b5df-5d3874f1ac36_story.html?noredirect=on; Amy Martyn and FairWarning, "States are Trying to Cap the Price of Insulin. Pharmaceutical Companies are Pushing Back," *NBC News*, August 15, 2020 (reporting that lawmakers "in at least 36 states" are considering price caps on insulin copays), https://www.nbcnews.com/news/us-news/states-are-trying-cap-price-insulin-pharmaceutical-companies-are-pushing-n1236766.

benefit managers (PBMs) and that has led to drug shortages and concentration.[775] As it currently stands, GPOs receive rebates from medical equipment manufacturers, and PBMs receive rebates from drug manufacturers; both insulate incumbent suppliers from competition. PBMs continue to drive prices higher and receive kickbacks for doing so, while patients suffer increasing pharmaceutical costs. Repealing the anti-kickback safe harbor rule would force GPOs and PBMs to negotiate on behalf of hospitals and patients, respectively, not their own profits.

- **Prohibiting Private-Equity Ownership of Hospitals and Medical Practices:** Private equity companies own an increasing number of hospitals, nursing homes, and medical practices, including practices that staff emergency rooms across the country.[776] These private equity companies are run by some of the richest investors in America, and they are reshaping our health care system by closing hospitals, slashing services, increasing prices, and firing doctors or cutting their pay.[777] They have continued to do so during the coronavirus pandemic—even as they received huge bailouts from Congress.[778] Private-equity acquisitions of health care facilities should be restricted or barred.[779]

Labor

Corporate concentration enables big corporations to exert enormous power over working people. One pernicious manifestation is the explosion of non-compete arrangements that limit worker mobility, preventing them from seeking a safer or better-paying job, starting their own businesses, or otherwise competing in the labor market. Another is the rampant misclassification of workers in the gig economy, a trend prior administrations have ignored or abetted. The Biden administration should work with Congress to restore worker power and make it easier for workers to hold abusive and extractive corporations accountable, including by:

- **Barring Non-compete Clauses:** Non-compete clauses restrict wages and dampen entrepreneurship, reducing wages, wage growth, and new-firm entry, and entrenching workers in potentially sexist, racist, or otherwise discriminatory workplaces.[780] Yet anywhere

775 Matt Stoller, "On Antitrust Enforcement," American Compass, June 11, 2020, https://americancompass.org/essays/on-antitrust-enforcement/.

776 Eileen Appelbaum and Rosemary Batt, "Private Equity Buyouts in Healthcare: Who Wins, Who Loses?" Institute for New Economic Thinking, Working Paper Series No. 118, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3593887; Isaac Arnsdorf, "Medical Staffing Companies Owned by Rich Investors Cut Doctor Pay and Now Want Bailout Money," *ProPublica*, April 10, 2020, https://www.propublica.org/article/medical-staffing-companies-owned-by-rich-investors-cut-doctor-pay-and-now-want-bailout-money.

777 Gretchen Morgenson and Emmanuelle Saliba, "Private Equity Firms Now Control Many Hospitals, ERs and Nursing Homes. Is It Good for Health Care?" *NBC News*, May 13, 2020, https://www.nbcnews.com/health/health-care/private-equity-firms-now-control-many-hospitals-ers-nursing-homes-n1203161.

778 Jessica Silver-Greenberg, Jesse Drucker, and David Enrich, "Hospitals Got Bailouts and Furloughed Thousands While Paying C.E.O.s Millions," *The New York Times*, June 8, 2020, https://www.nytimes.com/2020/06/08/business/hospitals-bailouts-ceo-pay.html.

779 One way to restrict such acquisitions is to pass a law similar to the one proposed in California to make such acquisitions more difficult. Chris Cummins, "California Bill to Rein In Private-Equity Health-Care Buyouts Die," *The Wall Street Journal*, September 4, 2020, https://www.wsj.com/articles/california-bill-to-rein-in-private-equity-health-care-buyouts-dies-11599250052

780 Open Markets Institute et al., "Open Markets Institute, Open Markets, AFL-CIO, SEIU, and Over 60 Signatories Demand the FTC Ban Worker Non-Compete Clauses." See also Sandeep Vaheesan and Matthew Buck, "Non-Competes and Other Contracts of Dispossession," working paper, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727043.

from 30 percent to 50 percent of U.S. workers are bound by a non-compete restriction.[781] As noted above, the FTC should immediately issue rules outlawing non-compete clauses in work arrangements. In addition, Congress should pass the bipartisan Workplace Mobility Act, which would greatly narrow the use of non-competes.[782]

- **Targeting Concentrated Power Among Employers:** As noted above, antitrust agencies should challenge monopsonists, opening investigations and challenging mergers. And they should radically limit or entirely stop prosecuting, investigating, or weighing in on licensing or organizing efforts by workers and instead defer to the Department of Labor and local governments.

- **Removing Barriers to Class Action Litigation:** Private class action litigation plays a crucial role in enforcing antitrust laws. Both Congress and the courts, however, have made it more difficult for plaintiffs to bring and win class action cases. And monopolists use class action waivers to make it more difficult for consumers and competitors to challenge their unlawful behavior. Congress should repeal the laws, legal precedents, and federal rules that target and limit class litigation. Specifically, Congress should bar enforcement of pre-dispute class action waivers; remove court-imposed barriers to class action certification; repeal the Class Action Fairness Act; and repeal Rule 23(f) of the Federal Rules of Civil Procedure.

- **Preventing Misclassification of Gig Workers:** Uber, Lyft, DoorDash, and Postmates have built their business model on exploiting the workers who make their services possible. Congress, state legislatures, and state and federal regulators should investigate these dominant corporations and the impact their growth had on workers, small businesses, and local communities. States should continue cracking down on worker misclassification and extending employee classification status to gig workers. The Biden administration should stop wielding antitrust laws against independent contractors and encourage—not undermine—state and local efforts to promote collective bargaining. Congress should also pass legislation making misclassification a violation of federal labor law and reject attempts to pass off weakening worker rights and protections as a "third way" approach.[783]

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781 Alexander J.S. Colvin and Heidi Shierholz, "Non-compete Agreements," Economic Policy Institute, December 10, 2019, https://www.epi.org/publication/noncompete-agreements/.

782 "Murphy, Young Introduce Bill to Limit Non-Compete Agreements, Protect Workers," press release, Senator Chris Murphy, October 17, 2019, https://www.murphy.senate.gov/newsroom/press-releases/-murphy-young-introduce-bill-to-limit-non-compete-agreements-protect-workers; Workforce Mobility Act of 2019, S. 2614, 116th Cong., § 1 (2019).

783 Carolyn Said, "Lyft Plans Next Gig-Work Move: Making Peace With Unions that Opposed Proposition 22," *LMTOnline*, November 6, 2020, https://www.lmtonline.com/local-politics/article/Uber-Lyft-shares-soar-following-passage-of-15701236.php; Seth D. Harris and Alan B. Krueger, "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker,'" Brookings Institution, Hamilton Project Discussion Paper 2015-10, December 2015, https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

Media, News, and Entertainment

America's media landscape is now dominated by vertically integrated conglomerates that wield substantial market power across multiple sectors. At the same time, at the hands of Big Tech and private equity, our news publishing industry has fallen apart, presenting an existential threat to an independent press. Congress and federal regulators should restore competition to the media, news, and entertainment industries. It should do so by:

- **Investigating and Reviewing Media Mergers:** Congress and federal regulators should launch immediate investigations into the Disney-Fox and Comcast-NBC mergers, and seek to unwind them. And they should prevent future consolidation by aggressively reviewing future acquisitions, blocking further vertical integration, and policing anticompetitive practices throughout the industry, including defensive mergers.

- **Unwinding Entertainment Mergers:** DOJ should continue to police the Live Nation-Ticketmaster consent decree while also seeking to unwind the merger.

- **Investigating Monopsony in Hollywood:** Media conglomerates like Disney and Netflix have used their monopoly power to transform the way writers, actors, and other talent are compensated in Hollywood. Both companies have suppressed pay and pursued loss-leading strategies on the backs of their creative workforce. Congress and federal regulators should investigate Hollywood's new market structure, with the goal of preventing the centralization of power in streaming. They should also consider providing credit solutions for small business at very low rates as well as permanent default solutions for new businesses.

- **Preventing Consolidation in Podcasting:** Compared to other technology industries, podcasting is a relatively open, functional, and egalitarian market. Spotify, however, is attempting to dominate the industry by rolling up power the way Google and Facebook did over the internet.[784] The FTC should use its Section 6(b) authority to study the podcasting industry to understand Spotify's and other firms' acquisition activity, and whether companies are making potentially anticompetitive acquisitions of nascent or potential competitors. Such research is essential to creating effective policies to combat corporate power in the digital audio market.

- **Blocking Further Monopolization of News Publishing:** The most important thing Congress can do to save American journalism is to eliminate Google and Facebook's monopolization of advertising revenue. Congress and federal regulators should also prohibit private-equity predation in the news publishing industry by passing the Stop Wall

784 Matt Stoller, "Will Spotify Ruin Podcasting," *BIG*, February 8, 2020, https://mattstoller.substack.com/p/will-spotify-ruin-podcasting.

Street Looting Act and using antitrust authorities to block private equity from acquiring newspapers simply in order to drive down wages and initiate layoffs.[785]

- **Pass the Journalism Competition and Preservation Act:** Facebook and Google's control over online advertising is so complete that even innovative new media businesses like *BuzzFeed* and *HuffPost* can't generate revenue.[786] Congress should break Big Tech's chokehold over advertising markets and ensure that news organizations receive a fair share of the data and ad revenue generated by their content.[787] Rep. David Cicilline's bipartisan bill would provide news publishers a narrow and temporary authority to collectively negotiate with dominant online platforms.[788]

Telecommunications

Today, a handful of corporations provide essential services like broadband, radio, and wireless, thereby controlling access to information, communications, and entertainment for millions of Americans. The FCC has significant authority to foster competition and facilitate the free exchange of information and ideas fundamental to a democratic society. The FCC should use its power to make communications markets work for the whole country—not just corporate giants—including by:

- **Reimplementing the Open Internet Rules:** The Trump administration repealed the FCC's Open Internet Order, which protected net neutrality by regulating broadband internet access as a "telecommunications service" under Title II of the Communications Act.[789] The Open Internet Order should be immediately restored, and the FCC should explore rate regulation as a solution to concentrated market power.[790] Congress should also enshrine the Open Internet Order into law.
- **Enforcing Structural Separations Among Communications Companies:** The FCC should prevent powerful communications companies from owning and exploiting their power over essential infrastructure to dominate other lines of business. For guidance, the FCC should look to its Financial Interest and Syndication Rules, or "Fin-Syn rules," which

785 "Warren, Baldwin, Brown, Pocan, Jayapal, Colleagues Unveil Bold Legislation to Fundamentally Reform the Private Equity Industry," press release, Senator Elizabeth Warren, July 18, 2019, https://www.warren.senate.gov/newsroom/press-releases/warren-baldwin-brown-pocan-jayapal-colleagues-unveil-bold-legislation-to-fundamentally-reform-the-private-equity-industry; Stop Wall Street Looting Act, S. 2155, 116th Cong. § 1 (2019).

786 "Buzzfeed-Huffington Post Merger Reveals Advertising Market Is in Crisis," press release, American Economic Liberties Project, November 19, 2020, https://www.economicliberties.us/press-release/buzzfeed-huffington-post-merger-reveals-advertising-market-is-in-crisis/.

787 Sanjukta Paul and Hal Singer, "Countervailing Coordination Rights in the News Sector are Good for the Public (A Response to Professor Yun)," *Competition Policy International*, June 12, 2019, https://www.competitionpolicyinternational.com/countervailing-coordination-rights-in-the-news-sector-are-good-for-the-public-a-response-to-professor-yun/#:~:text=1%20Sanjukta%20Paul%20is%20Assistant,Georgetown's%20McDonough%20School%20of%20Business.

788 U.S. Congress, House, *Journalism Competition and Preservation Act of 2019*, H.R. 2054, 116th Congress, 1st sess., introduced in House May 15, 2019, https://www.congress.gov/bill/116th-congress/house-bill/2054?s=1&r=4.

789 "FCC Acts to Restore Internet Freedom," press release, Federal Communications Commission, December 14, 2017, https://www.fcc.gov/fcc-releases-restoring-internet-freedom-order#:~:text=On%20January%205%2C%202017%2C%20the,mobile%20broadband%20Internet%20access%20service.

790 Daniel A. Hanley, "Another Trump Legacy: Spreading Price Discrimination on the Internet," *Washington Monthly*, July 30, 2020 (noting that, to reinstate net neutrality, "all a Biden administration would need to do is appoint favorable FCC commissioners."), https://washingtonmonthly.com/2020/07/30/another-trump-legacy-spreading-price-discrimination-on-the-internet/.

prevented networks from owning prime-time programming as well as owning stakes in syndicated programs.[791] The FCC could also consider strengthening various media ownership rules, which set limits on how many companies and markets any one company can operate in.[792]

- **Preventing Further Consolidation:** The FCC has a lower legal standard for blocking communications mergers than the DOJ.[793] Yet the FCC has largely deferred to the DOJ in merger cases. The FCC should use its authority to police corporate consolidation more aggressively than antitrust law allows. The agency should unwind megamergers, like Nexstar's $4.1 billion acquisition of Tribune Media, that created broadband duopolies or monopolies, vertically integrated communications infrastructure and content, or consolidated control over the public airwaves.[794] And it should assertively police existing consent decrees, like the one it entered with T-Mobile and Sprint, penalizing noncompliance with harsh fines or by seeking an unwinding. If, as various binding commitments require, T-Mobile does not maintain the jobs it promised or if Dish does not become a facilities-based carrier, state and federal enforcers should unwind T-Mobile's acquisition of Sprint.[795] As the Supreme Court has written, assuring the public "has access to a multiplicity of information sources is a governmental purpose of the highest order," because "it promotes values central to the First Amendment."[796]

- **Making Full Use of Limits on Media Ownership:** As part of its past legacy in limiting concentrations of power over U.S. media, the FCC put in place limits on how many broadcast stations any one entity could own.[797] The FCC should continue to enforce these rules and even strengthen them.

- **Revisiting FCC Consequences for Sinclair Broadcasting:** Earlier this year, the FCC fined Sinclair Broadcast Group $48 million after it tried to acquire Tribune Media and misled the FCC. Chairman Ajit Pai called Sinclair's conduct "completely unacceptable."[798] However, the

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791 Lina M. Khan, "The Separation of Platforms and Commerce."93 Daniel A. Hanley, "The FCC Has Untapped Powers. The Next Administration Needs to Use Them."

792 Daniel A. Hanley, "The FCC Has Untapped Powers. The Next Administration Needs to Use Them," *Washington Monthly*, October 9, 2020, https://washingtonmonthly.com/2020/10/09/the-fcc-has-untapped-powers-the-next-administration-needs-to-use-them/.

794 Dade Hayes, "Nexstar Gets FCC Approval for $4.1B Acquisition of Tribune Media," *Deadline*, September 16, 2019, https://deadline.com/2019/09/nexstar-gets-fcc-approval-for-4-1b-acquisition-of-tribune-media-1202736000/.

795 "Attorney General Becerra Announces Settlement Ending the State's Challenge to T-Mobile, Sprint Merger," press release from the California Attorney General, March 11, 2020, https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-ending-state%E2%80%99s-challenge-t-mobile; "DISH to Becomes National Facilities-based Wireless Carrier," press release, DISH, July 26, 2019 ("DISH has committed to the Federal Communications Commission that DISH will deploy a facilities-based 5G broadband network capable of serving 70 percent of the U.S. population by June 2023, and has requested that its spectrum licenses be modified to reflect those commitments."), https://ir.dish.com/news-releases/news-release-details/dish-become-national-facilities-based-wireless-carrier; Michael Hiltzik, "Column: With Its Sprint Merger in the Bag, T-Mobile is Already Backing Away From Its Promises," *Los Angeles Times*, June 26, 2020, https://www.latimes.com/business/story/2020-06-26/tmobile-merger-promises.

796 Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994).

797 Daniel A. Hanley et al., "Financing Free Speech: A Typology of Government Competition Policies in Information, Communication, and Media Markets," Center for Liberty & Journalism, 5-7, September 2020, https://static1.squarespace.com/static/5efcb64b1cf16e4c487b2f61/t/5f6a6224a4d0b87437a0a7f0/1600807462241/financing-free-speech_cjl-sept2020.pdf.

798 "Sinclair Agrees to Pay $48 Million Civil Penalty," press release, Federal Communications Commission, May 6, 2020, https://docs.fcc.gov/public/attachments/DOC-364198A1.pdf.

FCC could also have revoked Sinclair's broadcasting licenses.[799] The FCC should consider whether further proceedings are necessary to hold Sinclair accountable and check its abuse of power over U.S. media markets.

- **Supporting Community and Low-Income Broadband and Wi-Fi Access:** Trump's FCC has discouraged the development of community broadband networks, including locally and cooperatively owned networks, which provide better service at lower cost.[800] The Biden administration should reverse this position and work with Congress to invest in community broadband infrastructure—and if necessary, preempt state and municipal prohibitions on community broadband and Wi-Fi networks.[801] Congress could subsidize privately owned competitors to take on cable incumbents via reverse auctions of the kind used to promote entry in unserved markets. The FCC could also expand or initiate programs to help low-income households obtain broadband access. Its current Lifeline Program provides low-income people with much-needed help to access telephony; broadband too should be universally available.[802]

- **Reforming the Federal Communications Commission:** The Office of Economics and Analytics was created under the Trump administration to make it more difficult for the FCC to exercise its regulatory authority and should be eliminated.[803]

Transportation

America's transportation industries are increasingly concentrated. Deregulation in the airline and railroad industries paved the way for decades of consolidation, while mergers and acquisitions in industries like trucking have increased dramatically in recent years.[804] The possibility of major infrastructure investment as part of a recovery package makes it all the more important that the Biden administration and Congress work to restore competition in the U.S. transportation sector, including by:

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799 Jon Brodkin, "FCC Fines Sinclair $48M, Refuses to Revoke Its Broadcast Licenses," *Ars Technica*, May 7, 2020, https://arstechnica.com/tech-policy/2020/05/fcc-fines-sinclair-48m-refuses-to-revoke-its-broadcast-licenses/?comments=1.

800 David Shepardson, "U.S. FCC Votes to Tighten Rules on Cable Franchise Fees," *Reuters*, August 1, 2019, https://www.reuters.com/article/usa-fcc-television/us-fcc-votes-to-tighten-rules-on-cable-franchise-fees-idUSL2N24X180.; Jon Brodkin, "FCC Republican Claims Municipal Broadband is Threat to First Amendment," *Ars Technica*, October 30, 2018, https://arstechnica.com/tech-policy/2018/10/fcc-republican-claims-municipal-broadband-is-threat-to-first-amendment/.

801 Daniel A. Hanley, "Universal Broadband, Now More Than Ever," *The American Prospect*, October 2, 2020, https://prospect.org/economy/universal-broadband-now-more-than-ever/.

802 Hanley, "Universal Broadband"; Emily Birnbaum, "Jessica Rosenworcel Could Be the FCC Chair Under Biden. She Certainly Sounds the Part," *Protocol*, September 10, 2020 (quoting FCC Commissioner Rosenworcel saying, "I think we need 100 percent of our households online. It needs to be a national policy – 100 percent, nothing less, because everyone needs to have access to affordable and reliable broadband."), https://www.protocol.com/jessica-rosenworcel-fcc-interview.

803 "Ajit Pai's Pro-Monopoly Overhaul at the FCC," *The Corner*, Open Markets Institute, January 25, 2018, https://www.openmarketsinstitute.org/publications/corner-newsletter-jan-25-2018overhaul-at-the-fcc-big-medicine-vs-big-pharma-antitrust-tech.

804 Phillip Longman and Lina Khan, "Terminal Sickness," *Washington Monthly*, March/April 2012, https://washingtonmonthly.com/magazine/marchapril-2012/terminal-sickness/; Matthew Buck, "As Wall Street Loots America's Railroads, Manufacturers and Farmers Suffer," *The Corner*, Open Markets Institute, October 4, 2018, https://www.openmarketsinstitute.org/publications/corner-newsletter-october-4-2018-railroads-squeeze-farmers-manufacturers-wall-street-sec-commissioner-jackson-concentration-problem-hurting-small-businesses; Eric M. Johnson and Nick Carey, "U.S. Truck Firms Accelerate into the Merging Lane," *Reuters*, November 6, 2017, https://www.reuters.com/article/us-usa-trucking-m-a/u-s-truck-firms-accelerate-into-the-merging-lane-idUSKBN1D61EC; Aaron Huff and James Jaillet, "Carriers Seize on Conditions for Cheap Capacity as Trucking Acquisitions Ramp Up," *Commercial Carrier Journal*, February 7, 2020, https://www.ccjdigital.com/carriers-cheap-trucking-acquisitions/.

- **Protecting Airline Consumers:** The Department of Transportation has significant regulatory authority to regulate air travel, protect consumers from airline abuses, and improve safety. The DOT should use this authority to save and re-envision the airline industry post-pandemic. The department should start by retracting its rulemaking on Defining Unfair or Deceptive Practices, and by issuing congressionally mandated rules on refunds, late baggage, and aviation worker protections.[805] DOT should then issue a bold regulatory agenda to protect airline consumers post-pandemic, increase transparency, bar abusive fees, regulate seat pitch and size, prevent maintenance outsourcing, strengthen competition through expanded access to flight data, and reinvigorate enforcement of existing rules like those on tarmac delays.[806]

- **Investigating and Reviewing Airline Mergers:** Congress and federal regulators should launch immediate investigations into all airline mergers concluded since 2007. They should study the impacts of industry consolidation on consumers, workers, and communities, and research how to re-regulate the airline industry, including by requiring airlines to meet baseline standards for regional access.[807] To guard against post-pandemic consolidation, they should challenge future airline mergers and aggressively police anticompetitive practices across the industry.

- **Investigating and Reviewing Railroad Mergers and Conduct:** Congress and federal regulators should also launch investigations into rail industry consolidation, including accusations of price-fixing in freight rail.[808] Aggressive antitrust enforcement is necessary not only to guard against future anticompetitive mergers but also to prevent monopolistic incumbents from hampering efforts to build out high-speed rail.

- **Investigating Concentration in Other Transportation Industries:** Congress should investigate concentration, corporate power, and practices in the trucking, pipeline, bus, transit, highway construction, and maritime industries. Like the House Antitrust Subcommittee's digital markets investigation, transportation investigations should examine whether monopolistic corporations in each industry have built or abused monopoly power and recommend a series of policy recommendations to restore competition, improve service and safety, and protect and empower workers, including through granting them collective bargaining rights.[809] Thorough investigations are a prerequisite to stronger enforcement and statutory reform.

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805 Defining Unfair or Deceptive Practices, 85 Federal Register 11881 (February 28, 2020); Letter from Senator Edward Markey to Secretary of Transportation Elaine L. Chao, June 10, 2020, https://www.markey.senate.gov/imo/media/doc/DOT%20Unfair%20and%20Deceptive%20Practices%20Rule%20letter.pdf; Association of Flight Attendants, "10 Hours Rest is Law – Implement Now," November 13, 2019, https://www.afacwa.org/10_hours_rest_is_law_implement_now.

806 Hal Singer, "How Airlines Exploit Laws to Literally Squeeze Customers," *The American Conservative*, December 23, 2019, https://www.theamericanconservative.com/articles/how-airlines-exploit-laws-to-literally-squeeze-customers/.

807 Phil Longman and Lina Khan, "Terminal Sickness."

808 David C. Lester, "More Shipper Accusations of Railroad Price Fixing," *Railway Track and Structures*, January 6, 2020, https://www.rtands.com/freight/class-1/more-shipper-accusations-of-railroad-price-fixing/.

809 Sanjukta M. Paul, "The Enduring Ambiguities of Antitrust Liability for Worker Collective Action," *Loyola University Chicago Law Journal* 47, no. 3 (2016): 979-984.

- **Reforming the Federal Aviation Administration:** The Boeing 737 Max fiasco was aided and abetted by an FAA that has long been captured by industry.[810] The FAA must make sweeping reforms to restore its independence, strengthen accountability and oversight, and ensure aviation safety. At a bare minimum, the FAA should overhaul its process for approving new plane designs—and adding new derivatives to old plane designs—and insulate it from any corporate influence. Congress and the FAA should strengthen whistleblower protections for U.S. aviation manufacturing employees and impose strict standards on maintenance performed in foreign repair stations. Congress could also weigh more dramatic reforms, like establishing a systemic risk council to determine whether an aviation company's business model undermines its safety and reliability, and stiffen fees and penalties on repeat corporate offenders.[811]

- **Appointing Independent Regulators:** The Biden administration should be especially careful to appoint to the Surface Transportation Board, Federal Aviation Administration, and Federal Maritime Commission regulators who are dedicated to public service and independent from corporate power.

Small Business

Small and independent businesses make our communities more prosperous, entrepreneurial, and connected, creating jobs and strengthening our middle class. Yet for decades, federal and state policies have helped the biggest corporations at local businesses' expense, making it more difficult for smaller firms to access markets and sapping dynamism from the American economy. The Biden administration and Congress can begin rebuilding America's small business economy by:

- **Reforming the Small Business Administration:** The SBA has long been understaffed, underfunded, and underutilized. As a result, it lacks the tools necessary to provide robust assistance in underserved areas of the economy, as we saw during COVID-19. Instead of providing direct, equitable support to small businesses, SBA was forced to work through private financial intermediaries through the Payroll Protection Program. Congress should strengthen and reform the SBA, including by funding and authorizing the agency to make direct loans to small and medium-sized businesses to rebuild supply chains and manufacturing capacity post-pandemic.

- **Reforming Franchising Law:** Big franchisors exercise enormous power over their franchisees, and they use it to extract profit at franchisees' and workers' expense.[812] The

810 Maureen Tkacik, "Crash Course," *The New Republic*, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

811 Maureen Tkacik, "Rescue Mission: Bailing Out Boeing and Rebuilding it to Thrive," American Economic Liberties Project, Working Paper Series on Corporate Power #1, March 23, 2020, https://www.economicliberties.us/our-work/boeing-bailout-report-2020/.

812 Brian Callaci, "Control Without Responsibility: The Legal Creation of Franchising, 1960-1980," *Enterprise & Society* (2020): 1-27.

FTC should exercise its regulatory authority over franchises to stop unfair, deceptive, and discriminatory franchising practices.[813] The FTC should continue the process of updating its Franchise Rule, and the Department of Labor and National Labor Relations Board should restore the joint employer standard for franchisor liability.[814] The FTC and Congress should investigate consolidation in the restaurant industry, including the impacts of highly consolidated food-delivery services and potentially unfair or deceptive practices by franchisors.[815] Either body could restrict franchisors' ability to insert no-poaching clauses in franchise agreements, which prevent franchisees from hiring workers away from other franchisees. And Congress should strengthen and reform franchising law, including by giving the FTC more power to go after bad actors and by prohibiting other abusive contractual terms in franchising agreements. This is a critical strategy for supporting minority small-business owners, as nearly a third of franchises in 2012 were owned by people of color, compared to 18 percent of nonfranchised businesses.[816]

- **Strengthening Predatory-Pricing Law:** Industry incumbents should not be allowed to leverage their vast resources to bleed smaller competitors of all their resources until they can no longer afford to stay in business. Congress should eliminate the "recoupment" test to make it easier for the government or private parties to bring predatory-pricing lawsuits.[817]

- **Targeting Aid to Microbusinesses:** COVID-19 relief efforts left many of the smallest businesses behind. Congress should direct assistance to small "micro" businesses in any future recovery packages, as Rep. Ayanna Pressley and Senator Kamala Harris proposed in the Saving Our Streets Act.[818]

- **Supporting Community Banks:** Community-based financial institutions like credit unions and small and mid-sized banks are vital to the small-business economy. Though they control only 16 percent of banking assets, they provide more than 50 percent of all small-business loans, and they understand the makeup and needs of the communities they serve.[819] Yet the banking sector has consolidated dramatically since the 2008 financial crisis, and a growing share of counties no longer have any local banks at all—a reality that now impairs their

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8 813 "FTC Commissioner Rohit Chopra on Protecting Franchisees," *CNBC*, September 25, 2020, https://www.cnbc.com/video/2020/09/25/ftc-commissioner-rohit-chopra-small-business-franchises-squawk-box.html.

814 "With 'Joint Employer' Rule, Trump NLRB Sides With Corporations Again," press release, National Employment Law Project, February 25, 2020, https://www.nelp.org/news-releases/joint-employer-rule-trump-nlrb-sides-corporations/; Jonathan Maze, "Calls Grow for Tighter Franchise Regulations," *Restaurant Business*, September 27, 2020, https://www.restaurantbusinessonline.com/financing/calls-grow-tighter-franchise-regulations.

815 "Schakowsky, Scanlon, Jayapal Lead Inquiry Into Unfair, Deceptive Digital Food Delivery Practices Hurting Small Restaurants and Consumers," press release, Rep. Jan Schakowsky, September 22, 2020, https://schakowsky.house.gov/media/press-releases/schakowsky-scanlon-jayapal-lead-inquiry-unfair-deceptive-digital-food-delivery.

816 International Franchise Association Foundation, "Franchised Business Ownership by Minority and Gender Groups," April 5, 2019, 1, 5, https://www.franchise.org/sites/default/files/2019-04/Franchise%20Business%20Ownership%202018_0.pdf.

817 Lina Khan, "Amazon's Antitrust Paradox," 722-730.

818 "Rep. Pressley, Senator Harris Introduce Groundbreaking Bill to Support Small Neighborhood Businesses During COVID-19 Pandemic," press release, Rep. Ayanna Pressley, May 6, 2020, https://pressley.house.gov/media/press-releases/rep-pressley-senator-harris-introduce-groundbreaking-bill-support-small.

819 "Small Business Lending by Size of Institution, 2018," Institute for Local Self-Reliance, May 14, 2019, https://ilsr.org/small-business-lending-by-size-of-institution-2014/.

ability to shore up local businesses during COVID-19.[820] Congress and federal regulators need to break up the consolidated financial industry and restore lending power to smaller, local lenders. Such efforts to diversify business lending are especially vital to supporting women and minority entrepreneurs, as well as those in rural areas.

PROVIDE COMMITTED LEADERSHIP FROM THE WHITE HOUSE

Enacting aggressive competition policies across government requires dedicated, high-level leadership from the White House. That can be accomplished by:

- **Ensuring That Nonenforcement Officials Believe in Fighting Corporate Monopolies:** President Biden must appoint to his White House individuals who are committed to combating corporate power and empower them to direct and coordinate antimonopoly efforts at every agency. The White House should reject policymakers who have held senior roles in the industries they will regulate or who have worked as corporate lobbyists or consultants. The Biden transition and administration must also take care to appoint to agencies, policy councils, and other executive offices only those policymakers who have challenged corporate power.
- **Endorsing and Implementing the House Antitrust Digital Markets Recommendations:** The House Antitrust Subcommittee's Competition in Digital Markets Report provides comprehensive recommendations for reforming antitrust laws for the 21st century. The Biden administration should endorse the report, direct federal agencies to implement its recommendations, and work with Congress to advance the statutory changes it outlines.
- **Implementing E.O. 13,725:** The Biden administration should immediately and aggressively implement the 2016 competition executive order. The Biden White House should put a senior advisor in charge of implementation to ensure that all federal agencies use all regulatory tools at their disposal to ensure that injured workers, businesses, and consumers can seek vindication under antimonopoly laws, and that markets under their jurisdiction are open and competitive. This includes asking all nominees to Senate-confirmed positions—and all leadership appointed through Vacancies Act authorities—to commit to prioritizing implementation. This also includes complying with the order's reporting requirements by publicly publishing agencies' competition agendas on a semi-annual basis.

820 Stacy Mitchell, "Report: Fewer Small Businesses are Receiving Federal Relief Loans in States Dominated by Big Banks," Institute for Local Self-Reliance, April 29, 2020, https://ilsr.org/banking-consolidation-ppp-report/#_ednref5.

- **Removing Barriers to Antimonopoly Enforcement:** The Biden White House should make sure that its efforts to coordinate competition policy advance, not hamper, antimonopoly goals. Policy councils and the Office of Cabinet Affairs should be used to speed and support, not slow, federal agency antitrust enforcement, rulemaking, and investigations. The White House regulatory review process should also be streamlined and reformed to eliminate barriers to increasing competition and reversing concentration. For example, the Biden White House should rescind executive orders requiring agencies to minimize regulatory activity and functionally eliminate the Office of Information and Regulatory Affairs.[821]

***A flurry of antimonopoly actions occurred as this report was being finalized. For more information see: The FTC announced this study as this report was being finalized. For more information see: "Local Journalism: America's Most Trusted News Sources Threatened," U.S. Senate Committee on Commerce, Science, and Transportation, October 2020, https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf**
"Everyone But Us: The Trump Administration and Medical Supply Exports" Report by the Office of Congresswoman Katie Porter (CA-45) April 6, 2020, https://porter.house.gov/uploadedfiles/everyone_but_us.pdf
See Staff Reports, Committee on Oversight and Reform U.S. House of Representatives September- October 2020
Drug Pricing Investigation: Celgene and Bristol Myers Squibb—Revlimid
Drug Pricing Investigation: Teva—Copaxone
Drug Pricing Investigation: Amgen—Enbrel and Sensipar
Drug Pricing Investigation Novartis—Gleevec
Drug Pricing Investigation Mallinckrodt—H.P. Acthar Gel

821 Kalen Pruss, "It's Time for OIRA to Go," *The American Prospect*, April 24, 2020, https://prospect.org/day-one-agenda/its-time-for-oira-to-go/.

APPENDIX

Below is a complete count of FTC and DOJ merger enforcement actions between 1993 and 2016. The percent shows the number of actions in relation to the total number of HSR mergers filed each year.

TABLE 1: FTC AND DOJ MERGER ENFORCEMENT BETWEEN 1993-2016

Year	Enforcement actions per HSR threshold transaction:	Total HSR Mergers Filed	Total Enforcement Actions
2016	2.65%	1772	47
2015	2.39%	1754	42
2014	2.04%	1618	33
2013	2.95%	1286	38
2012	3.14%	1400	44
2011	2.62%	1414	37
2010	3.63%	1128	41
2009	4.53%	684	31
2008	2.23%	1656	37
2007	1.61%	2108	34
2006	1.83%	1746	32
2005	1.12%	1610	18
2004	1.74%	1377	24
2003	3.72%	968	36
2002	2.98%	1142	34
2001	2.46%	2237	55
2000	1.68%	4749	80
1999	1.77%	4340	77
1998	1.84%	4575	84
1997	1.72%	3438	59
1996	1.99%	2864	57
1995	1.95%	2612	51
1994	2.02%	2128	43
1993	1.38%	1745	24

**Enforcement includes "Complaints Filed in District Court" and "Transactions Restructured or Abandoned prior to Filing a Complaint"*
Source: FTC Annual HSR Reports

Below is a complete list of the 17 insurance and health information technology acquisitions by the largest five insurance companies between 2009 and 2016.

TABLE 2: TOP 5 INSURER ACQUISITIONS OF INSURANCE AND HEALTH IT COMPANIES BETWEEN 2009-2016

Insurer	Acquisition	Year
Aetna	Medicity	2011
Aetna	Prodigy Health Group	2011
Aetna	Coventry Health Care	2013
Aetna	bswift	2014
Aetna	InterGlobalGroup	2014
Humana	Concentra	2010
United	HealthNet	2009
United	XLHealth	2012
United	Amil Participações S.A.	2012
United	Audax Health	2014
United	Alere Health	2014
United	Catamaran	2015
Cigna	HealthSpring	2011
Anthem (WellPoint)	DeCare Dental	2009
Anthem (WellPoint)	CareMore	2011
Anthem (WellPoint)	Amerigroup	2012
Anthem (WellPoint)	Simply Healthcare Holdings	2015

Below is a list of FTC actions against pharmaceutical companies between 2009 and 2016. Thirty of the 36 actions were settled through divestitures.

TABLE 3: LIST OF FTC ACTIONS AGAINST PHARMA COMPANIES BETWEEN 2009-2016

Pharma	Year	Enforcement
Teva/Allergan	2016	Divestment
Lupin Ltd., et al., In the Matter of	2016	Divestment
Bedford Laboratories/Hikma Pharmaceuticals, In the Matter of	2016	Divestment
Hikma Pharmaceuticals PLC, In the Matter of	2016	Divestment
Mylan, N.V., In the Matter of	2016	Divestment
Pfizer Inc., a corporation, and Wyeth, a corporation, In the Matter of	2016	Divestment
Endo Pharma	2016	Dismissed (later refiled in part)
Endo International/Par	2015	Divestment
Pfizer Inc./Hospira	2015	Divestment
Concordia Healthcare/Par	2015	Settlement
Impax/CorePharma	2015	Divestment
Sun Pharma/ Ranbaxy Laboratories	2015	Divestment
Eli Lilly/Novartis Animal Health	2014	Divestment
Novartis/GlaxoSmithKline	2014	Divestment
AbbVie & Besins Healthcare	2014	Litigation (continues)
Akorn/VersaPharm	2014	Divestment
Valeant Pharmaceuticals/Precision	2014	Divestment
Actavis PLC and Forest Laboratories	2014	Divestment
Akorn and Hi-Tech Pharmacal	2014	Divestment
Endo/Boca	2014	Divestment
Mylan/Agila	2013	Divestment
Warner Chilcott/Actavis	2013	Divestment
Novartis/Fougera Holdings	2012	Divestment
Watson Pharmaceuticals/Actavis Inc	2012	Divestment
Perrigo Company/Paddock Laboratories	2011	Divestment
Teva Pharmaceutical/Cephalon	2011	Divestment
Hikma Pharmaceuticals/Baxter	2011	Divestment
Valeant Pharma/Ortho Dermatologics	2011	Divestment
Grifols, S.A.,/Talecris Biotherapeutics Holdings	2011	Divestment

Novartis/Alcon	2010	Divestment
Watson Pharmaceuticals/Robin Hood Holdings	2009	Divestment
Schering-Plough/Merck & Co	2009	Divestment
CSL Limited/Talecris Biotherapeutics	2009	Called off (after FTC filed suit)
FTC v. Actavis	2009	Litigated (to Supreme Court)
King Pharmaceuticals, Inc.,/Alpharma	2008	Divestment
Ovation Pharmaceuticals	2008	Litigated (dismissed by court)

The following dataset is a collection of sector-specific merger statistics above the Hart-Scott-Rodino threshold. Every year, the Federal Trade Commission's Hart-Scott-Rodino Annual Report provides a review of the previous fiscal year's merger activity and merger enforcement. In the appendix, the report provides overall merger filings by sector and reports each total based on an industry description (used below).

The table provides a total count of these merger filings from 2009 to 2016.

TABLE 4: MARKET SECTOR BREAKDOWN OF HSR FILED MERGERS BETWEEN 2009-2016

Industry Group of Acquiring Person	2009	2010	2011	2012	2013	2014	2015	2016	SUM
Not Available	37	77	92	100	109	114	138	193	
Crop Production			4				2		
Animal Production	2	1	2	1		2	2	5	15
Forestry and Logging, Fishing, Hunting	1	1	1			3	2	6	14
Oil and Gas Extraction	5	21	20	19	19	30	17	16	147
Mining	3	5	9	7	8	7	7	7	53
Support Activities for Mining	2	6	17	12	13	13	12	6	81
Utilities	19	39	35	34	26	34	36	43	266
Construction of Buildings	3		7	3	1	5		4	23
Heavy and Civil Engineering Construction	3	14	8	9	15	11	10	10	80
Specialty Trade Contractors	1	3	3	1	5	7	3	11	34
Food and Kindred Products	9	35	34	28	37	48	43	35	269
Beverage and Tobacco Product Manufacturing	4	3	2	10	4	9	11	15	58
Textile Mills				1	1			1	3
Textile Products					4		3	2	9
Apparel Manufacturing				1	2		4	2	9
Leather and Allied Product Manufacturing				1	1				2
Wood Product Manufacturing				2	7	4	10	6	29
Paper Manufacturing	2	9	9	12	8	8	12	11	71
Printing and Related Support				1	4	9	8	4	26
Petroleum and Coal Products Manufacturing	5	7	9	5	15	26	21	21	109
Chemical Manufacturing	60	67	77	95	74	111	145	129	758
Plastic and Rubber Manufacturing	8	12	20	20	14	18	16	24	132
Nonmetallic Mineral product Manufacturing	1	4	5	7	6	4	4	12	43
Primary Metal Manufacturing	7	7	18	19	15	16	13	11	106

Fabricated Metal Product Manufacturing	9	17	23	17	16	16	19	20	137
Machinery Manufacturing	9	16	29	31	31	33	32	35	216
Computer and Electronic Product Manufacturing	27	47	45	37	40	54	56	45	351
Electric Equipment, appliance, and Component Manufacturing	5	8	13	6	7	11	10	11	71
Transportation Equipment Manufacturing	23	35	42	41	34	47	39	41	302
Furniture and Related Product Manufacturing	2			3	5	3		4	17
Miscellaneous Manufacturing	6	18	20	32	18	28	32	24	178
Wholesale Trade, Nondurable Goods	1	1	1						3
Merchant Wholesales, Durable Goods	39	63	115	63	55	64	64	89	552
Merchant Wholesale, Nondurable Goods	35	64	78	73	68	74	94	78	564
Wholesale Electric Markets and Agent and Brokers				2	2	4	5	4	17
Motor Vehicle and Parts Dealers	2	2	5	6	6	12	13	15	61
Miscellaneous Repair Services				1			2	2	5
Furniture and Home Furnishing Stores						2		4	6
Electronics and Appliance Stores	1	3	1	1	1	1	2	1	11
Food and Beverage Stores	1	6	8	5	5	6	5	4	40
Health and Personal Care Stores	1	7	7	10	10	4	7	5	51
Gasoline Stations	6	3	7	5	3	1	6	7	38
Clothing and Clothing Accessories Stores	2	5	5	2	10	12	4	4	44
Sporting Goods, Hobby, Book, and Music Stores	1	4		4	2	2	1	3	17
General Merchandise Stores				1	2	4	3	4	14
Miscellaneous Store Retailers				3	5	2	2	1	13
Non-store Retailers	4	14	11	12	6	11	11	5	74
Air Transportation	6	4	4	2	3		2	2	23
Railroad Transportation					2				2
Water Transportation				4	5	5	3	4	21
Truck Transportation	1	1	1	2	1	5	4	7	22
Transit and Ground Transportation						1	1	1	3
Pipeline Transportation	2	6	8	7	3	8	3	9	46
Support Activities for Transportation				6	4	6	11	9	36
Couriers				1		1	2	2	6
Warehousing and Storage	1	2					3	1	7
Publishing industries (except internet)	24	39	45	51	36	42	31	47	315
Motion Pictures and Sound Recording Industries	3	3	4	5	8	4	9	12	48
Information Services and Data Processing Services		1	1			1			3
Broadcasting (except internet)	5	10	10	12	20	24	18	10	109

Internet Publishing and Broadcasting		4	2						6
Telecommunications	20	32	38	34	29	45	39	36	273
Internet Service Providers, Web Service Portals, and Data Processing Services	4	16	21	10	4	20	22	16	113
Other Information Services	3	1	8	19	11	9	20	12	83
Monetary Authorities - Central Bank	1								1
Credit Intermediaries and related Activities	25	30	29	27	34	30	29	29	233
Securities, Commodity Contracts, and other Financial Investments and Related Activities	77	88	107	147	135	176	200	173	1103
Insurance Carriers and Related Activities	37	40	57	52	46	61	78	53	424
Funds, Trusts, and other Financial Vehicles	20	25	23	18	30	46	45	67	274
Real Estate	4	1	5	7	12	10	12	8	59
Rental and Leasing Services	3	9	8	10	4	4	14	13	65
Lessors of Nonfinancial Intangible Assets	3	4	6	7	3	8	9	12	52
Professional, Scientific, and Tech Services	38	64	86	85	53	112	107	104	649
Management Companies and Enterprises				2	3		1	2	8
Admin and Support Services	8	27	27	33	25	29	39	50	238
Waste Management and Remediation Services	2	1	3	7	4	6	9	4	36
All Other Support				3					3
Education Services	3	3	5	9	7	4	9	5	45
Ambulatory Health Care Services	3	13	30	16	15	26	22	23	148
Hospitals	17	28	29	35	44	27	42	35	257
Nursing Care Facilities				4	10	6	2	3	25
Social Assistance	2	3	2				1	2	10
Performing Arts, Spectator Sports, and Related Industries	3	5	1	1	2	2	3	1	18
Amusement, Gambling, and Rec Industries	1	3	3	8	4	8	5	1	33
Accommodation	3	2		4	1	1	2	13	26
Food Services and Drinking Places	5	6	18	19	12	11	13	15	99
Repair and Maintenance	1	3	5	2	1	2	7	3	24
Personal and Laundry Services	2	4	3	6	1	4	6	6	32
Religious, Grantmaking, Civic, Professional, and Similar Orgs	2	2	3	1		4	4	2	18
Admin of Human Resource Programs	1			1			1		3
Admin of Enviro Quality Programs	2	4	2						8
Nonclassifiable Establishments	6								6
SUM of HSR Transactions/year by sector (acquiring party)	**684**	**1128**	**1414**	**1400**	**1286**	**1618**	**1754**	**1772**	**11056**

Source: FTC Annual Competition Reports Between 2009-2016. *https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports*

Below is a list of second request counts filed by the FTC and DOJ between 1981 and 2016.

The Federal Trade Commission and Department of Justice share jurisdiction over the merger review process, and transactions requiring further review are assigned on a case-by-case basis depending on industry expertise.

After filing a merger transaction, companies must wait 30 days before the proposed transaction may be complete. An exception to this 30-day period is when "early termination" is granted—allowing the transaction to move forward promptly and without further review.

However, if the proposed merger raises concerns, either agency can file a "second request," which extends the review period and requires the merging parties to provide further information regarding the transaction.

Table 2 reflects the total number of second requests filed each fiscal year by both the Federal Trade Commission and the Department of Justice between 1981 and 2016.

Source: FTC Annual HSR Reports, 1981-2016, *https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports*

TABLE 5: TABLE OF SECOND REQUESTS FILED BETWEEN 1981-2016

Year	Total Second Requests
2016	54
2015	47
2014	51
2013	47
2012	49
2011	55
2010	42
2009	31
2008	41
2007	63
2006	45
2005	50
2004	35
2003	35
2002	49
2001	70
2000	98
1999	111
1998	125
1997	122
1996	99
1995	101
1994	73
1993	71
1992	44
1991	64
1990	89
1989	64
1988	68
1987	58
1986	71
1985	67
1984	61
1983	34
1982	65
1981	69

Below is a table comparing the annual value of M&A deals in the United States with the value of the deals challenged by the FTC and DOJ each year.

TABLE 6: VALUE OF M&A DEALS CHALLENGED BY FTC AND DOJ BETWEEN 2009-2016

Year	Total Merger Value (In Billions)	DOJ Challenges	FTC Challenges
2009	$ 877,610,000,000	$ 99,335,000,000	$ 53,187,600,000
2010	$ 981,800,000,000	$ 21,394,550,000	$ 183,248,000,000
2011	$ 1,247,040,000,000	$ 74,554,500,000	$ 10,663,000,000
2012	$ 995,650,000,000	$ 60,988,000,000	$ 80,444,800,000
2013	$ 1,214,790,000,000	$ 46,446,000,000	$ 38,936,500,000
2014	$ 2,153,800,000,000	$ 51,820,000,000	$ 57,725,000,000
2015	$ 2,417,390,000,000	$ 85,018,250,000	$ 204,497,000,000
2016	$ 1,784,770,000,000	$ 369,386,900,000	$ 192,377,000,000
SUM:	**$ 11,672,850,000,000**	**$** 808,943,200,000	$ 821,078,900,000

* All deal values came from publicly disclosed press. Undisclosed values are not included.
Source: FTC HSR Reports and *IMAA-Institute.org*

GLOSSARY

Antitrust Laws: Laws aimed at preventing corporate monopolies and firms from amassing and abusing market power through unfair practices such as collusion, consolidation, harmful mergers, and exclusionary or predatory business practices. Statutes include the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, the Celler-Kefauver Act, and the Hart-Scott-Rodino Antitrust Improvements Act.

Behavioral or Conduct Remedies: A requirement, often reached through settlement or litigation, that a company proactively act or refrain from certain acts or "conduct." Often contrasted with "structural remedies" or "divestitures."

Celler-Kefauver Antimerger Act of 1950: Law that strengthened the Clayton Act's anti-merger provisions by regulating asset acquisitions, vertical mergers, and "conglomerate" mergers (mergers between companies in unrelated supply chains).

Clayton Act of 1914: Law banning monopolistic practices including price discrimination, tying arrangements, exclusive dealing, and mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly." The law also inserted an exemption from the antitrust laws to labor so that anti-collusion rules are not used to break unions.

Consumer Welfare Standard: An ideological interpretation of antitrust, championed by conservative scholar Robert Bork and adopted by the Supreme Court in *Reiter v. Sonotone*. It holds that corporate antitrust liability should be based purely on whether an action increases economic efficiency and not based on broader concerns over the competitive process and concentrations of power. In general, the consumer welfare standard holds that if a corporation's actions result in lower prices for consumers in the short term, then courts should not find it guilty of breaking the antitrust laws.

Divestiture: The selling off of assets, often due to a settlement or court ruling.

Federal Trade Commission (FTC) Act of 1914: Law creating the Federal Trade Commission, a federal agency with the broad mission to "prevent unfair methods of competition, and unfair or deceptive acts or practices." It empowers the Commission to seek injunctive relief, prescribe specific rules for competition, investigate markets, and publish reports and policy recommendations to Congress and the public.

Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976: An act, amending the Clayton Act, that established the current federal merger review process. It mandates the prescreening of proposed mergers and acquisitions above a certain threshold (currently all transactions ≥$94 million) for potential antitrust violations.

Herfindahl–Hirschman Index (HHI): HHI is a commonly accepted measure of market concentration and is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. A market with four competitors of equal size will have an HHI of 2,500, while a monopolist with the entire market will have an HHI of 10,000.

Horizontal Mergers: Mergers that combine firms that compete against one another in the same market.

Market Share: The percentage of a market or industry's total sales held by one or a group of companies.

Merger Guidelines: Merger guidelines issued by the DOJ and FTC that serve as agency interpretations of merger law and inform the public as to how mergers will be challenged. Often used as persuasive authority by courts as to what level of concentration is anticompetitive. The DOJ and FTC's major guidelines have come out in 1968, 1982, 1984, 1992, and 2010.

Monopoly: Unified control, either through one corporation or multiple corporations in collaboration, of a branch of trade or service, in which the monopolist has the power to unilaterally dictate terms with customers or other businesses. Under current antitrust law, a monopoly broadly refers to a company with a large enough market share—not necessarily 100 percent—to act anticompetitively without significantly losing customers or market share.

Packers & Stockyards Act (PSA): Progressive-era antimonopoly law that widely prohibits unfair or deceptive practices, attempts to monopolize, and market manipulation by meatpackers, swine livestock and poultry dealers, and market agencies.

Price Fixing, Bid Rigging, Market Allocation, Collusion: Forms of anticompetitive, horizontal, collusive agreements (or cartel behavior) in which firms use their market power to their benefit at the expense of consumers or other businesses. These violate the Sherman Act and may be criminally prosecuted five years from occurrence.

Robinson-Patman Act: Law banning "price discrimination," or charging different groups different prices for goods for the purpose of eliminating competition.

Rule of Reason: A standard used for judging whether a practice violates the antitrust laws by balancing that conduct's pro- and anticompetitive effects. The rule of reason is in contrast to a per se rule, which simply bars a practice regardless of whether it has beneficial effects. Some antitrust practices are judged according to a rule of reason standard, some according to a per se standard.

Second Request: Action the DOJ and FTC take under the Hart-Scott-Rodino Act requiring merging parties to provide further information about their consolidation beyond that provided in their initial filing. Second requests are an indication the DOJ or FTC plan to challenge a merger.

Section 2 of the Sherman Act: A section of the Sherman Act making it unlawful for any person to "monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce."

Section 5 of the Federal Trade Commission Act: A section of the FTC Act banning "unfair methods of competition ... and unfair or deceptive acts or practices," including practices that violate the Sherman Act and the other antitrust laws as well as others left to the FTC to define.

Section 6(b), Section 6(b) Studies: A section of the FTC Act giving the FTC the authority to study markets and companies and the power to compel reports or answers to questions from corporations and individuals.

Sherman Antitrust Act of 1890: The first federal antitrust law outlawing "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." This law is both a civil and a criminal statute that allows for treble damages in a successful recovery.

Structural Remedies: A requirement, often reached through settlement or litigation, that a company sell assets or abandon certain business lines in order to comply with antitrust law. For example, antitrust agencies may require two merging companies to sell some plants or stores to a third party as a condition of their merger. Often contrasted with behavioral remedies. See Divestiture.

Structural Separations: Rules limiting a firm from engaging in certain lines of business. Policymakers frequently used structural separations to prevent corporations from using power in one market against other companies it has power over.

Vertical Mergers: Mergers that combine firms at different stages of a supply chain.

AMERICAN ECONOMIC LIBERTIES PROJECT

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economicliberties.us

@econliberties

info@economicliberties.us