Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents

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Introduction

In recent years, economic inequality has become a central topic of public debate in the United States and much of the developed world. The popularity of Thomas Piketty's nearly 700-page tome, *Capital in the Twenty-First Century*, is a testament to this newfound focus on economic disparity.[1] As top intellectuals, politicians, and public figures have come to recognize inequality as a major problem that must be addressed, they have offered a range of potential solutions. Frequently mentioned proposals include reforming the tax system, strengthening organized labor, revising international trade and investment agreements, and reducing the size of the financial sector.[2]

One underexplored theme in this larger debate is the role of monopoly and oligopoly power.[3] Given the current distribution of business ownership assets in the United States, market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to

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[1] Thomas Piketty, Capital in the Twenty-First Century (2013). Piketty and his publisher expected that twenty thousand copies of his book would be sold—instead more than two million copies were sold around the world. *See* J. Bradford DeLong, *The Melting Away of North Atlantic Social Democracy*, Talking Points Memo (Feb. 21, 2016), http://talkingpointsmemo.com/features/marchtoinequality/fourmeltingsocialdemocracy/ [https://perma.cc/MSV5-DWK7].

[2] *See generally* Anthony B. Atkinson, Inequality: What Can Be Done? (2015).

[3] A few commentators have drawn attention to this connection. *See, e.g.*, Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. 1, 10–13 (2015); David Dayen, *The Most Important 2016 Issue You Don't Know About*, New Republic (Mar. 11, 2016), https://newrepublic.com/article/131412/important-2016-issue-dont-know [https://perma.cc/DN43-E3FK]; Paul Krugman, *Robber Baron Recessions*, N.Y. Times (Apr. 18, 2016), http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html?_r=0 [https://perma.cc/AMU4-Y9UT]. More recently, a series of reports from the White House have also acknowledged the potential connection between a decline in competitive markets and a rise in economic inequality. *See, e.g.*, The White House, Council of Economic Advisers Issue Brief, Labor Market Monopsony: Trends, Consequences, and Policy Responses (2016). Additionally, Senator Elizabeth Warren has observed that rising consolidation contributes to inequality. Elizabeth Warren, Senator of Massachusetts, Keynote Remarks at New America's Open Market Program Event: Reigniting Competition in the American Economy (June 29, 2016) ("Concentration is not the only reason for rising economic insecurity, but it is one of them.") (transcript available at http://washingtonmonthly.com/2016/06/30/elizabeth-warrens-consolidation-speech-could-change-the-election/ [https://perma.cc/TAW8-F2PQ]).

the few belonging to the 1% and 0.1% at the top of the income and wealth distribution. In concrete terms, monopoly pricing on goods and services turns the disposable income of the many into capital gains, dividends, and executive compensation for the few. Evidence across a number of key industries in the United States indicates that excessive market power is a serious problem. Firms in industries ranging from agriculture to airlines collude, merge and exclude rivals, and raise consumer prices above competitive levels, while pushing prices below competitive levels for suppliers. The aggregate wealth transfer effect from pervasive monopoly and oligopoly power is likely, at a minimum, hundreds of billions of dollars per year.

On top of enabling regressive redistribution in the marketplace, market power gives firms tremendous political clout. In a system with few campaign finance constraints and a revolving door between government and industry, large businesses have tremendous power over politics. They can use their power to push legislators and regulators to lock in their existing gains and lobby for policies that further enhance their wealth and power. This article takes as its premise that the degree of economic inequality we confront today is highly problematic. Even bracketing its moral undesirability, extreme economic inequality subverts political equality and threatens American democracy.[4]

The domination of our markets by monopolists and oligopolists was not inevitable. As David Singh Grewal has written, "Capitalism is fundamentally a legal ordering: the bargains at the heart of capitalism are products of law."[5] In accordance with this understanding of capitalism, monopoly and oligopoly are the result of conscious policy and political choices, tracing back to an intellectual movement in the 1960s, advanced by the courts in the late 1970s, implemented systematically by the administration of President Reagan in the 1980s, and followed by subsequent administrations. With the appointment of numerous conservatives to the federal antitrust agencies and judiciary, the Reagan administration ushered in a radical revision of the antitrust laws that previously promoted competitive markets.[6] Antitrust laws historically sought to protect consumers and small suppliers from noncompetitive pricing, preserve open markets to all comers, and disperse economic and political power. The Reagan administration—with no input from Congress—rewrote antitrust to focus on the concept of neoclassical economic efficiency.[7] In dramatically narrowing the goals of antitrust,

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[4] *See* Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. Rev. 669 (2014); *cf.* Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 Cornell L. Rev. 1445 (2016) (arguing that constitutional theories fail to adequately account for, and suggesting a conceptual framework for mitigating "elite economic domination").

[5] David Singh Grewal, *The Laws of Capitalism*, 128 Harv. L. Rev. 628, 652 (2014).

[6] This revision of antitrust was part of the larger global project of freeing capital from the social democratic fetters of the mid-twentieth century and strengthening its position, vis-à-vis other segments of society. *See generally* David Harvey, A Brief History of Neoliberalism (2005).

[7] This concept of efficiency (sometimes called "consumer welfare" in the antitrust community) focuses on *short-term* maximization of economic output and the prevention of

executive branch officials and judges held that open-ended standards favorable to businesses with market power, rather than clear rules, should govern most forms of business conduct. This elastic standard has crippled plaintiffs' attempts to challenge illegal behavior and has permitted large corporations to engage in anticompetitive conduct.

The Reagan administration's overturning of antitrust has had sweeping effects. But antitrust laws can be restored to promote competitive markets once again. Doing so would also produce a more equitable distribution of wealth and power in American society. This requires two things: first, an intellectual shift that embraces the original goals of antitrust and second, the appointment of antitrust officials and federal judges committed to this approach. A determined administration should do a number of things to revive Congress's vision as expressed in 1890 and 1914. First, antitrust laws must be reoriented away from the current efficiency focus toward a broader understanding that aims to protect consumers and small suppliers from the market power of large sellers and buyers, maintain the openness of markets, and disperse economic and political power. Second, clear rules and presumptions must govern mergers, dominant firm conduct, and vertical restraints and replace the current rule of reason review and other amorphous standards, which heavily tilt the scales in favor of defendants. Third, by using existing legal powers or seeking additional authority from Congress, the agencies should challenge monopoly and oligopoly power that injures the public on account of duration or magnitude of harm. Fourth, strong structural remedies and blocking of anticompetitive mergers are necessary to ensure that competitive markets are restored and maintained. Fifth and finally, antitrust agencies must be subject to strong transparency duties to allow the public to understand the internal decision-making processes and choices over whether to pursue—or not to pursue—a particular case.

A revived antitrust movement could play an important role in reversing the dramatic rise in economic inequality. With public engagement and political will, the antitrust counterrevolution—which has produced monopolistic and oligopolistic markets and contributed to a captured political system—can be undone. To be clear, our argument is not that antitrust should embrace redistribution as an explicit goal, or that enforcers should harness antitrust in order to promote progressive redistribution. Instead we hold that the failure of antitrust to preserve competitive markets contributes to regressive wealth and income distribution and—similarly—restoring antitrust is likely to have progressive distributive effects.

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inefficiency that arises from "deadweight loss" (mutually beneficial transactions that are not made due to some market impediment). *See* John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 265–67 (1988). This concept of efficiency is tautological in that it assumes that "if individuals choose to act in a certain way, that this must *de jure* be the rational utility-maximizing choice." William Davies, *Economics and the "Nonsense" of Law: The Case of the Chicago Antitrust Revolution*, 39 ECON. & SOC'Y 64, 70 (2010).

Recent commentary has sought to refute the connection between lax antitrust enforcement and growing income inequality by claiming that exercises of market power has "complex crosscutting effects" and therefore cannot be "robustly generalized" as regressive.[8] To be sure, there may be *some* instances in which the effects of market power are not straightforwardly regressive. But the idea that market power in several major industries—airlines, electricity, pharmaceuticals, telecommunications—may have progressive or even neutral effects is implausible. Under current economic arrangements, market power, in general, can be expected to transfer wealth from ordinary Americans to affluent executives and shareholders. In other words, market power is likely to have regressive income and wealth effects.

The article proceeds as follows. Part I examines how market power contributes to economic inequality. Part II provides case studies of anticompetitive practices and non-competitive market structures in several key industries. Part III lays out how economic power often translates into political power. Part IV traces the political decision, initiated by the courts in the late 1970s and applied comprehensively by the Reagan administration, to narrow the scope of the antitrust laws—a choice that has permitted large corporations to dominate our markets and politics. Part V presents a vision of the antitrust laws that accords with what Congress intended in enacting these landmark statutes and offers specific policy prescriptions.

I. How Market Power Contributes to Economic Inequality

Economics identifies two major ways in which firms with market power can harm society: first, by reducing output below the socially optimal level (the efficiency effect)[9], and second, by raising prices (the distributional effect).[10] The dollar amount of the distributional effect is typically several times larger than the dollar amount of the efficiency effect.[11] Moreover, these higher prices typically transfer wealth from consumers to the firms with market power, which can redistribute income and wealth upwards. The reason this redistributive effect tends to be regressive is that the managers and owners of firms with market power are typically wealthier than the consumers of the products the firms sell.[12] To borrow the words of former

[8] Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 Cornell L. Rev. 1171, 1176, 1207 (2016).

[9] Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 250 (1987).

[10] *Id.* at 251.

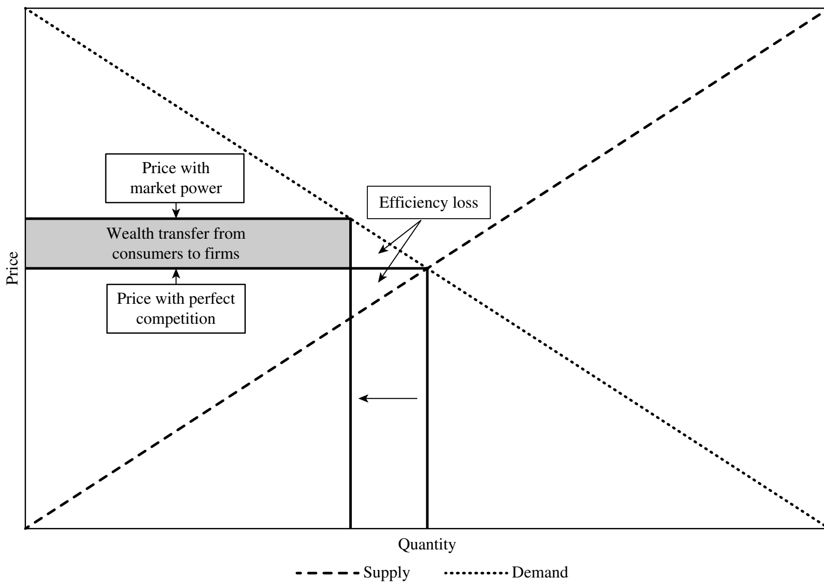
[11] John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 461 (2012) (estimating based on a number of studies that wealth transfer effect of cartels is five to thirty-three times larger than efficiency loss).

[12] The short-term efficiency and distribution effects are only part of the story and do not account for the other ills from market power. Non-competitive markets can also subvert long-term innovation and damage a nation's political economy more broadly. Barry C. Lynn, Cornered: The New Monopoly Capitalism and the Economics of Destruction 216–55 (2010).

Federal Reserve Chairman Marriner Eccles, pervasive market power in an economy is likely to operate as "a giant suction pump . . . draw[ing] into a few hands an increasing portion of currently produced wealth."[13]

The figure below lays out the short-term economic effects of market power. A market in which suppliers have market power is compared to a market in which perfect competition prevails.[14] Relative to a market with perfect competition, the equilibrium price is higher and the equilibrium quantity of output is lower when market power exists. As a result: (1) wealth is transferred from consumers to firms (the gray rectangle), and (2) economic efficiency is reduced (the two white triangles labeled "efficiency loss").

FIGURE 1: SHORT-TERM ECONOMIC EFFECTS OF MARKET POWER



Further, in many markets—most notably agriculture—large buyers have the power to drive prices below the competitive level. In this monopsonistic or oligopsonistic scenario, wealth is transferred from suppliers to purchasers.

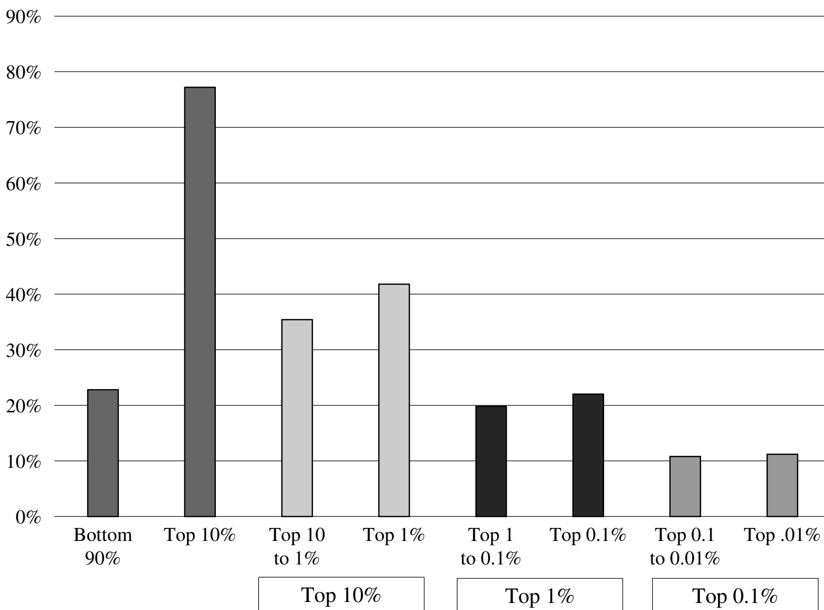
The wealth transfer from market power is likely to have regressive effects. Economic research has found that the ownership of stocks and other business interests is heavily concentrated among the top 10%, and especially

[13] MARRINER S. ECCLES, BECKONING FRONTIERS: PUBLIC AND PERSONAL RECOLLECTIONS 76 (1951).

[14] Perfect competition is, of course, a textbook ideal that is almost never seen in the real world. Nonetheless, it provides a baseline for comparison and serves to illustrate how market power transfers wealth from consumers to firms.

the top 1% and 0.1% of American families ranked by wealth. Emmanuel Saez and Gabriel Zucman have estimated that in 2012 the top 10% owned 77.2% of total wealth in the United States, with the top 1% and top 0.1% accounting for 41.8% and 22%, respectively.[15] In other words, the richest 160,000 families together owned nearly as much wealth in stocks, bonds, pensions, housing, and other assets as the 144 million families in the bottom 90% did as a whole.[16] The following chart illustrates the concentrated ownership of business assets. Wealth, including business and non-business assets, is heavily concentrated at the very top of the distribution. Around seventy-eight percent of the nation's wealth is concentrated in the top ten percent of the population. And as skewed as the overall wealth distribution is, this figure, in fact, *understates* the concentration of ownership of business assets because it includes housing wealth, which is distributed more broadly than other forms of wealth.[17]

FIGURE 2: WEALTH CONCENTRATION IN THE UNITED STATES IN 2012[18]



Focusing on income from productive assets, capital income is heavily concentrated among the top 10% and, in particular, the top 0.1%.[19] In 2012,

[15] Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* 47 (NBER Working Paper No. 20625, 2014), http://gabriel-zucman.eu/files/SaezZucman2014.pdf [https://perma.cc/HY5K-FVAY].
[16] *Id.*
[17] *Id.* at 58.
[18] Figure is based on data from Saez & Zucman, *see id.* at 49.
[19] PIKETTY, *supra* note 1, at 302.

the top 0.1% families, as measured by wealth, received approximately thirty-three percent of total capital income excluding capital gains and approximately forty-three percent of total capital income including capital gains.[20] In light of this distribution, a large percentage of market power rents likely flow to a tiny sliver of the American population.

Along with shareholders, top executives also appear to capture a portion of the rents[21] from their firm's market power.[22] In recent decades, executive pay has increased dramatically. The spectacular increases in income for this group—dubbed "super managers" by Thomas Piketty—has been an important driver of rising inequality in the United States.[23] Due to passivity among dispersed shareholders and captive boards of directors, chief executive officers and other top managers have the effective power to set their own pay.[24] A sizable fraction of this increase has come in the form of stock-based compensation.[25] Executives' discretion over their own pay allows them to capture a portion of market power rents.[26] Economist William Lazonick has written that "[e]ven when adjusted for inflation, the compensation of top U.S. executives has doubled or tripled since the first half of the 1990s, when it was already widely viewed as excessive."[27]

Contemporary corporate law and norms encourage managers to retain market power rents[28] among themselves and shareholders. The "shareholder revolution" of the late 1970s and early 1980s established a tight nexus between the interests of executives and shareholders—in particular short-term shareholders—of corporations based or publicly traded in the United States.[29] Corporate law and norms in the United States today, much more so than in other industrialized nations and even the United States in the mid-

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[20] Saez & Zucman, *supra* note 15, at 53.

[21] Per a standard economic definition, "rents" refers to profits earned above the amount that would be earned in a competitive market.

[22] Jason Furman & Peter Orszag, Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, A Firm-Level Perspective on the Role of Rents in the Rise in Inequality 14 (Oct. 16, 2015), https://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf [https://perma.cc/LSY8-SMMG]; *see also* Gustavo Grullon & Roni Michaely, *Corporate Payout Policy and Product Market Competition* 19–20, Am. Fin. Ass'n New Orleans Meetings Paper (Mar. 15, 2007), http://portal.idc.ac.il/en/main/research/caesareacenter/annualsummit/documents/08-8.pdf [https://perma.cc/8T6U-TJ2W] (finding that corporations operating in less competitive markets pay out a smaller fraction of earnings to shareholders than corporations in more competitive markets).

[23] Piketty, *supra* note 1, at 302–03.

[24] Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 Oxford Rev. Econ. Pol'y 283, 300–02 (2005); Marc van Essen et al., *Assessing Managerial Power Theory: A Meta-Analytic Approach to Understanding the Determinants of CEO Compensation*, 41 J. Mgmt. 164, 187 (2015).

[25] Bebchuk & Grinstein, *supra* note 24, at 289–90

[26] As Bebchuk and Grinstein write, "The aggregate compensation paid by public firms to their top-five executives was 9.8 per cent of the aggregate earnings of these firms during 2001–3, up from 5 per cent during 1993–5." *Id.* at 284.

[27] William Lazonick, *Profits Without Prosperity*, 92 Harv. Bus. Rev. 46, 48 (2014).

[28] "Market power rents" refers to profits that a company earns by virtue of its market power and that—absent this market power—it would not earn.

[29] Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. Penn. L. Rev. 2003, 2008–10 (2013).

twentieth century, encourage executives to identify with shareholders and pursue short-term profit maximization.[30] Instead of promoting the welfare of workers and communities, for example,[31] executives are socialized to maximize short-term profits and enhance the price of the stock.[32] In effect, managers are conditioned and pressured to run the business to advance the interests of their wealthiest constituents: shareholders.[33] While often taken as a given, the promotion of shareholder interests over those of workers or the public rests on questionable assumptions—and is historically new.[34]

At points in the past, managers may have felt sufficient pressure from other segments of the firm, specifically workers, to share market power rents more equitably. Indeed, in the unionized manufacturing sector in the mid-twentieth century United States, the windfalls from market power appear to have been divided with workers. The paradigmatic example is the "Treaty of Detroit" arrangements that governed the U.S. auto industry (and heavy industry generally) during the decades following World War II.[35] Although the three giant carmakers earned significant oligopoly profits, they shared some of the rents with their unionized workers through annual cost-of-living and productivity raises and pensions negotiated under collective bargaining agreements.[36]

Other sectors also followed this practice of sharing market power rents with organized workers. Evidence from pre-deregulation airline and trucking industries suggests that, in oligopolistic industries with high union density, market power rents were, in part, disbursed to workers through higher compensation.[37] More generally, in concentrated industries characterized by oligopoly power, unionized workers appeared to earn more than their non-

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[30] *See generally* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. Penn. L. Rev. 2063 (2001).

[31] *See* Mark J. Roe, Political Determinants of Corporate Governance: Political Context, Corp. Impact 38–39 (2003).

[32] *Id.*

[33] Perhaps the most revealing—and troubling—illustration of this shareholder wealth maximization norm is the stock buyback phenomenon. In recent years, many companies have, instead of investing in their productive capacities, used surplus cash to buy back their stocks, raise their stock prices, and enrich equity holders—including the executives who have received stock options—in the process. In stark terms, this buyback epidemic means that many executives sacrifice the long-term profitability and viability of the company to promote the short-term interests of shareholders. *See* Karen Brettell et al., *The Cannibalized Company*, Reuters (Nov. 16, 2015, 2:30 PM), http://www.reuters.com/investigates/special-report/usa-buybacks-cannibalized/ [https://perma.cc/C8JY-CGS2].

[34] *See* William Lazonick, Stock Buybacks: From Retain-and-Reinvest to Downsize-and-Distribute, Brookings, Ctr. For Effective Pub. Mgmt. 12–14 (Apr. 2015) (explaining that workers and the government often make sizable and uncertain investments in firms, contrary to the assumption that only shareholders do, and that shareholders typically do not fund the productive investments of a firm).

[35] Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* 20–21 (NBER Working Paper No. 13106, May 2007), http://www.nber.org/papers/w13106.pdf [https://perma.cc/PK3H-MENM].

[36] *Id.* at 23–24.

[37] *See generally* Nancy L. Rose, *Labor Rent-Sharing and Regulation: Evidence from the Trucking Industry*, 95 J. Pol. Econ. 1146 (1987); David Card, *Deregulation and Labor Earnings in the Airline Industry* (NBER Working Paper No. 5687, July 1996).

unionized counterparts, receiving a portion of the rents obtained by their employers.[38] The effects of unionization extended beyond particular organized firms and industries. The higher density of unions contributed to the establishment norms of equity and to the securing of higher wages in non-unionized sectors as well.[39] On the whole, the power of organized labor blunted the regressive economic effects of market power.

Given that labor today lacks effective countervailing power, market power rents are not likely to be shared with workers in shareholder-centric business sectors. In recent decades, labor's countervailing power has been more notable for its absence than its presence.[40] Labor markets and workplaces have been radically transformed to the detriment of the working class, with a qualitative shift from unionized, full-time jobs in manufacturing to non-unionized, contingent jobs in the service sector.[41] In 2015, only 6.7% of private sector workers belonged to a union,[42] compared to 25% in 1975.[43] On top of the decades-long decline of organized labor,[44] the U.S. labor market has been weak in recent years. Nearly eight years after the financial crisis, the U.S. economy has not returned to full employment,[45] undermining the bargaining power of even those with jobs.[46] In an economy in which workers lack bargaining power and cannot demand higher wages, managers are un-

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[38] *See generally* Thomas Karier, *Unions and Monopoly Profits*, 67 Rev. Econ. & Stat. 34 (1985); John E. Kwoka, Jr., *Monopoly, Plant, and Union Effects on Worker Wages*, 36 Indus. & Lab. Rel. Rev. 251 (1983).

[39] *See generally* Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 Am. Soc. Rev. 513 (2011).

[40] *See* Quoctrung Bui, *50 Years of Shrinking Union Membership, In One Map*, Nat'l Public Radio (Feb. 23, 2015, 11:04 AM), http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map [https://perma.cc/3TQE-HUWY] ("Fifty years ago, nearly a third of U.S. workers belonged to a union. Today, it's one in 10.").

[41] *See generally* Guy Standing, The Precariat: The New Dangerous Class (2011); David Weil, The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It (2014).

[42] Press Release, Bureau of Labor Statistics, Union Members—2015 (Jan. 28, 2016), http://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/C5HR-C5LY].

[43] Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 27 (Princeton Univ., Working Paper No. 503, Sept. 2005), https://core.ac.uk/download/pdf/6894934.pdf [https://perma.cc/PW7V-6YUC].

[44] Another labor market development, the growth of independent contracting and franchising, has created a "fissured workplace" in which those who work together on a daily basis may not be employed by the same entity or may have very different economic relationships with the same employer. This fissuring of workplaces appears to have further eroded notions of intra-firm wage equity and fairness and contributed to lower wages at the bottom of the pay scale. Weil, *supra* note 41, at 83–87.

[45] Chico Harlan, *An Unfruitful Jobs Recovery Rewrites the Definition of Full Employment*, Wash. Post (July 2, 2015), https://www.washingtonpost.com/business/economy/an-unfruitful-jobs-recovery-rewrites-the-definition-of-full-employment/2015/07/02/1006e5c0-20ff-11e5-84d5-eb37ee8eaa61_story.html [https://perma.cc/5M3J-KY2S].

[46] Paul Krugman, *The Populist Imperative*, N.Y. Times (Jan. 23, 2014), http://www.nytimes.com/2014/01/24/opinion/krugman-the-populist-imperative.html [https://perma.cc/X27S-5G58].

likely to share the spoils from market power with their employees.[47] Wage trends support this hypothesis. Despite rising labor productivity, wages have stagnated for most workers since the mid-1970s.[48]

The trend of increasing consolidation and rising market power coupled with stagnant or declining wages suggests one possible way forward. A revived union movement and realigned CEO incentives could help mitigate the regressive effects of market concentration.[49] With the exception of industries whose network effects or high fixed costs necessitate monopoly, however, market competition is still preferable to market concentration.

In contrast to shareholders and executives at businesses with market power, consumers—the victims of market power—are much more likely to be representative of society at large. While an affluent person is very likely to spend more in absolute dollars on consumption than a person of lesser means, the relationship between income and consumption is not one-to-one. In other words, a person with an income fifty times greater than the median income is unlikely to consume fifty times as much as the person earning the median income. Rather, a person earning fifty thousand dollars per year almost certainly spends a larger fraction of his or her income on consumption than a person earning one million dollars per year.[50] More specifically, a less affluent person is likely to spend a larger portion of his or her income on essential goods—such as energy, food, and health care—than a wealthier person.[51] Monopoly and oligopoly overcharges are the functional equivalent

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[47] Even in unionized sectors defined by producer market power, corporations have been reluctant to share the proceeds with workers. Verizon, whose unionized workers went on strike in 2016, illustrates how the surplus of a corporation is disbursed today. The telecom undertook

> a $5 billion stock buyback last year to boost its stock price, on top of an already generous dividend. If that money had instead been divided among 180,000 workers, it would have come to $28,000 per person—showing that there's plenty of profit to be shared across the company. Or, if it costs $500 to install FiOS in one household, that money could have been used to help 10 million households cross the digital divide.

Mike Konczal, *How the Rise of Finance Has Warped Our Values*, WASH. POST (Apr. 22, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/04/22/how-the-rise-of-finance-has-warped-our-values/?utm_term=.674021859bc7 [https://perma.cc/7MCH-HYXF].

[48] *See* Josh Bivens & Lawrence Mishel, *Understanding the Historic Divergence Between Productivity and a Typical Worker's Pay: Why It Matters and Why It's Real* 3 (EPI, Briefing Paper No. 406, Sept. 2015), http://www.epi.org/files/2015/understanding-productivity-pay-divergence-final.pdf [https://perma.cc/72KG-VKSL] ("Net productivity grew 1.33 percent *each year* between 1973 and 2014, faster than the meager 0.20 percent annual rise in median hourly compensation. In essence, about fifteen percent of productivity growth between 1973 and 2014 translated into higher hourly wages and benefits for the typical American worker.").

[49] For a more comprehensive analysis of how a new labor law could help achieve greater economic and political equality, see Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1 (2016).

[50] Saez & Zucman, *supra* note 15, at 30; Atif R. Mian et al., *Household Balance Sheets, Consumption, and the Economic Slump* 26 (Chi. Booth, Research Paper No. 13-32, June 2013), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1961211 [https://perma.cc/RE9Z-LJKD].

[51] *See, e.g.*, PHILLIP R. KAUFMAN ET AL., U.S. DEP'T OF AGRIC., ECON. REPORT NO. 759, DO THE POOR PAY MORE FOR FOOD? ITEM SELECTION AND PRICE DIFFERENCES AFFECT LOW-INCOME HOUSEHOLD FOOD COSTS iii (1997), https://www.ers.usda.gov/webdocs/publications/

of a sales tax and, in the markets for necessities, are very likely to have regressive effects, as most sales taxes do.[52]

The distributive effects of market power are understudied. In a 1975 study, William Comanor and Robert Smiley found that market power in the U.S. economy had significant regressive wealth effects in the 1960s—a period of much less economic inequality and greater economy-wide competition than the present.[53] Their economic simulations of the U.S. economy in 1963[54] found that monopoly power transferred wealth to the most affluent segment of society. Comparing the real-world economy in which firms in many markets possess monopoly or oligopoly power with a theoretical economy in which all markets are competitive, Comanor and Smiley found that a fully competitive economy would benefit the overwhelming majority of Americans. Specifically, 93.3% of the population that had limited or no business ownership interests would see an improvement in their relative wealth position, thanks to lower prices for goods and services.[55] In contrast, the most affluent 2.4% of the population, which had total assets of greater than one hundred thousand dollars in 1962, would see a decline in wealth of as much as fifty percent.[56] A recent study that performed an economic simulation of the European Union found comparable progressive distributional effects from curbing market power.[57]

Given managerial norms that prize the interests of the generally affluent shareholder class, the inability of workers to demand a share of market power rents, and the higher fraction of income devoted to consumption by working and middle class Americans, market power in most sectors can be expected to redistribute wealth upwards. Oligopolistic and monopolistic firms, by raising prices, capture wealth from consumers. In the case of oligopsonists and monopsonists, these powerful buyers capture wealth from small producers by depressing purchase prices for their output. The higher prices borne by consumers (the ninety-nine percent as a rough shorthand) translate into larger profits for firms and ultimately larger dividends and capital gains for shareholders and larger salaries and bonuses for executives—two groups that tend to be overwhelmingly affluent (the one percent as shorthand).

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aer759/32372_aer759.pdf [https://perma.cc/44BF-PLST] ("[P]oor households spend a higher proportion of their income on food than wealthier households which confirms a fundamental principle of economics—the percentage of income spent on necessities falls as income rises.").

[52] *See, e.g.*, Sean Higgins et al., *Comparing the Incidence of Taxes and Social Spending in Brazil and the United States*, 61 Rev. Income & Wealth (forthcoming 2016).

[53] Piketty, *supra* note 1, at 24.

[54] William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q.J. Econ. 177, 187 (1975).

[55] *Id.* at 191.

[56] *Id.*

[57] Fabienne Ilzkovitz & Adriaan Dierx, *Competition Policy and Inclusive Growth*, VoxEU (June 19, 2016), http://voxeu.org/article/competition-policy-and-inclusive-growth [https://perma.cc/9REP-E7MN].

II. How Large Businesses Collude, Merge, and Monopolize Markets and Extract Income from Consumers and Small Producers

Trends in several major industries suggest that market power is a pervasive problem and an important contributor to economic inequality in the United States.[58] Businesses use a variety of methods—including collusion, mergers, and exclusion—that are, at best, policed imperfectly, to extract greater wealth from the public than would be possible were they subject to stronger competitive forces.[59] Case studies of anticompetitive behavior in six key sectors of the economy shed light on how market power transfers income and wealth in a generally upward direction. Consumers in a number of markets pay more for everyday goods and services—and small suppliers in some markets may receive less income—because of monopoly and oligopoly power. Given the distribution of capital ownership, power of top-level managers, and powerlessness of workers, these elevated consumer prices and depressed producer prices generally transfer income from the ordinary many to the elite few.

Table 1: Estimates of Seller-Side Market Power Rents in Six Sectors of the U.S. Economy in 2014[60]

		Billions of Dollars of Market Power Rents				
		Percentage of Total Revenues Attributed to Market Power Rents				
Industry	**Annual Revenue (in billions)**	**5%**	**10%**	**15%**	**20%**	**25%**
Hospitals	$972	$49	$97	$146	$194	$243
Pharmaceuticals	$377	$19	$38	$57	$75	$94
Food*	$704	$35	$70	$106	$141	$176
Telecommunications	$229	$11	$23	$34	$46	$57
Airlines	$207	$10	$21	$31	$41	$52
Electricity**	$176	$9	$18	$26	$35	$44
Total (in billions)	**$2,664**	**$133**	**$266**	**$400**	**$533**	**$666**

*Retail sales for food consumed at home.
**Residential electricity sales only.

[58] Other important drivers of economic inequality in the United States appear to be the reduced progressivity of the tax system, the growth of the financial sector, and the weakening of organized labor. *See generally* Atkinson, *supra* note 2.

[59] In fact, market power may be even more severe and pervasive than some statistics suggest. Cross-ownership by financial institutions in competing firms means that conventional measures of concentration understate market power in many markets. José Azar et al., *Anti-Competitive Effects of Common Ownership* 37–38 (Ross Sch. of Bus., Paper No. 1235, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345 [https://perma.cc/CC9C-MS69].

[60] Sources of industry revenue data:

Hospitals: *National Health Expenditure Data*, Ctrs. for Medicare & Medicaid Servs. (Aug. 10, 2016), https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html [https://perma.cc/DL5W-NHAU].

While these case studies do not purport to establish a firm causal relationship between market power and economic inequality, they point to a connection between the two, particularly when viewed together with other developments.[61] For instance, the share of corporate profits as a percentage of gross domestic product has risen alongside the rise in inequality, especially over the past fifteen years.[62] More firms also appear to be earning rates of return on their assets that are above competitive levels.[63] Goldman Sachs has even advised clients to invest in oligopolistic sectors as a means of enjoying higher rates of return.[64] In open, competitive markets, these high rates of return would ordinarily spur business investment from incumbents and new entrants. Rather than chasing these attractive returns, however, many businesses are sitting on large reserves of idle cash.[65]

Pharmaceuticals: *U.S. Pharma Market Will Top $377 Billion in 2014; Up 11–13%*, PHARM. COMMERCE (Nov. 20, 2014), http://pharmaceuticalcommerce.com/latest-news/us-pharma-market-will-top-377-billion-in-2014-up-11-13/ [https://perma.cc/URS8-D8JT].

Food: *Food Sales*, U.S. DEP'T OF AGRIC. (June 23, 2016), http://www.ers.usda.gov/data-products/food-expenditures/food-expenditures/#Food%20Sales [https://perma.cc/6FQH-8VDH].

Telecommunications: FED. COMMC'NS COMM'N, UNIVERSAL SERVICE MONITORING REPORT 12 (2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-337019A1.pdf [https://perma.cc/3GUU-LZ65].

Airlines: *Operating Revenue (In Thousands of Dollars $000): All U.S. Carriers – All Regions*, U.S. DEP'T OF TRANSP., http://www.transtats.bts.gov/Data_Elements_Financial.aspx?Data=7 [https://perma.cc/R4H3-C98F].

Electricity: *2014 Total Electric Industry Revenue (Thousands Dollars)*, ENERGY INFO. ADMIN., http://www.eia.gov/electricity/sales_revenue_price/pdf/table3.pdf [https://perma.cc/NG2Z-UTD4].

Connor and Lande reviewed 1,157 estimates of cartel overcharges and found the median overcharge to be 23.3% and the mean overcharge to be 49%. Connor & Lande, *supra* note 11, at 456. On the whole, monopolies and oligopolies face fewer coordination challenges than cartels and thus exercise market power more ruthlessly. Even accounting for reduced sales volume from higher prices, assuming market power rents in oligopolistic or monopolistic markets to be 15 to 25% of revenues appears quite defensible. In more competitive segments of an industry, market power rents (as a percentage of revenues) are likely to be lower. Market power rents (as a percentage of total revenues) for an entire industry depend on, among other things, the fraction of revenues derived from competitive rather than oligopolistic or monopolistic segments.

[61] *See generally* Paul Krugman, CHALLENGING THE OLIGARCHY, N.Y. REV. BOOKS (Dec. 17, 2015), http://www.nybooks.com/articles/2015/12/17/robert-reich-challenging-oligarchy/ [https://perma.cc/U6V2-FPKM] (discussing the relationship between market power and rising inequality in a review of ROBERT B. REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW (2015)).

[62] *Corporate Profits After Tax (Without IVA and CCAdj) / Gross Domestic Product*, FED. RESERVE BANK OF ST. LOUIS, https://research.stlouisfed.org/fred2/graph/?g=cSh [https://perma.cc/ZX8C-HK4R].

[63] Furman & Orszag, *supra* note 22, at 9–10.

[64] Ryan Cooper, *Even Goldman Sachs Thinks Monopolies Are Pillaging Consumers*, WEEK (June 30, 2016), http://theweek.com/articles/633101/even-goldman-sachs-thinks-monopolies-are-pillaging-american-consumers [https://perma.cc/8M4L-GLJF].

[65] Eric Platt, *Top 50 Boardroom Hoarders Sit on $1 Trillion in Cash*, FIN. TIMES (May 10, 2015), https://www.ft.com/content/34d58a8a-f5a0-11e4-bc6d-00144feab7de.

A. Health Care

Health care is one of the biggest sectors of the U.S. economy, making up 17.5% of national gross domestic product in 2014.[66] Consequently, changes in consumer prices have significant distributive effects. Some have argued that because health care spending is largely mediated through an insurance system, consumers are rarely the direct or even the ultimate payers of health care costs.[67] What this view misses, however, is that insurers frequently pass on higher costs to consumers in the form of higher premiums and higher deductibles. Individuals receiving their health insurance through employer-based plans may experience price hikes in the form of lower wages, assuming employers choose to pass on costs too. Rising concentration in local health insurance markets makes consumers even more likely to bear higher healthcare costs. One study estimated that the increase in local market concentration raised insurance premiums by about thirty-four billion dollars per year, or about two hundred dollars per person with employer-sponsored health insurance, between 1998 and 2007.[68]

1. Hospitals

Hospitals comprise one of the leading sub-industries in health care, generating $923 billion in revenue in 2014.[69] Two successive rounds of consolidation have transformed the hospital industry over the last few decades. The first major merger wave began in the 1980s, when nearly two hundred hospitals merged per year.[70] By the mid-1990s, annual merger volume had increased nine-fold.[71] Market concentration increased accordingly: in 1990, the average Herfindahl-Hirschman Index (HHI, a widely used measure of market concentration) in a metropolitan statistical area was 1,576 (considered "moderately concentrated"); by 2003, that figure had risen to 2,323 (close to the threshold for "highly concentrated").[72] Over this period, the

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[66] *National Health Expenditure Data*, Ctrs. for Medicare & Medicaid Servs. (Aug. 10, 2016), https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html [https://perma.cc/3FF5-M7BF].

[67] *See, e.g.*, Crane, *supra* note 8, at 31.

[68] Leemore Dafny et al., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 Am. Econ. Rev. 1161, 1163 (2012).

[69] *Revenue of Hospitals (NAICS 62211) in the United States from 2009 to 2014 (in Billion U.S. Dollars)*, Statista (2016), http://www.statista.com/statistics/296845/revenue-hospitals-in-the-us/ [https://perma.cc/GZ7X-CT3D].

[70] *The True Price of Reduced Competition in Health Care: Hospital Monopolies Drastically Drive Up Prices*, Promarket (Mar. 14, 2016), https://promarket.org/the-true-price-of-reduced-competition-in-health-care-hospital-monopolies-drastically-drive-up-prices [https://perma.cc/R354-84S7].

[71] Claudia H. Williams et al., How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?, Robert Wood Johnson Found. 1 (2006), http://www.rwjf.org/en/library/research/2006/02/how-has-hospital-consolidation-affected-the-price-and-quality-of.html [https://perma.cc/72ZP-NCNP].

[72] *Id.*

number of competing local hospital systems available to the average American fell from six to four.[73]

This initial round of consolidation has been followed by a more recent wave, particularly in the wake of the Affordable Care Act, which encouraged provider consolidation in the name of greater coordination of health care delivery. Sixty-six mergers occurred in 2010; 488 have taken place since then, with 112 in 2015 alone.[74] Sixty percent of hospitals are now part of larger health systems, an increase of seven percentage points from the early 2000s.[75] Nearly half of all hospital markets in the United States are highly concentrated, one-third are moderately concentrated, and the remaining one-sixth are unconcentrated. Meanwhile, under the HHI, no hospital market is considered highly competitive.[76]

Research indicates that consolidation among hospitals has led to a significant increase in health care prices. Studies assessing the effects of consolidation within the same geographic region in the 1990s found that prices in these areas increased by forty percent or more.[77] More recent work found that the trend continues: price increases following hospital mergers in concentrated markets often exceed twenty percent.[78] A separate summary of existing research cites eight studies that found price increases ranging from ten to forty percent due to mergers.[79]

Hospital consolidation can raise consumer health prices in many ways, including by increasing the bargaining power of hospitals in negotiations with insurers. Having fewer hospital systems makes it costlier for a health insurer to exclude even one system from its network. Given that each system may cover a large part of the market, consumers and employers are less likely to purchase a plan that does not provide patients access to a significant fraction of the local hospital market. With greater leverage, each hospital system can charge insurers a higher price—which insurers pass on to consumers in the form of lower benefits and higher premiums, co-pays, and deductibles.

A recent study of private health care spending analyzed data for thirty percent of individuals with employer-sponsored coverage, encompassing ninety-two billion health insurance claims from eighty-eight million people. The authors found that the prices hospitals negotiate with health insurance firms vary significantly both within and across geographic areas in the

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[73] *Id.*

[74] *Hospital Merger and Acquisition Activity Up Sharply in 2015, According to Kaufman Hall Analysis*, KAUFMANHALL, http://www.kaufmanhall.com/about/news/hospital-merger-and-acquisition-activity-up-sharply-in-2015-according-to-kaufman-hall-analysis [https://perma.cc/2EP7-NURD].

[75] David M. Cutler & Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 JAMA 1964, 1965 (2013).

[76] *Id.* at 1966.

[77] *Id.* at 1967–68.

[78] MARTIN GAYNOR & ROBERT TOWN, THE IMPACT OF HOSPITAL CONSOLIDATION—UPDATE, ROBERT WOOD JOHNSON FOUND. 1 (2012), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261 [https://perma.cc/UYR3-UYVZ].

[79] Cutler & Scott Morton, *supra* note 75.

United States. For example, 2011 hospital prices for certain treatments were twelve times higher in the most expensive region in the country than in the cheapest region, and could vary by up to a factor of nine even *within* a city. Notably, the single primary driver of this difference across markets is competition. Hospitals in monopoly markets, for example, have prices that are fifteen percent higher than those in markets with four or more providers, the study found, even after controlling for differences in cost and clinical quality. Hospitals in duopoly markets, meanwhile, charge prices that are 6.4% higher, and markets with a hospital triopoly are 4.8% more expensive.[80] The authors estimate that the price of an average inpatient stay at a monopoly hospital is almost $1,900 higher than where there are four or more competitors. "We know that these higher prices end up getting translated into higher premiums that employers pass on to workers," one of the authors said in an interview.[81]

Strikingly, the correlation between market consolidation and increased prices holds across different forms of ownership. Nonprofit hospitals traditionally argue that mergers between them will not raise prices precisely because they are nonprofits. But data established that "prices are just as high in nonprofit as in for-profit organizations,"[82] even though the government subsidizes nonprofits "to the tune of $30 billion dollars annually, in the form of tax exemptions."[83]

2. *Pharmaceuticals*

The pharmaceutical industry raises a number of competition issues. These include well-known debates over the optimal level of patent protection, as well as two specific practices that will be our focus here: (1) exclusion payments by branded drug makers to prospective generic rivals and (2) product hopping by branded drug makers. Both practices delay generic drug

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[80] *See* Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured* 3 (NBER, Working Paper No. 21815, Dec. 2015), http://www.nber.org/papers/w21815.pdf [https://perma.cc/993D-9ZYH].

[81] Mike Cummings, *Hospital Prices Show "Mind-Boggling" Variation Across U.S. Driving Up Health Care Costs*, YALE NEWS (Dec. 2015), http://news.yale.edu/2015/12/15/hospital-prices-show-mind-boggling-variation-across-us-driving-health-care-costs [https://perma.cc/TY9C-3VDF].

[82] Cutler & Scott Morton, *supra* note 75, at 1967 (citation omitted); *see also* Emmett B. Keeler et al., *The Changing Effects of Competition on Non-Profit and For-Profit Hospital Pricing Behavior*, 18 J. HEALTH ECON. 69, 81–82 (1999); Cooper et al., *supra* note 80; Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, FED. TRADE COMM'N 31, https://www.ftc.gov/sites/default/files/documents/reports/competitive-effects-not-profit-hospital-mergers-case-study/hospitals.pdf [https://perma.cc/NHH2-27DF] ("These price increases—and in particular, the price increase at Watsonville hospital, a locally-sponsored and administered community hospital—suggest strongly that mergers involving not-for-profit hospitals are a legitimate focus of antitrust concern.").

[83] *See The True Price of Reduced Competition in Health Care: Hospital Monopolies Drastically Drive Up Prices*, PROMARKET (Mar. 14, 2016), https://promarket.org/the-true-price-of-reduced-competition-in-health-care-hospital-monopolies-drastically-drive-up-prices [https://perma.cc/R354-84S7].

competition and cost consumers billions of dollars more per year in pharmaceutical expenditures.

Exclusion payments between branded and generic drug manufacturers have received significant antitrust scrutiny in recent years.[84] Under the regulatory scheme established by the Hatch-Waxman Act, a generic drug maker can enter the market and compete against a patented drug maker with a bioequivalent drug and without performing full clinical trials ordinarily required for a new drug. To qualify for this path to the market, the generic company must show that either the patents covering the branded drug are invalid or the generic drug does not infringe these patents.[85] The incumbent branded drug maker has the opportunity to prevent generic entry by filing a patent infringement suit.[86] The Hatch-Waxman regime offers a faster path to entry for generic drugs and is intended to promote greater competition in the pharmaceutical market.

Over the past two decades, however, branded drug makers have used the system to frustrate generic competition. Soon after a generic company has announced its intention of entering a market under the auspices of Hatch-Waxman, branded drug manufacturers have filed lawsuits alleging patent infringement by the prospective generic entrant.[87] This act alone is not necessarily either anticompetitive or contrary to the purpose of Hatch-Waxman. However, instead of litigating the case or reaching a settlement in which the branded manufacturers receive compensation from the alleged patent infringers, branded drug manufacturers *pay* the generic company on the condition that the generic company postpone its planned market entry.[88] On its face, this conduct is suspicious, as the branded company with a patented product is paying the alleged infringer; the owner of a legal entitlement is paying someone else not to violate it.[89] This conduct appears to be market allocation, with the branded drug company paying the generic rival *not* to compete.[90]

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[84] *See, e.g.*, FTC v. Actavis, Inc., 133 S. Ct. 2233 (2013).

[85] 21 U.S.C. § 355(j)(2)(A)(vii) (2015).

[86] *Id.* § 355(j)(5)(B)(iii).

[87] *See* Fed. Trade Comm'n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions 1 (2010) [hereinafter FTC Pay-for-Delay Study], 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 [https://perma.cc/C38N-LR6P].

[88] *See* Staff of the Bureau of Competition, Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2013, at 4 (2014), https://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/141222mmafy13rpt-1.pdf [https://perma.cc/QL77-CHHA] (providing number of settlements in each year between 2004 and 2013 in which branded company paid generic entrant to resolve litigation).

[89] *See* Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 Mich. L. Rev. 37, 68 (2009).

[90] *See* Susan Schipper, *Bad Medicine:* FTC v. Actavis, Inc. *and the Missed Opportunity to Resolve the Pay-for-Delay Problem*, 73 Md. L. Rev. 1240, 1262 (2014).

These arrangements are lucrative for both the branded and generic drug companies—and costly for consumers. The attraction for the branded drug company is apparent: monopoly profits, even when diminished by the amount of the exclusion payment, remain higher than the competitive profits the branded drug company would otherwise make.[91] A generic drug can sell for as much as ninety percent less than the branded drug.[92] For the generic company, the exclusion payment—a share of the branded drug company's monopoly profits—is almost certainly greater than the profits it would make in a competitive market.[93] In other words, the branded and generic drug companies agree to share monopoly profits instead of competing them away and ending up collectively worse off. These monopoly rents come out of the pockets of consumers who bear the higher prices for essential drugs. In the case of widely used medicines, an exclusion payment can transfer billions of dollars per year from consumers into the pockets of pharmaceutical companies.[94] One scholar estimated that in 2005, settlements that had the appearance of anticompetitive purpose cost consumers approximately fourteen billion dollars.[95]

Another anticompetitive practice, arguably even more costly to consumers than exclusion payments,[96] is "product hopping" by branded drug companies. In a product hopping strategy, branded drug manufacturers make minor tweaks to the existing branded drug to obtain a new patent and extend their monopoly position. Under state generic substitution laws, pharmacists are allowed or required to fill a prescription with an available generic equivalent, unless the doctor or patient expressly requests the branded version in the prescription.[97] Because generic competition can reduce prices substantially,[98] branded drug manufacturers have powerful incentives to take measures to perpetuate patent protection in the years leading up to the expiration of the patent.

Product hopping can foreclose generic entry for a significant period of time. The tweaks made to the existing drug often have negligible clinical benefits for patients and include changing a drug delivery form to a capsule from a pill (or vice-versa), combining two drugs that had been marketed

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[91] *See* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1580–81 (2006).

[92] FTC Pay-for-Delay Study, *supra* note 87.

[93] Hemphill, *supra* note 91, at 1581.

[94] FTC Pay-for-Delay Study, *supra* note 87, at 2.

[95] *See* C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 Colum. L. Rev. 629, 649 (2009).

[96] For now, government action appears to have diminished the prevalence of exclusion payments. *See* Press Release, Fed. Trade Comm'n, Pay-for-Delay Deals Decreased Substantially in the First Year Since Supreme Court's Actavis Decision (Jan. 13, 2016), https://www.ftc.gov/news-events/press-releases/2016/01/ftc-report-drug-patent-settlements-shows-potential-pay-delay [https://perma.cc/BR39-6LMN].

[97] *See* Garth Boehm et al., *Development of the Generic Drug Industry in the U.S. After the Hatch-Waxman Act of 1984*, 3 Acta Pharmaceutica Sinica B 297, 298 (2013).

[98] *See* FTC Pay-for-Delay Study, *supra* note 87, at 1.

separately, and slightly modifying the drug molecule.[99] Once they develop the new formulation or delivery mechanism, pharmaceutical companies heavily market the new version to doctors and seek to persuade them to prescribe it instead of the previous version that is about to go off patent.[100]

Given the large amounts of money branded companies devote to marketing efforts,[101] these efforts at "switching the market" to the new version are likely to be successful.[102] If the branded drug company executes the switch successfully, doctors, who do not bear the price of more expensive drugs,[103] start prescribing the new drug in place of the old.[104] Generic drug makers cannot offer an unbranded version of the new patented drug, which means that state generic substation laws cannot play their competition-enhancing purpose. The result is that the branded drug company maintains its monopoly.[105] To ensure that the product hop is successful, some branded drug makers have even withdrawn the old version from the market to deprive doctors of the option of comparing the clinical effectiveness of the old and new versions and prescribing the old out of consideration for the patient's out-of-pocket expenses.[106]

This product hopping costs consumers billions of dollars annually. One analysis, using conservative assumptions, estimated that product hopping costs consumers more than twenty billion dollars a year.[107] As an example, insulin, essential for diabetics, appears to be persistently expensive because of a series of product hops by branded manufacturers that have limited generic competition.[108] Even when a product change has non-trivial benefits for patients, this product improvement has to be weighed against the high cost of monopolistic overcharges that third-party payers and ultimately consumers have to bear.[109] And importantly, in many actual instances of product

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[99] *See* Michael A. Carrier, *A Real-World Analysis of Pharmaceutical Settlements: The Missing Dimension of Product Hopping*, 62 FL. L. REV. 1009, 1016–17 (2010) [hereinafter Carrier I].

[100] *See* Steve D. Shadowen et al., *Anticompetitive Product Changes in the Pharmaceutical Industry*, 41 RUTGERS L.J. 1, 45–46 (2009).

[101] *See* Troyen A. Brennan et al., *Health Industry Practices That Create Conflicts of Interest: A Policy Proposal for Academic Medical Centers*, 295 J. AM. MED. ASS'N 429, 430 (2006).

[102] Empirical research has found that payments from drug manufacturers to doctors do influence doctors' prescribing practices. *See* Charles Ornstein et al., *Now There's Proof: Docs Who Get Company Cash Tend to Prescribe More Brand-Name Meds*, PROPUBLICA (Mar. 17, 2016, 5:00 AM), https://www.propublica.org/article/doctors-who-take-company-cash-tend-to-prescribe-more-brand-name-drugs [https://perma.cc/HP66-SDDN].

[103] *See* Shadowen et al., *supra* note 100, at 11–13.

[104] *Cf.* Michael A. Carrier, *Provigil: A Case Study of Anticompetitive Behavior*, 3 HASTINGS SCI. & TECH. L.J. 441, 447–48 (2011) [hereinafter Carrier II] (describing why this process happens in this way).

[105] *See* Carrier I, *supra* note 99, at 1018.

[106] *See* Shadowen et al., *supra* note 100, at 56–57.

[107] *See id.* at 42.

[108] *See* Kasia Lipska, Opinion, *Break Up the Insulin Racket*, N.Y. TIMES (Feb. 20, 2016), http://www.nytimes.com/2016/02/21/opinion/sunday/break-up-the-insulin-racket.html [https://perma.cc/QK7G-VV6D].

[109] *See* Jonathan Jacobson et al., *Predatory Innovation: An Analysis of* Allied Orthopedic v. Tyco *in the Context of Section 2 Jurisprudence*, 23 LOY. CONSUMER L. REV. 1, 3–4 (2010).

hopping, the new iteration of the drug appears to offer no tangible clinical benefits over the existing version.[110]

B. Agriculture and Food Retail

After decades of mergers, the food retail and agricultural inputs and processing sectors have become highly concentrated. The industry today is shaped like an hourglass: millions of consumers and farmers on either end, connected through a few large companies. Retail consolidation has enabled firms to squeeze their suppliers for greater margins—spurring consolidation along the supply chain—and led to worse outcomes for consumers. Research suggests this level of consolidation has redistributive effects, transferring wealth from both farmers and consumers to processors, distributors, and retailers in the middle.

In retail, the top four grocers—Walmart, Kroger, Costco, and Safeway —control more than half of all grocery sales.[111] Concentration can be even higher at the local level: in over twenty-nine metropolitan markets, Walmart captures more than fifty percent of all grocery sales.[112] Meanwhile, consolidation shows no signs of slowing;[113] the last few years have seen major mergers between Kroger and Harris Teeter, Albertsons and Safeway,[114] and Ahold and Delhaize (which operate a suite of East Coast grocers, including Giant, Stop & Shop, and Food Lion).[115]

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[110] *See, e.g.*, Carrier I, *supra* note 99, at 1017 ("[T]he makers of the antidepressant Prozac and the cholesterol treatment TriCor switched from capsule to tablet form, while anxiety-treating Buspar switched from tablet to capsule.").

[111] *Market Share of the Leading Grocery Retailers in the United States in 2014*, STATISTA RESEARCH & ANALYSIS, http://www.statista.com/statistics/240481/food-market-share-of-the-leading-food-retailers-of-north-america/.

[112] Stacy Mitchell, *Eaters Beware: Walmart Is Taking over Our Food System*, GRIST (Dec. 30, 2011), http://grist.org/food/2011-12-30-eaters-beware-walmart-is-taking-over-our-food-system/ [https://perma.cc/L76Y-MV6X]. This number has not been updated to reflect Walmart's market share since announced it would be shuttering several Express Stores and SuperCenters.

[113] As an industry analyst recently wrote, "The food retail industry is simultaneously consolidating and differentiating. We're seeing fewer companies and more store concepts. The mindset winning today is that you need to 'get big or get niche' to capture more of the market." Mark Dunson, *Five Emerging Trends for Supermarket Retailers to Leverage in 2016*, CHAIN STORE AGE (Nov. 30, 2015), http://www.chainstoreage.com/article/five-emerging-trends-supermarket-retailers-leverage-01 [https://perma.cc/H245-BRCT].

[114] The level of consolidation resulting from this merger will be greater than what government had planned and approved. Last year the FTC required Albertsons and Safeway to sell off hundreds of stores as part of their merger. Months after the sale, however, one of the major buyers of their stores declared bankruptcy and put the acquired stores back up for sale. Albertsons has bought back twelve of those stores—at a price far lower than what it had originally paid. *See* Emily Parkhurst, *Albertsons Buys Haggen, Will Continue to Operate 15 Stores Under Haggen Brand*, PUGET SOUND BUS. J. (Mar. 14, 2016), http://www.bizjournals.com/seattle/news/2016/03/14/albertsons-buys-haggen-will-continue-to-operate-15.html.

[115] Alexandra Biesada, *Albertsons Files IPO amid Consolidation in Grocery Industry*, BIZMOLOGY (July 9, 2015), http://bizmology.hoovers.com/albertsons-files-ipo-amid-consolidation-in-grocery-industry [https://perma.cc/47VY-4KAD].

Concentration in the grocery sector is a relatively new phenomenon: through the 1980s, the industry was largely decentralized and most Americans purchased food from a variety of regional and local supermarket chains. A wave of grocery mergers and buyouts in the 1990s, coupled with entry by warehouse clubs and discount general merchandise stores into grocery products, reshaped the landscape. Grocers sought to bulk up in order to compete with the scale of warehouse clubs and large discount stores, fueling further mergers and leading many local grocers to close; there were 385 grocery mergers between 1996 and 1999 alone.[116] The share of groceries sold by the four biggest food retailers more than doubled between 1997 and 2009, from seventeen percent in 1994 to twenty-eight percent in 1999 and thirty-four percent in 2004.[117]

While grocers often tout efficiencies as a benefit of mergers, little evidence suggests that consumers have actually witnessed lower prices. Instead, concentration seems to have resulted in higher prices.[118] Several academic studies have found a link between higher levels of local retail concentration and higher grocery prices.[119] A majority of studies reviewed by the U.S. Department of Agriculture (USDA) in 2003 found that higher concentration in grocery store markets contributes to higher consumer food prices.[120] According to the American Antitrust Institute, concentration across the food supply chain has "undoubtedly contributed to the increased cost of food."[121]

In addition to raising prices for consumers, consolidation in the food and agriculture sector has facilitated a significant wealth transfer from farmers to food processors and meat packers. A handful of firms today control the processing sector. The top four processors nationally control eighty percent of beef, sixty percent of hog, and fifty percent of poultry.[122] Powerful players in commodities have expanded both horizontally and vertically; ADM, Bunge, Cargill, and Dreyfus—the "big four"—control "as much as 90 per cent of the global grain trade."[123] On the processor side, firms have

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[116] *Consolidation and Buyer Power in the Grocery Industry*, Food & Water Watch 1 (Dec. 2010), https://www.foodandwaterwatch.org/sites/default/files/consolidation_buyer_power_grocery_fs_dec_2010.pdf [https://perma.cc/P3TW-N2EM].

[117] Tom Vilsack, U.S. Sec'y of Agric., Comments at Workshop on Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy 7 (Dec. 8, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2011/02/22/dc-agworkshop-transcript.pdf [https://perma.cc/JU3Y-Q7Z3].

[118] *But cf.* David E. Davis, *Prices, Promotions, and Supermarket Mergers*, J. Food & Agric. Indus. Org., Jan. 2010, at 1.

[119] *See, e.g.*, Ronald W. Cotterill, Antitrust Analysis of Supermarket Retailing: Common Global Concerns that Play Out in Local Markets 6–7 (Food Mkt. Policy Ctr. ed., July 2005).

[120] Richard Sexton et al., *Grocery Retailer Behavior in the Procurement and Sale of Perishable Fresh Produce Commodities*, USDA-ERS Contractors & Cooperators Rep No. 2., at 3 (Sept. 2003).

[121] Am. Antitrust Inst., Transition Report on Competition Policy 281 (2008).

[122] Table 2: Comparison of 1999 and 2011 data of CR 4 (on file with Harvard Law Library).

[123] Sophia Murphy et al., Cereal Secrets 3 (Oxfam ed., 2012), https://www.oxfam.org/sites/www.oxfam.org/files/rr-cereal-secrets-grain-traders-agriculture-30082012-en.pdf [https://perma.cc/2XP3-S243].

both horizontally consolidated and vertically integrated, upending the structure of the industry for farmers and rendering them captive to a handful of buyers. As with grocery stores, concentration at the local level can be even more severe; many local markets are monopolized by a single firm, rendering farmers captive to the one entity. Farmers are also squeezed by powerful players when they purchase inputs. In the seed industry, six hundred independent companies in 1996 have whittled down today to six giants,[124] which now control sixty-three percent of the global seed market.[125]

The effects of horizontal consolidation are exacerbated by the fact that the dominant and other leading firms in some of these sectors have also vertically integrated. In the chicken industry, for example, a processing company delivers birds to farmers, who feed and grow them, and the firm then collects them to take to market.[126] The monopsony power held by these processors enables them to require farmers to bear the risks of business—including steep investments in farming equipment—and also to reduce the prices paid for farmers' products.[127]

Academic research has found that the farmer's share of the retail dollar of food has been dramatically decreasing, while consumers pay largely the same or slightly higher prices. What has changed is that the middlemen that dominate these sectors—Cargill, Monsanto, Tyson, JBS—are reaping much higher returns, effecting a wealth transfer from farmers to these firms.

C. Telecommunications

Telecommunication services are central to the lives of most Americans. It is estimated that in 2015 the average U.S. household spent around three thousand dollars accessing services such as mobile voice, mobile data, cable, landline voice, and broadband Internet.[128] Consumers spent approximately forty-one percent of this on mobile service (for voice and data), and over thirty-seven percent of U.S. households have between four and eight connected devices—a number that is expected to rise.[129] In sum, telecommunications services comprise a significant and growing part of the consumer economy.

Historically, the telecom sector—both wireline and wireless service—has been highly concentrated. In 1984, under a court-approved settlement in

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[124] Guy Chazan & Lindsay Whipp, *Farmers Sound Alarm Over Mega Deals*, FIN. TIMES (Sept. 6, 2016), http://www.ft.com/cms/s/0/c815119c-6f4f-11e6-9ac1-1055824ca907.html#axzz4JtDb914H.

[125] *Id.*

[126] *See* Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Oct./Nov. 2012), http://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/ [https://perma.cc/F24Y-CAVC].

[127] *See id.*

[128] Chetan Sharma, *US Mobile Market Update Q3 2015*, TECH. & STRATEGY CONSULTING (2015), http://www.chetansharma.com/usmarketupdateq32015.htm [https://perma.cc/JZ8X-UTGN].

[129] *Id.*

a long-running monopolization suit, AT&T divested its local phone operations and created seven "Baby Bells." The aim was to isolate the monopolistic local phone segment and establish the conditions for competition in the long-distance and equipment markets.

Following the 1996 Telecommunications Act—which lifted ownership caps and deregulated rates—companies across sub-sectors linked up. The old AT&T, meanwhile, had for years been seeking to enter local markets, but exclusionary tactics by the Baby Bells kept the firm out.[130] In 2005, AT&T gave up and merged with SBC, while Verizon bought up MCI.[131] Long-distance and local phone service—which the government had sought to separate in 1984—had once again been coupled, and the United States was left with two major phone companies, AT&T and Verizon. The sector remains highly concentrated today: in mobile subscriptions, the top four firms—AT&T, Verizon, Sprint, and T-Mobile—control roughly ninety-eight percent of the market; the top two alone control around sixty-eight percent.[132]

Over the last few years, evidence has emerged that these firms are not competing to improve service. During AT&T's proposed bid to buy up T-Mobile, the public learned that AT&T was "sitting on large swaths of underutilized spectrum and maintaining legacy networks rather than investing in upgrades that would substantially increase capacity"—signaling that it was not facing competitive pressures.[133]

More generally, these firms have responded to increased demand not by expanding capacity but by hiking prices and degrading service—primarily through introducing data caps and tiered pricing. In 2010, AT&T eliminated its unlimited data plan for new users;[134] Verizon followed shortly after by introducing tiered pricing. Since then, AT&T has gone on to "throttle" customers with existing unlimited coverage, slowing down their service once they hit certain usage amounts, even when there was no congestion.[135] As noted by analysts and reporters, the company has used throttling to coax customers to switch to pricier plans with limited service. AT&T drew a one hundred million dollar fine from the Federal Communications Commission

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[130] *See* Susan Crawford, Captive Audience 50 (2013).

[131] *Id.*

[132] *Market Share of Wireless Subscriptions Held by Carriers in the U.S. from 1st Quarter 2011 to 3rd Quarter 2016*, Statista, https://www.statista.com/statistics/199359/market-share-of-wireless-carriers-in-the-us-by-subscriptions/ [https://perma.cc/E25J-NT6Y].

[133] Hibah Hussain et al., *Capping the Nation's Broadband Future*, New America 10 (Dec. 17, 2012), https://www.newamerica.org/oti/policy-papers/capping-the-nations-broadband-future/ [https://perma.cc/TAN8-2ZYK].

[134] AT&T has recently re-introduced an "unlimited" data plan that maxes out at three hundred GBP. *See* Press Release, AT&T, AT&T Introduces New Unlimited Plan for AT&T Wireless and DIRECTV Subscribers (Jan. 11, 2016), http://about.att.com/story/unlimited_plan_for_wireless_and_directv_subscribers.html [https://perma.cc/VKG9-TGXP].

[135] Jon Brodkin, *AT&T Still Throttles "Unlimited Data"—Even When Network Not Congested*, Ars Technica (Dec. 4, 2014), http://arstechnica.com/information-technology/2014/12/att-still-throttles-unlimited-data-even-when-network-not-congested/ [https://perma.cc/5YEP-L8VH].

and a lawsuit from the Federal Trade Commission for deceptively marketing these plans subject to throttling as "unlimited."[136] Looking at wireless broadly, analysts estimate that between fifty to seventy percent of Americans overpay for their mobile-phone plans, paying double what they would in a more competitive market.[137]

Research suggests that Verizon and AT&T's choice to introduce data caps and tiered pricing is an exercise of market power. Rapid technological advancement over the last few years has led the costs of providing service to decline, even as consumer demand for data has increased. As one study observes:

> Though mobile providers may need to utilize some usage limitations on their network given greater capacity constraints as compared to wired broadband, the use of flat monthly caps makes little sense when congestion on the network is likely to be time and geographically limited. Instead, the decision by AT&T Wireless and Verizon Wireless to move users onto tiered plans and the current price levels are largely influenced by Wall Street demands to report ever-growing revenue and profit margins. Rather than effectively managing use of the network, data caps are a strategy for ISPs to increase their revenue per user.[138]

Partly as a result, Americans are allocating a greater share of their monthly budget to pay for wireless service. Consumer spending for mobile service has increased since 2008, even while families have cut back in other sectors—a fact that wireless carriers are using to bet they can hike prices even higher.[139] Profits at wireless firms remain high: AT&T made $6.7 billion in net income in 2014 and $13.7 billion in 2015,[140] while Verizon generated $9.6 billion and $17.9 billion, respectively.[141] AT&T returned more than

[136] Jon Brodkin, *AT&T Urges Unlimited Data Customers to Give Up Plans, Raises Price by $5*, Ars Technica (Dec. 1, 2015), http://arstechnica.com/gadgets/2015/12/att-urges-unlimited-data-customers-to-give-up-plans-raises-price-by-5/ [https://perma.cc/BPP8-V8MW].

[137] Olga Kharif & Scott Mortiz, *You're Probably Paying Too Much for Your Mobile-Phone Service*, Bloomberg (Mar. 11, 2016), http://www.bloomberg.com/news/articles/2016-03-11/you-re-probably-paying-too-much-for-your-mobile-phone-service [https://perma.cc/XEH7-29EP].

[138] Hussain et al., *supra* note 133, at 3.

[139] Anton Troianovski, *Cellphones Are Eating the Family Budget*, Wall St. J. (Sept. 28, 2012), http://www.wsj.com/articles/SB10000872396390444083304578018731890309450 ("Wireless carriers are betting they can pull bills even higher by offering faster speeds on expensive new networks and new usage-based data plans. The effort will test the limits of consumer spending as the draw of new technology competes with cellphone owners' more rudimentary needs and desires.").

[140] AT&T Inc., Annual Report (Form 10-K, Exhibit 13) (Feb. 18, 2016), https://www.sec.gov/Archives/edgar/data/732717/000073271716000147/ex13.htm [https://perma.cc/7M3C-9P7E].

[141] Verizon Commc'ns Inc., Annual Report (Form 10-K, Exhibit 13) (Feb. 23, 2016), https://www.sec.gov/Archives/edgar/data/732712/000119312516473367/d35513dex13.htm [https://perma.cc/K5CT-ARUV].

$11 billion to shareholders in 2014,[142] while Verizon returned $7.8 billion in dividends.[143]

A similar story is true in the cable sector. Two firms—Comcast and Time Warner—control more than two-thirds of the national broadband market. Sixty-one percent of Americans live in markets with no competition, meaning they have access to, at most, one high-speed broadband provider.[144] Despite a substantial decrease in the cost of operating a network and transporting data, consumers have not seen a subsequent decline in the cost of service. Instead, broadband companies have further raised prices and also imposed data caps.[145] Since their reports to investors show sharply declining costs for IP transit as a percentage of revenue, this is leading to higher net profits.[146]

At the same time, quality has not kept up. Studies show that U.S. consumers pay more for slower Internet speeds than consumers in other countries. For example, providers in Seoul, Hong Kong, and Tokyo offer one gigabit per second plans for under forty dollars; in major U.S. cities, the fastest speed available is five hundred Mbps and costs around three hundred dollars a month.[147]

Although regulators managed to block the proposed Comcast-Time Warner deal—which would have handed a single firm more than half the country's high-speed Internet and one-third of the cable television market[148]—a suite of proposed deals since then show that the oligopolistic providers seek to consolidate further. In July 2015, the Justice Department[149] and Federal Communications Commission[150] permitted AT&T's forty-eight billion dollar acquisition of DirecTV to proceed. Another large merger was

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[142] Press Release, AT&T, AT&T Reports Strong Subscriber Gains and Solid Revenue Growth in Fourth Quarter (Jan. 27, 2015), http://about.att.com/story/att_fourth_quarter_earnings_2014.html [https://perma.cc/S7Z3-L2RW].

[143] Letter from Lowell McAdam, Chairman & Chief Exec. Officer, Verizon Commc'ns Inc., to Verizon Commc'ns Inc. Shareowners (2014), http://www.verizon.com/about/sites/default/files/annual/chairmans-letter-2014.html [https://perma.cc/Z8BE-P8GZ].

[144] FEDERAL COMMC'NS COMM'N, 2016 BROADBAND PROGRESS REPORT ¶ 86 (2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-6A1.pdf [https://perma.cc/4UMT-6LFW].

[145] Hussain et al., *supra* note 133, at 6–7.

[146] *Id.* at 6.

[147] Danielle Kehl et al., *The Cost of Connectivity*, NEW AMERICA (Oct. 30, 2014), https://www.newamerica.org/oti/new-report-the-cost-of-connectivity-2014/ [https://perma.cc/3KTT-RD4E].

[148] Brian Fung, *The Latest Time Warner Cable Merger Isn't Comcast All Over Again, Execs Argue*, WASH. POST (May 26, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/05/26/the-latest-time-warner-cable-merger-isnt-comcast-all-over-again-execs-argue/ [https://perma.cc/9MFY-LAAD].

[149] Press Release, Dep't of Justice, Office of Public Affairs, Just. Dep't Will Not Challenge AT&T's Acquisition of DirecTV (July 21, 2015), https://www.justice.gov/opa/pr/justice-department-will-not-challenge-atts-acquisition-directv [https://perma.cc/4SSQ-5VXV].

[150] FED. COMMC'NS COMM'N, FCC ORDER APPROVING AT&T-DIRECTV TRANSACTION (July 28, 2015), https://www.fcc.gov/document/fcc-releases-order-approving-att-directv-transaction.

recently allowed to proceed: Charter's bid to acquire Time Warner Cable.[151] Shortly after, Time Warner proceeded to raise its Internet and television rates for New York customers.[152]

D. Industries Historically Subject to Price Regulation

1. Airlines

Since the deregulation of entry and prices in the airline industry in 1978, the sector has been characterized by boom-and-bust cycles.[153] Airlines collectively lost nearly sixty billion dollars between 1978 and 2009.[154] While this fact might suggest that the restructured industry has been competitive, the sector is, in fact, dominated by firms that wield market power—the result of a wave of mergers and exclusionary practices by dominant hub carriers. Looking both nationwide and at major hub airports, a defining feature of the industry today is extremely high concentration.

Over the past ten years, the number of major carriers has declined from nine to four, with a handful of smaller competitors existing on the fringes.[155] This concentrated market structure is the culmination of merger activity that took off a few years after deregulation in 1978.[156] While vigorous entry has occurred at times over the past forty years, nearly all entrants were either liquidated or absorbed by a rival.[157] Mergers have eliminated previous head-to-head competition on a number of routes.[158] In the latest merger wave, Delta purchased Northwest in 2008, United acquired Continental in 2010, Southwest bought AirTran in 2011, and American combined with US Airways in 2014.[159] Nearly ninety percent of city-pair markets are highly

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[151] Federal Comm'cns Comm'n, Commission Approves Charter, TWC and Bright Merger Office of Public Affairs (May 10, 2016), https://www.fcc.gov/document/commission-approves-charter-twc-and-bright-house-merger.

[152] Larry Rulison, *Time Warner Cable Raises TV and Internet Rates Once Again*, Albany Times Union (Jan. 18, 2016), http://blog.timesunion.com/business/after-ny-oks-merger-time-warner-cable-raising-rates/72121/ [https://perma.cc/U3Q7-GZ46].

[153] *See* Severin Borenstein, *On the Persistent Financial Losses of U.S. Airlines: A Preliminary Exploration* 2, (NBER Working Paper No. 16,744, Jan. 2011), http://www.nber.org/papers/w16744.pdf [https://perma.cc/GB6W-N2X9] ("[I]n 2009 dollars, domestic passenger airline operations lost $10 billion from 1979 to 1989, made profits of $5 billion in the 1990s and lost $54 billion from 2000 to 2009.").

[154] *Id.*

[155] Kerry Close, *Travel Groups Want Congress to Investigate Airline Competition (or Lack Thereof)*, Time (Feb. 2, 2016), http://time.com/money/4204413/airline-competition-congress/?iid=sr-link1 [https://perma.cc/RYX5-Z5Y7].

[156] Severin Borenstein & Nancy L. Rose, *How Airlines Market Work . . . Or Do They? Regulatory Reform in the Airline Industry* 20 (NBER Working Paper No. 13,452, Sep. 2013), http://www.nber.org/papers/w13452.pdf [https://perma.cc/P7AF-RGLG].

[157] *Id.* at 18.

[158] Scott McCartney, *Where Airfares Are Taking Off*, Wall St. J. (Apr. 10, 2013), http://www.wsj.com/articles/SB10001424127887324010704578414813368268482.

[159] Christopher Drew, *Airlines Under Justice Dept. Investigation Over Possible Collusion*, N.Y. Times (July 1, 2015), http://www.nytimes.com/2015/07/02/business/airlines-under-justice-dept-investigation-over-possible-collusion.html [https://perma.cc/MJ6M-FS9B].

concentrated.[160]

The effects of this concentrated market structure are clear. With just four major players in the market, the incentives to compete have been significantly diminished. A market structure conducive to coordinated pricing appears to have emerged.[161] The big four carriers face each other in a number of markets and have little reason to undercut current fares and sabotage collective profits.[162] Airlines indeed appear to follow each other in imposing new fees on fliers, an indication of tacit collusion.[163] Pricing "discipline" (at the expense of consumers) is now the watchword among airline executives.[164]

Despite the dramatic decline in fuel prices (one of the most important inputs in air travel) over the past two years, airfares have remained largely constant and even increased on some routes.[165] In 2015, the average airfare hit a twelve-year high, accounting for inflation.[166] After a decade of massive losses following the attacks of September 11, 2001, and the subsequent decline in demand for air travel,[167] the industry has posted strong profits over the past two years.[168] American Airlines alone made $7.6 billion in 2015.[169] Warren Buffett, who previously vowed not to invest in airlines again after losing money in the industry in the 1990s, has acquired stakes in all four major carriers, reflecting a belief that bountiful profits are here to stay.[170]

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[160] Fiona Scott Morton et al., Charles River Associates, Benefits of Preserving Consumers' Ability to Compare Airline Fares 35–36 (2015), http://www.traveltech.org/wp-content/uploads/2015/05/CRA.TravelTech.Study_.pdf [https://perma.cc/73RM-Z9KH].

[161] David McLaughlin & Mary Schlangenstein, *U.S. Looks at Airline Investors for Evidence of Fare Collusion*, Bloomberg (Sept. 22, 2015), http://www.bloomberg.com/news/articles/2015-09-22/do-airfares-rise-when-carriers-have-same-investors-u-s-asks [https://perma.cc/M594-9YT5].

[162] *See generally* Federico Ciliberto & Jonathan W. Williams, *Does Multimarket Contact Facilitate Tacit Collusion? Inference on Conduct Parameters in the Airline Industry*, 45 Rand J. Econ. 764 (2014).

[163] Tim Wu, *Enough with the Crazy Change Fees*, New Yorker (July 21, 2015), http://www.newyorker.com/business/currency/enough-with-the-crazy-change-fees [https://perma.cc/97KB-L698].

[164] James B. Stewart, *"Discipline" for Airlines, Pain for Fliers*, N.Y. Times (June 11, 2015), http://www.nytimes.com/2015/06/12/business/airline-discipline-could-be-costly-for-passengers.html [https://perma.cc/BL64-VEUQ].

[165] Volodymyr Bilotkach, *Oil Prices Have Nosedived. Why Aren't Airfares Doing the Same?*, Wash. Post (Dec. 25, 2015), https://www.washingtonpost.com/posteverything/wp/2014/12/25/oil-prices-have-nosedived-why-arent-airfares-doing-the-same/?utm_term=.eff0e4715c96 [https://perma.cc/58T2-XN97].

[166] Drew Harwell, *Airlines Are Making Record Profits, But Don't Expect a Cheaper Seat*, Wash. Post (Apr. 30, 2015), https://www.washingtonpost.com/news/business/wp/2015/04/30/airlines-are-making-record-profits-but-dont-expect-a-cheaper-seat/ [https://perma.cc/Q5R5-TELN].

[167] Severin Borenstein, *Why Can't U.S. Airlines Make Money?*, 101 Am. Econ. Rev. 233, 233–34 (2011).

[168] Jad Mouawad, *Airlines Reap Record Profits, and Passengers Get Peanuts*, N.Y. Times (Feb. 6, 2016), http://www.nytimes.com/2016/02/07/business/energy-environment/airlines-reap-record-profits-and-passengers-get-peanuts.html?_r=0 [https://perma.cc/6E6J-CH7X].

[169] *Id.*

[170] Martin Schmalz, *Warren Buffett Is Betting the Airline Oligopoly Is Here to Stay*, Harv. Bus. Rev. (Nov. 17, 2016), https://hbr.org/2016/11/warren-buffett-is-betting-the-airline-oligopoly-is-here-to-stay [https://perma.cc/Q6UJ-9TDJ].

The deregulation of the airline industry also ushered in the development of the hub-and-spoke model—an outcome that some deregulation advocates did not foresee and one that has produced monopolized hub airports.[171] Instead of offering direct point-to-point service, airlines typically route fliers through one of their hubs. Hubs dominated by one airline include Dallas-Fort Worth (American) and Atlanta (Delta).[172] Empirical research has found that higher concentration at an airport is associated with higher fares.[173] These findings suggest that, by establishing a so-called fortress hub that it dominates, an airline can insulate itself from competition and make larger profits than it would at a more competitive airport.

In light of the economic attraction of hubs, dominant airlines have taken a number of measures to impede and exclude new entrants. Dominant hub carriers have resorted to predatory pricing—short periods of below-cost competition—to drive out new entrants that threatened their monopolistic position.[174] Among other carriers, American Airlines at Dallas Fort-Worth and Northwest at its Detroit hub appear to have resorted to deep, but short-lived, price cuts to exclude new rivals and maintain their hub market power.[175] These campaigns have succeeded, in light of the fragile financial positions of many of the new entrants, and perpetuated the hub carriers' dominance.[176] Monopolistic hub carriers also appear to have built large holdings of slots and thereby deprived rivals of the access that they need to serve an airport.[177] Some carriers appear to have exchanged and purchased an excess number of airport slots (the right to take off or land) to shore up hub dominance and deny rivals access to these airports.[178]

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[171] *See, e.g.*, Alfred E. Kahn, *Surprises of Airline Deregulation*, 78 Am. Econ. Rev. 316, 318 (1988).

[172] Justin Bachman, *This Is Why No Airline Will Ever Dominate LAX*, Bloomberg (Feb. 2, 2016), https://www.bloomberg.com/news/articles/2016-02-02/this-is-why-no-airline-will-ever-dominate-lax [https://perma.cc/NH7M-KHAC].

[173] Borenstein & Rose, *supra* note 156, at 44; *see also* Ashutosh Dixit et al., *Aggressive and Predatory Pricing: Insights and Empirical Examination in the Airline Industry*, 25 J. Pub. Pol'y & Mktg. 172, 184 (2006) ("Our descriptive studies show increasing concentration and yield premiums within the major airline hubs.").

[174] Dixit et al., *supra* note 173, at 184.

[175] *See* Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 953 (6th Cir. 2005); United States v. AMR Corp., 335 F.3d 1109, 1111 (10th Cir. 2003); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941, 981 (2001).

[176] Edlin, *supra* note 175, at 980–81, 983–84.

[177] Morton et al., *supra* note 160, at 40–43.

[178] Justin Bachman, *Forget About Airline Mergers. Now It's All About Trading Airport Slots*, Bloomberg (June 16, 2015), http://www.bloomberg.com/news/articles/2015-06-16/forget-about-airline-mergers-now-it-s-all-about-trading-airport-slots [https://perma.cc/PPA2-UTH4]; *see also* Jad Mouawad, *Justice Department Opposes United-Delta Swap for Newark Landing Slots*, N.Y. Times (Nov. 10, 2015), http://www.nytimes.com/2015/11/11/business/united-delta-deal-at-newark-opposed-by-justice-department.html [https://perma.cc/H22G-TE9Y].

2. *Electricity*

With the shift away from utility regulation to market-based pricing at the wholesale level, the lack of competition has become a serious and persistent issue in electricity markets. Across the country, the generation sector has been opened up to new entry and competition, even as transmission and distribution remain natural monopolies. Despite the benefits touted by proponents, wholesale markets have proven structurally vulnerable to the exercise of market power by generators.[179] In electricity markets that are not structurally competitive, the logic of withholding capacity is straightforward: because the demand for electricity is inelastic, higher prices are not likely to lower volume of sales. Instead, raising prices can pay off handsomely because "collecting $120 for 83% of your fleet of electric power plants produces 99% more revenue than getting $50 for 100% of the fleet."[180]

Four episodes of anticompetitive behavior—one in California, another in New York, and two more recent ones in New England and the Mid-Atlantic—exemplify the high consumer cost of market power in electricity markets. Given that electricity is essential and that residential electric supply is a nearly $180 billion dollars per year industry,[181] even the occasional exercise of market power can cost consumers billions of dollars.

Although California's wholesale electricity markets performed competitively during their first two years of operation in 1998 and 1999,[182] a wave of anticompetitive behavior starting in late 2000 showed the shortcoming of how electricity markets have been structured.[183] The manner in which the market had been set up proved to be a critical mistake. Due to reduced hydropower generation in the Pacific Northwest, a major source of electricity for California, the state became heavily reliant on in-state generation in 2000.[184] During the restructuring of the industry, the vertically-integrated, regulated utility companies sold most of their natural gas generation facilities to just five companies.[185] In the absence of adequate import competition, these five generators could unilaterally withhold capacity and raise wholesale market prices above competitive levels.[186] Manipulative trading strate-

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[179] Sandeep Vaheesan, *Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity*, 46 U. Mich. J.L. Reform 921, 928–32 (2013).

[180] David Cay Johnston, *How Electricity Auctions Are Rigged to Favor Industry*, Al Jazeera Am. (May 29, 2014), http://america.aljazeera.com/opinions/2014/5/electricity-auctionpricespowerbillsconsumers.html [https://perma.cc/2UUR-3WFT].

[181] *2014 Total Electric Industry-Revenue (Thousands Dollars)*, U.S. Energy Info. Admin, http://www.eia.gov/electricity/sales_revenue_price/pdf/table3.pdf [https://perma.cc/WJ74-RB4Q].

[182] Frank A. Wolak, *Diagnosing the California Electricity Crisis*, 16 Electricity J. 11, 20 (2003).

[183] *Id.*

[184] *Id.* at 21.

[185] Severin Borenstein, *The Trouble with Electricity Markets: Understanding California's Restructuring Disaster*, 16 J. Econ Persps. 191, 195 (2002).

[186] Wolak, *supra* note 182, at 23.

gies orchestrated by Enron exacerbated the abuse of market power.[187] At the retail level, prices were capped in much of the state.[188] The combination of high wholesale prices and fixed retail prices meant that utilities serving customers hemorrhaged money, resulting in rolling blackouts and one of the largest utility companies in the state filing for bankruptcy.[189]

This crisis lasted from late 2000 until the summer of 2001 and inflicted massive harm on California residents. The devastating blackouts belied the fact that generators held more than sufficient capacity within the state to meet demand.[190] The crisis was most likely the product of generators acting independently (that is, without colluding with each other) to create artificial shortages that boosted their profits.[191] As a result of rampant anticompetitive behavior by these firms, the public is estimated to have paid close to twenty billion dollars more for electricity during the affected period in 2000 and 2001 than it would have had markets been competitive.[192]

On the East Coast, New York experienced a costly period of anticompetitive behavior from 2006 to 2008. Due to insufficient transmission connections with upstate New York, New York City is dependent on generators within its five boroughs, particularly during periods of peak demand.[193] At the time, generation ownership within New York City was highly concentrated.[194] After potential antitrust obstacles thwarted its attempt to buy a competing generation facility, Keyspan—one of the in-city generators—entered into a financial swap agreement that gave it an economic interest in this rival.[195] With this quasi-equity stake, Keyspan successfully raised prices in the capacity market,[196] where utility companies purchase generation to meet peak demand and maintain adequate reserves.[197] This arrangement is

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[187] Severin Borenstein et al., *Inefficiencies and Market Power in Financial Arbitrage: A Study of California's Electricity Markets*, 56 J. INDUS. ECON. 347, 371 (2008).

[188] Wolak, *supra* note 182, at 16.

[189] *Id.* at 29.

[190] *Id.* at 25.

[191] *See* Frank A. Wolak, *Measuring Unilateral Market Power in Wholesale Electricity Markets: The California Market, 1998-2000*, 93 AM. ECON. REV. 425, 430 (2003).

[192] Frank A. Wolak, *Managing Unilateral Market Power in Electricity* 7 (World Bank Policy Research, Working Paper No. 3691, 2005). In the summer of 2000 alone, ratepayers are estimated to have paid over four billion dollars more due to the exercise of market power. *See* Severin Borenstein, James B. Bushnell & Frank Wolak, *Measuring Market Inefficiencies in California's Restructured Wholesale Electricity Market*, 92 AM. ECON. REV. 1376, 1398 (2002).

[193] *Transmission Congestion Drives Power Price Division Between Upstate and Downstate New York*, ENERGY INFO. ADMIN. (Sept. 26, 2011), http://www.eia.gov/todayinenergy/detail.cfm?id=3230 [https://perma.cc/G8ZJ-DJ84].

[194] United States v. Keyspan Corp., 763 F. Supp. 2d 633, 635 (S.D.N.Y. 2011).

[195] *Id.* at 636.

[196] *Id.* at 635.

[197] *ICAP Data & Information*, NEW YORK INDEP. SYS. OPERATOR (2016), http://www.nyiso.com/public/markets_operations/market_data/icap/index.jsp [https://perma.cc/6JVT-FSUN].

estimated to have increased capacity market costs by nearly $160 million dollars in 2006 alone.[198]

Over the past two years, officials have uncovered evidence of manipulation in the Mid-Atlantic and New England capacity markets. In both markets, firms have bought up generation assets and then gone on to dramatically increase capacity market prices. In New England, for example, prices more than doubled over the previous year after a private equity fund bought—and almost immediately shut down—a large coal-fired power plant in Connecticut.[199] This action raised capacity market costs by an estimated $1.7 billion.[200] In the wholesale market that covers the Mid-Atlantic and parts of the Midwest, Exelon submitted high bids on three nuclear power plants in the capacity market, causing prices to rise and capacity market costs to balloon by $3.7 billion.[201] This price increase occurred just a few years after Exelon had acquired Constellation, a major Mid-Atlantic power generator.[202]

III. How Oligopolists and Monopolists Also Rig Politics and Policy in Their Favor

As described above, powerful firms in concentrated markets possess greater ability to extract wealth from consumers and producers than they would in competitive markets. Another way in which concentrated market structures can have regressive wealth effects is through the levers of politics and policy. Firms that achieve economic dominance in their sectors also gain political influence, which they can marshal to sway policy in their favor.

The idea that market power has political significance was foundational to the passage of the Sherman Act. At the most basic level, proponents understood that concentration of economic power concentrates political power, posing a threat to democracy akin to monarchy or dictatorship. Responding to the large industrial entities that had developed through the late 1800s, one article denounced the growth of concentrated economic power as a "great, unscrupulous, powerful plutocracy."[203] Another warned of the "political menace that was resident in these stupendous aggregations of wealth."[204] The Sherman Act itself was widely understood as following in a tradition that "aimed to control political power through decentralization of economic

[198] Motion to Comment of Consolidated Edison Co. of N.Y., Inc., etc., Re N.Y. Indep. Sys. Operator, FERC Docket No. ER07-360 (Jan. 27, 2009).

[199] Motion to Intervene and Protest of George Jepsen, Att'y Gen. for the State of Conn. at 7, No. ER14-1409 (Fed. Energy Reg. Comm'n, April 14, 2014).

[200] *Id.* at 8.

[201] Rich Heidorn Jr. & Ted Caddell, *How Exelon Won by Losing*, RTO Insider (June 3, 2014), http://www.rtoinsider.com/exelon-pjm-capacity-mkt/ [https://perma.cc/BRW6-2AB3].

[202] Joel Kirkland, *Exelon-Constellation Deal Could Create 'Clean Energy' Giant*, N.Y. Times (Apr. 29, 2011), http://www.nytimes.com/cwire/2011/04/29/29climatewire-exelon-constellation-deal-could-create-clean-83126.html [https://perma.cc/SQX2-XFSN].

[203] D. M. Mickey, *Trusts*, 22 Am. L. Rev. 538, 549 (1888).

[204] Andrews, *Trusts According to Official Investigations*, 3 Q.J. Econ. 117, 150 (1889).

power."[205] Former President and future Supreme Court Justice William Howard Taft sounded a similar theme and argued that antitrust legislation was essential in combating the "plutocracy" of the "great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us."[206]

Though contemporary antitrust analysis disregards the political ramifications of market power, large corporations have significant power and influence over politics and policy.[207] Concentrated markets, in which few players dominate, aggrandize corporate influence over politics and policy in at least two ways. First, an industry characterized by five hundred firms of varying sizes, with different leadership and business philosophies, will typically share a more heterogeneous set of goals than an industry controlled by five firms. In an industry with fewer participants, there are less likely to be conflicts and more likely to be an agreed upon set of common interests.[208] And second, a smaller group of concentrated interests will face a lower cost of organizing than the larger groups of dispersed interests. In general, fewer actors will mean that the industry can more easily solve collective action problems, be it through jointly identifying what to demand, sharing costs of lobbying, or producing effective messaging.[209] In some instances, a single large entity may even find it worthwhile to act unilaterally. In short, concentration increases the likelihood that actors will share interests and decreases the costs of organizing to advocate for their agenda.

While empirical research on this subject is mixed, evidence suggests that concentration and industry lobbying activity are related.[210] Research examining industry size, structure, and rent-seeking backs this finding: "a study of six thousand publicly traded firms' reported lobbying from 1999 to 2006 showed that corporate lobbying is directly related to firm size."[211] Po-

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[205] David K. Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1220 (1988).

[206] William Howard Taft, The Anti-Trust Act and the Supreme Court 4 (1914).

[207] *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Persps. on Pol. 564, 565 (2014) ("The central point that emerges from our research is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.").

[208] *See, e.g.*, Adam Levitin, *Glass-Steagall Is Campaign Finance Reform*, Credit Slips (Nov. 29, 2015), http://www.creditslips.org/creditslips/2015/11/glass-steagall-is-campaign-finance-reform.html [https://perma.cc/V4NA-CZ96] ("By splitting up the financial services industry into squabbling factions, the result will be a substantial reduction in the influence of any particular section of the industry. Divide et impera.").

[209] *See generally* Mancur Olson, The Logic of Collective Action: Public Goods and Theory of Groups (1965).

[210] *See generally* Jeffrey Drope & Wendy Hansen, *New Evidence for the Theory of Groups: Trade Association Lobbying in Washington, D.C.*, 62 Pol. Res. Q. 303 (2009).

[211] Zephyr Teachout, *Corporate Rules as Political Rules: Antitrust as Campaign Finance Reform* 34 (Fordham Law Legal Studies, Research Paper No. 238418, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384182 [https://perma.cc/W8DC-RQVH] (citing Matthew D. Hill, G. Wayne Kelly, G. Brandon Lockhart & Robert A. Van Ness, *Determinants and Effects of Corporate Lobbying*, Fin. Mgmt. 931, 944–55 (2013)).

litical theory, meanwhile, suggests that several factors shape the type of rent-seeking that firms choose to undertake; almost all are positively correlated with company size.[212]

Recent observations linking economic concentration to increased political influence have remained largely broad and vague about how firms translate economic dominance into political power.[213] Insofar as observers do detail the connection, they generally point to corporate donations to political campaigns.[214] No doubt, funding of elections is a key lever companies use to exercise political power. However, it is worth identifying the larger set of activities that fall in this toolbox, including lobbying, staffing and recruiting from government, creating information, directing the politics of employees and contractors, and threatening sector failure or collapse.[215]

Finance presents a particularly salient example for understanding how possession of market powers aids or facilitates the exercise of political influence. As Simon Johnson and James Kwak have traced, a wave of mergers in the 1990s transformed the banking sector, yielding banks that were not just bigger but also involved in riskier financial activities. Their goal was to

> create ubiquitous financial "supermarkets" that would be indispensable to both retail and corporate customers. A new divide emerged in the industry as a result: a handful of megabanks on the one hand, and a suite of smaller traditional banks on the other. These megabanks—awash in unprecedented amounts of money—became "the new financial oligarchy."[216]

Since "the basic principle behind any oligarchy is that economic power yields political power,"[217] the megabanks soon concentrated their political efforts, flooding political campaigns with donations, staffing government, and generally propagating the idea that a large and unregulated financial sector would drive widespread prosperity.[218] Politicians duly complied. Leading members of Congress sponsored the Gramm-Leach Bliley Act, which largely repealed the Glass-Steagall separation of commerce and investment banking, and the Commodities Futures Modernization Act, which prohibited federal regulation of over-the-counter derivatives.[219] The sector

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[212] *See id.*

[213] *See, e.g.*, Robert Reich, *The Political Roots of Widening Inequality*, THE AMERICAN PROSPECT (Apr. 28, 2015), http://prospect.org/article/political-roots-widening-inequality [https://perma.cc/RFP4-G6GG] ("I've come to believe [the standard explanation] overlooks a critically important phenomenon: the increasing concentration of political power in a corporate and financial elite that has been able to influence the rules by which the economy runs.").

[214] *See, e.g.*, ROBERT REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW 168 (2015).

[215] *See* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. LAW & POLICY 37, 42–53 (2014).

[216] JAMES KWAK & SIMON JOHNSON, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 10 (2010).

[217] *Id.* at 74.

[218] *Id.* at 5–10.

[219] *Id.* at 89–95.

continued amassing political influence up until and through the financial crisis. As Senator Richard Durbin remarked in 2009, "[T]he banks—hard to believe in a time when we're facing a banking crisis that many of the banks created—are still the most powerful lobby on Capitol Hill. And frankly they own the place."[220]

In addition to drawing on these more traditional mechanisms of political influence, the banking sector leveraged its size and structure to yield favorable terms during the bailout and its aftermath.[221] This is not to say that executives created a "too big to fail" system for the purpose of wielding political power, but that the practical consequences of consolidation, by concentrating risk, did just that. Banking, of course, plays a uniquely central role in our economy; not all highly concentrated markets possess systemic fragility of the sort that firms can exploit in times of instability or uncertainty. Yet, the potential for great political power may span sectors such as commodities and pharmaceuticals.[222]

The fact that companies in concentrated sectors can wield outsized political influence has distributive implications. Business interests frequently lobby against regulations from which workers and consumers stand to gain. To take just one example: in 2009, the Packers and Stockyards Administration within the U.S. Department of Agriculture proposed rules that would have protected independent farmers from abusive practices by powerful processors and packers—regulations that would have helped halt the downward pressure on payments these firms make to farmers.[223] Yet a fierce lobbying effort by trade groups representing the biggest firms in this highly concentrated industry ultimately prompted Congress to thwart the administration, stalling the new rules.[224]

IV. How the Antitrust Counterrevolution Created Uncompetitive Markets

Highly concentrated markets in the contemporary United States are not the product of impersonal economic forces—rather they are the product of conscious legal and political decisions in the late 1970s and early 1980s. These decisions severely undermined the antitrust laws, crippling what had

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[220] *Id.* at 92.

[221] *See generally* Sheila Bair, Bull by the Horns: Fighting to Save Main Street from Wall Street and Wall Street from Itself (2012); Neil Barofsky, Bailout: How Washington Abandoned Main Street While Rescuing Wall Street (2012).

[222] Indeed, consolidation trends among commodity traders prompted one European think tank to suggest that these trading houses—which underpin global trade in raw materials—may have "systemic" implications. *See* Neil Hume, *Are Commodities Traders "Too Big to Fail"?*, Fin. Times (Dec. 6, 2013), https://www.ft.com/content/86b94d18-5ce6-11e3-81bd-00144feabdc0 [https://perma.cc/E7BQ-QHL3].

[223] *See* Christopher Leonard, The Meat Racket 284 (2014); Khan, *supra* note 126.

[224] Khan, *supra* note 126.

been a major congressional safeguard against monopoly and oligopoly.[225] Two policy decisions stand out above others. First, beginning with the Reagan administration, the antitrust agencies and federal courts held that the antitrust laws should protect the neoclassical concept of "efficiency."[226] Congress, in enacting the antitrust laws, had expressed very different aims—protecting consumers and small suppliers from wealth-redistributing monopolies, oligopolies, and cartels; maintaining open markets; and dispersing economic and political power.[227] The conservative conception of antitrust has, at most, acknowledged only the first of these three goals. Second—in a reflection of this new orientation—the antitrust agencies and the Supreme Court went on to abandon simple rules and presumptions, adopting the defendant-friendly rule of reason and other similarly open-ended standards to govern most forms of business conduct.[228]

The Reagan-initiated antitrust counterrevolution—perpetuated by subsequent Republican administrations and never seriously questioned by Democratic ones—has permitted powerful firms across sectors to control markets. Insofar as Democratic and Republican administrations have disagreed, it has been over the application of the efficiency standard—namely, whether a preference for short-term consumer interests should inform antitrust law—and enforcement actions at the margins.[229] In large measure, antitrust specialists in the United States have come to accept this narrow conception of antitrust—marked by a commitment to some variant of efficiency, with disagreements centered on the application of the rule of reason.[230] A once-populist and progressive "law against exploitation has become the law for exploiters" as "[e]fficiency and power win."[231]

A. *Efficiency Becomes the Near-Exclusive Goal of Antitrust*

With the inauguration of Ronald Reagan in 1981, the federal antitrust agencies executed a coup against prevailing antitrust thinking. Building on the rightward shift in antitrust jurisprudence in the 1970s,[232] the federal antitrust agencies moved to narrow objectives of antitrust law further. William

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[225] The Supreme Court once described the Sherman Act as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[226] Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 438–39 (1988).

[227] Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 560–62 (2012); *see also* John J. Flynn, *supra* note 7, at 260–61.

[228] *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

[229] *See, e.g.*, Baker & Salop, *supra* note 3, at 15–18.

[230] Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211–13 (2008).

[231] Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 963 (1987) (describing the critical legal studies movement's view of antitrust law as such).

[232] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977) (holding that rule of reason applies to territorial restraints imposed by manufacturers on distributors); United States v. Gen. Dynamics Corp., 415 U.S. 486, 510–11 (1974) (rejecting government

Baxter and James Miller, two conservative academics, were appointed to head of the Department of Justice's Antitrust Division and Federal Trade Commission, respectively.[233] Both Baxter and Miller subscribed to Robert Bork's belief, articulated in *The Antitrust Paradox*,[234] that the antitrust laws should only promote the neoclassical construct of efficiency.[235] According to Bork, Congress enacted the Clayton, Federal Trade Commission, and Sherman Acts only to prohibit conduct that reduced efficiency.[236] Under this ahistorical paradigm, conduct that did not impair efficiency should be permitted, regardless of the effects on consumers, producers, competitors, or the political economy at large.[237] A change in personnel followed this ideological overhaul, as economists began to play a much larger role at the antitrust agencies, at the expense of lawyers.[238] This shift in agency composition reflected and reinforced the shift in ideology, from broad political economy to narrow microeconomics.[239]

Baxter, Miller, and numerous federal judges appointed during the Reagan years applied Bork's interpretation of the antitrust laws, overriding the will of Congress. These conservative bureaucrats and judges accepted Bork's historical analysis. But Bork's argument—that Congress established antitrust laws in order to promote efficiency—was made out of whole cloth.

A number of scholars have studied the legislative histories of the antitrust laws and shown Bork's interpretation to be false. The congressmen and senators involved in the debates preceding the passage of the principal antitrust laws voiced a number of concerns, including the protection of consumers and suppliers from firms with market power, the defense of small businesses from the predatory tactics of large rivals, and the preservation of democracy.[240] Efficiency was not on Congress's radar in 1890 or 1914. In fact, the very concept of "efficiency" was not fully formulated by econo-

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challenge to merger in coal industry because it failed to show prospective anticompetitive effects).

[233] William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 Fordham L. Rev. 49, 49–50 (1991).

[234] *See generally* Robert H. Bork, The Antitrust Paradox (1978).

[235] Eleanor M. Fox, *Chairman Miller, the Federal Trade Commission, Economics, and "Rashomon,"* Law & Contemp. Probs. 33, 37 (1987); Fox & Sullivan, *supra* note 227, at 945–46.

[236] Bork, *supra* note 234, at 61–66.

[237] *See* Fox & Sullivan, *supra* note 229, at 945 ("It is often said that extremists are necessary to move tradition a short step. This is, perhaps, what Baxter and the Chicago School have done. In their intellectual universe, antitrust is embodied in a reductionist paradigm: antitrust concerns the functioning of markets; microeconomics is the study of the functioning of markets; therefore, antitrust is microeconomics. The potential and desired effect of markets is the efficient allocation of resources; therefore, the sole purpose of antitrust is to prevent inefficient allocation of resources. Private firms can in theory, under certain limited circumstances, misallocate resources by obtaining or enhancing market power and artificially restraining output without offsetting cost reductions; therefore, output reduction without offsetting cost savings is the only possible antitrust harm.").

[238] Davies, *supra* note 7, at 77.

[239] *Id.* at 79.

[240] *See, e.g.*, 51 Cong. Rec. 8850 (1914); 51 Cong. Rec. 13, 231 (1914); 21 Cong. Rec. 2598 (1890); 21 Cong. Rec. 2570 (1890); 21 Cong. Rec. 2461 (1890).

mists themselves until the 1920s.[241] In the 1980s, unelected policymakers and judges retrospectively imposed their conservative ideology on Congress's original vision.[242]

In pursuing their ahistorical and anti-democratic elevation of efficiency above Congress's stated goals, the proponents of this vision also adopted a benign view of conduct previously considered anti-competitive, highlighting the purported efficiency benefits. For example, courts had historically treated horizontal mergers in concentrated markets,[243] tying,[244] and vertical restraints[245] as competitively suspect. Along with Baxter, Miller, and other new federal antitrust officials,[246] judges on the federal bench—such as Bork himself, Frank Easterbrook, and Richard Posner—abandoned this traditional approach. They instead claimed that mergers, predatory pricing, tying, and vertical restraints often had beneficial (namely efficient) purposes and effects.[247] And even when the conduct of monopolists and mergers in concentrated markets harmed competition, proponents of the new antitrust paradigm insisted that markets, left to their own devices, would erode oligopoly and monopoly power.[248] With the exception of collusion and mergers in concentrated markets, the harms from anticompetitive conduct were largely assumed away. These beliefs have little, if any, empirical support.[249]

Weak merger enforcement over the past several decades exemplifies this ideological shift. According to Chicago School precepts, mergers typically have a benign effect on competition[250] and often even yield economies of scale and scope.[251] During and since the Reagan years, government merger enforcement has reflected these assumptions philosophically[252] and

[241] Peter C. Carstensen, *Antitrust Law and the Paradigm of Industrial Organization*, 16 U.C. Davis L. Rev. 487, 487–88 n.1 (1983).

[242] *See, e.g.*, Kenneth M. Davidson, Reality Ignored: How Milton Friedman and Chicago Economics Undermined American Institutions and Endangered the Global Economy 83–84 (2011); James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 Yale J.L. & Human. 263, 280 (1991).

[243] *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362–63 (1963).

[244] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 2 (1958) (finding that, in a tying arrangement, the purchase of one product is conditioned on the purchase of a second product).

[245] *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 43–44 (1960) (noting that vertical restraints impose limits on what, where, and at what price retailers can sell products purchased from upstream distributors and manufacturers).

[246] Fox, *supra* note 235, at 49–50.

[247] *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Penn. L. Rev. 925 (1978); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984); Bork, *supra* note 234.

[248] Easterbrook, *supra* note 247, at 32.

[249] Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 Antitrust L.J. 917, 921–26 (2014).

[250] Posner, *supra* note 247, at 928.

[251] Easterbrook, *supra* note 247, at 3.

[252] *See* U.S. Dep't of Justice, 1982 Merger Guidelines § 1, http://www.justice.gov/archives/atr/1982-merger-guidelines [https://perma.cc/7PQU-LD5N] (last updated Aug. 4, 2015) ("Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets.") [hereinafter 1982 Guidelines]; U.S. Dep't of Justice & Fed. Trade Comm'n, 2010 Hori-

in practice.[253]

B. The Rule of Reason Takes Center Stage

By applying this benign view of many forms of anticompetitive conduct and maintaining a quasi-religious faith in a "self-regulating" marketplace, the antitrust agencies and federal courts have relaxed antitrust rules. Specifically, the agencies and courts have moved away from simple rules and presumptions toward open-ended, fact-intensive legal standards.

The Reagan Department of Justice published merger guidelines that dramatically weakened government enforcement against harmful corporate consolidation.[254] These guidelines raised the concentration thresholds for anticompetitive horizontal mergers and established broad legality for vertical mergers.[255] The new merger guidelines initiated a shift away from clear merger rules toward a standards-based approach, which requires the antitrust agencies to conduct an exhaustive industry study before challenging mergers in even highly concentrated markets.[256] The latest version of the merger guidelines—the 2010 Horizontal Merger Guidelines[257]—further raised the concentration thresholds for competitively problematic mergers, stressed effects-based analysis, and devalued market shares and market structure.[258]

Federal judges, too, have adopted standards enshrining a permissive view of anticompetitive conduct. Over the past forty years, for example, the Supreme Court has relaxed monopolization doctrine. The Court has ruled that predatory pricing and refusals-to-deal should be subject to more relaxed standards that followed the spirit of the rule of reason—open-ended tests that required plaintiffs to define the relevant market, establish that defend-

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ZONTAL MERGER GUIDELINES § 10, https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [https://perma.cc/JT2F-H989] ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").

[253] The number of merger cases filed annually by the Department of Justice has remained fairly constant since the early 1980s. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS: FY 1980–1989 5, https://www.justice.gov/sites/default/files/atr/legacy/2011/09/13/215423.pdf [https://perma.cc/TZD4-6DVR] (between 1981 and 1989, the number of merger cases filed in a year never exceeded eight); U.S. DEP'T OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS: FY 2006–2015 6, https://www.justice.gov/atr/file/788426/download [https://perma.cc/S4RN-PJKU] (from 2006 to 2015 and across the Bush and Obama Administrations, the number of merger cases filed annually remained about the same and ranged from a low of four in 2007 to a high of fifteen in 2008).

[254] 1982 GUIDELINES, *supra* note 252.

[255] *See* Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 221 (2005) (noting that five FTC challenges to vertical mergers with exclusionary potential between 1993 and 2005 could not have been brought if the FTC had followed the vertical merger guidelines).

[256] Thomas E. Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure*, 71 CAL. L. REV. 497, 518–19 (1983).

[257] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 252.

[258] Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707–08, 721 (2010).

ants possessed market or monopoly power, and show anticompetitive effects. Heavily influenced by Bork's theoretical musings on the topic, the Court has asserted that predatory pricing is "rarely tried, and even more rarely successful."[259] Based on this belief, it has imposed a demanding standard on plaintiffs that requires them not only to prove below-cost pricing at an early stage of litigation but also "establish" future anticompetitive effects from this pricing conduct.[260] In the context of refusals-to-deal, the Court has embraced an effects-based analysis[261] and, in another instance, asserted that "the opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[262]

Some courts and agency officials have gone even further than the Supreme Court in favoring monopolists. Rather than recognize the exceptional power of monopolists, certain courts of appeals have imposed high burdens on plaintiffs attacking abusive monopolists.[263] For example, the Ninth Circuit has held that plaintiffs must show evidence of below-cost pricing (typically associated with predatory pricing) when challenging anticompetitive product bundling by a monopolist.[264] A former FTC commissioner joined this pro-monopoly chorus and wrote that plaintiffs should satisfy a higher "clear evidence" standard (rather than the usual "preponderance of the evidence" standard in civil cases) in monopolization suits.[265]

In rewriting antitrust precedent on vertical restraints in a pro-defendant fashion, the Supreme Court has held that the rule of reason is the default legal standard.[266] The per se rules that applied to vertical price and non-price restraints have been overturned. This process began with the Supreme Court's 1977 decision in *Continental Television, Inc. v. GTE Sylvania, Inc.*, which held that vertical non-price restraints should be evaluated using the rule of reason.[267] This freeing of vertical restraints from antitrust proscriptions culminated in the 2007 decision *Leegin Creative Leather Products, Inc. v. PSKS Inc.*[268] In this landmark ruling, the Court overruled the nearly

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[259] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

[260] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

[261] *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) ("The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.").

[262] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

[263] *See, e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1079 (10th Cir. 2012) (holding that plaintiffs alleging anticompetitive refusal-to-deal by a monopolist must show that the monopolist sacrificed short-term profits by not dealing with a rival).

[264] *See* Cascade Health Sols. v. PeaceHealth, 502 F.3d 895, 913–14 (9th Cir. 2007).

[265] In re McWane, Inc., 2014 FTC LEXIS 28, *143 (2014) (Wright, Comm'r, dissenting).

[266] *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason[.]' ").

[267] 433 U.S. 36, 58 (1977).

[268] 551 U.S. 877, 907 (2007).

century-old per se rule outlawing resale price maintenance.[269] In the series of cases that ended with the ruling in *Leegin*,[270] the Court relied on a theoretical—but empirically unsupported—view of competition in retail markets to assert that the vertical restraints at issue often had beneficial effects.[271]

The shift from per se rules and presumptions to the rule of reason and other standards-based tests has dramatically undercut antitrust enforcement. Outside of cases alleging collusion, plaintiffs have to define relevant antitrust markets, establish that defendants have market power, and show that the suspect practice has likely anticompetitive effects.[272] Antitrust litigation today requires the retention of economic experts and extensive discovery, which makes for costly and interminable litigation.[273] And often times, plaintiffs have to do all this just to survive defendants' motions to dismiss or motions for summary judgment. Not surprisingly, these legal standards have pushed plaintiffs' probability of success in court in the twenty-first century practically down to nil.[274] With good reason, one of the leaders of the intellectual coup in antitrust, Richard Posner, has described the rule of reason in practice as "little more than a euphemism for nonliability."[275]

These doctrinal changes have dramatically increased the power of businesses to control and steer how markets and industries develop. Large firms in concentrated markets today have broad latitude to acquire and merge with their direct rivals. Recent mergers proposed in oligopolistic markets include combinations between Anheuser-Busch InBev and SABMiller,[276] Dow Chemical and DuPont,[277] Anthem and Cigna, and Aetna and Humana.[278] Regardless of whether these pending mergers are stopped in court or modified

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[269] *Id.*

[270] *See also, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763–64 (1984); Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 727–28 (1988).

[271] *See* Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, *in* How the Chicago School Overshot the Mark 196, 210 (Robert Pitofsky ed., 2008).

[272] *See* United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (per curiam) (articulating rule of reason framework as series of five steps).

[273] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375, 1460–65 (2009).

[274] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 837 (2009) ("[Courts] dispose of 97% of rule of reason cases on the grounds that the plaintiff cannot show an anticompetitive effect.") [hereinafter Carrier III].

[275] Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 14 (1977).

[276] David Ingold, *Will the Justice Department Put the AB InBev Deal on Ice?*, Bloomberg (Oct. 8, 2015), http://www.bloomberg.com/graphics/2015-anheuser-busch-inbev-sabmiller-largest-beer-takeover/ [https://perma.cc/4YND-9DP3].

[277] Drew Harwell, *Dow and DuPont, Two of America's Oldest Giants, to Merge in Jaw-Dropping Megadeal*, Wash. Post (Dec. 11, 2015), https://www.washingtonpost.com/news/business/wp/2015/12/11/dow-and-dupont-two-of-americas-oldest-giants-to-merge-in-job-dropping-megadeal/ [https://perma.cc/5KH2-P2VV].

[278] The Justice Department has sued to enjoin these mergers. Leslie Picker & Reed Abelson, *U.S. Sues to Block Anthem-Cigna and Aetna-Humana Mergers*, N.Y. Times DealBook (July 21, 2016), http://www.nytimes.com/2016/07/22/business/dealbook/us-sues-to-block-anthem-cigna-and-aetna-humana-mergers.html [https://perma.cc/WLD3-VPG7].

through a consent decree, the fact that they are even being proposed—given their size—reveals the degree to which contemporary merger law has been enfeebled.

Dominant and other powerful firms also have broad freedom to marginalize their rivals and dictate terms to other players. With the current permissive treatment of predatory pricing, refusals-to-deal, and other exclusionary conduct, dominant firms have the ability to smother their smaller rivals and protect their monopoly power. In consumer goods markets, powerful manufacturers and retailers can establish vertical restraints that raise final prices and hamper the entry and growth of smaller competitors.

Even in the main area of antitrust, in which public enforcement remains relatively strong, courts have erected significant obstacles. Collusion is the one form of anticompetitive conduct still subject to strict rules[279]—and often appears to be the only type of conduct that draws consistent interest from the antitrust agencies.[280] Private plaintiffs, however, face major procedural roadblocks when pursuing these cases. Parties injured by collusive activity now have to present much more evidence in support of their complaints before they have had an opportunity to conduct in-depth factual discovery through the judicial process.[281] Courts have also dramatically expanded the purview of mandatory arbitration, permitting firms accused of collusion to use contractual provisions to bar private class actions.[282]

V. What Can Be Done to Tackle the Oligopolistic and Monopolistic Domination of Markets and Society

The result of this counterrevolution in antitrust—originating as an intellectual movement led by the Chicago School, stamped into policy by the Reagan administration[283]—is that markets across sectors are highly concentrated.[284] Powerful corporate actors that control our markets inflict major damage on the American economy, society, and democracy. But the antitrust status quo can be changed. Just as Reagan's executive and judicial appoin-

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[279] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (describing collusion as "the supreme evil of antitrust"); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 Fordham L. Rev. 2543, 2569 (2013) ("[The antitrust] system fell into disrepair as most practices, except hardcore cartel behavior, became subject to some form of the rule of reason.").

[280] *See, e.g.*, U.S. Dep't of Justice, Antitrust Div., Workload Statistics: FY 2006–2015, *supra* note 253, at 5–6 (indicating that the Antitrust Division filed forty-five criminal collusion or bid-rigging cases versus eight civil—zero Section 1, zero Section 2 cases, seven Section 7, and one other—cases in 2014).

[281] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[282] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (holding that the Federal Arbitration Act requires the enforcement of arbitration clauses that include class action waivers even when individual litigation would be economically infeasible).

[283] Davidson, *supra* note 242, at 66–73.

[284] *Too Much of a Good Thing*, Economist (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing [https://perma.cc/FV6K-797F].

tees deposed a century of antitrust thinking, their vision, in turn, can be abandoned. The antitrust agencies and courts can take actions to align the goals of antitrust with the vision of Congress when it passed the Sherman, Clayton, and Federal Trade Commission Acts. Antitrust should protect consumers from anticompetitive overcharges and small producers from anticompetitive underpayments, preserve open markets, and disperse economic and political power. While this "citizen interest" standard would not adopt redistribution as an explicit goal, applying it would likely help mitigate inequality.

To advance the citizen interest standard, a number of policy reforms are essential. First, antitrust doctrine should be simplified to ease enforcement and avoid interminable and largely fruitless inquiries into market dynamics. Second, antitrust should also address markets characterized by durable monopoly power or otherwise harmful market power and seek to restore competition. Third, if simpler, more competition-friendly doctrine is to be effective, it must be accompanied by strong remedies that promote competitive market structure, rather than attempt to contain market power through complicated conduct remedies. Fourth, while substantive changes are important, process must also change. The federal antitrust agencies must be more transparent and accountable.

The restoration of a progressive-populist antitrust under the citizen interest standard will not be an easy task and will take time. Antitrust officials and judges committed to the current way of thinking are unlikely to realize this goal. A Congress dominated by Republicans and business-friendly Democrats is even less likely to act.

All hope of an antitrust revival is not lost, however. In recent decades, the common law approach to antitrust has largely been used to retrench antitrust.[285] This judicial flexibility, however, has the potential to be used to revive an expansive vision of antitrust. In fact, the Reagan counterrevolution offers a model for those who believe in the untapped potential of the antitrust laws to protect consumers, preserve open markets, and safeguard democracy from concentrated private power. Reagan believed in a pro-corporate ideology and appointed antitrust enforcers and judges who shared his philosophy and had well-developed ideas on scaling back antitrust. A president with a progressive economic outlook, who appoints antitrust enforcers and judges with a commitment to the citizen interest standard, can revive a vital body of law that has been anemic for the past several decades.

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[285] *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[S]tare decisis is not an inexorable command. In the area of antitrust law, there is a competing interest, well-represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

A. *The Goals of Antitrust Should Reflect Congress's Vision in Enacting the Clayton, Federal Trade Commission, and Sherman Acts*

While scholars have spilled much ink debating Congress's vision in enacting the antitrust laws passed in the late nineteenth and early twentieth centuries,[286] there was no real debate until the 1970s. The Supreme Court routinely acknowledged that Congress intended to promote a variety of political and economic aims, and that the task of the judge was to seek to balance them.[287] Only after Bork had declared that the main goal of Congress in passing the Sherman Act was instead to enhance economic efficiency—defined as the sum of consumers' *and* producers' welfare[288]—did the intent of Congress become a point of contention. Stunningly, Bork's revisionist account has become mainstream, ratified by nearly four decades' worth of Supreme Court jurisprudence.[289]

Many legal scholars have studied the major antitrust statutes and shown that Bork's argument about efficiency is not supported by the legislative history.[290] Centrally, the passage of the Sherman Act was animated by at least three goals: (1) the distribution of political economic power, (2) the prevention of unjust wealth transfers from consumers and small suppliers to large entities, and (3) the preservation of open markets.[291] As scholars have noted, conflicting statements of legislative purpose make it impossible to identify a single, tidy aim. In fact, it is undeniable that a multitude of political, social, *and* economic concerns animated lawmakers. Leading economists of the late nineteenth and early twentieth centuries had "very little influence" over the passage of the antitrust statutes.[292] And moreover, efficiency is "a concept that economists only defined after the passage of the Federal Trade Commission Act and Clayton Act in 1914."[293]

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[286] Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 FORDHAM L. REV. 2151, 2152 (2013).

[287] *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1051, 1053, 1056, 1070 (1979).

[288] *See* BORK, *supra* note 234, at 405; Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 44 (1966).

[289] John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008) ("The conventional wisdom in the antitrust community is that the antitrust laws were passed to promote economic efficiency."). As the authors note, Bork was not alone in promoting a vision of antitrust that privileges efficiency. What was unique about Bork's efforts is that he seeded his efficiency argument in the legislative history of the Sherman Act, ensuring that "he would win the argument not just while the Chicago School was in power, but for all time." *Id.* at 193 n.4.

[290] *See, e.g.*, Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1146 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 80–104 (1982); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1235 (1988).

[291] *See* Fox, *supra* note 290, at 1182; *id.* at 1146 (citing 51 CONG. REC. 9265 (1914) (remarks of Rep. Morgan)).

[292] *See* Lande, *supra* note 290, at 88–89.

[293] *See* Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 406 (2014).

Since the literature explicating the various non-efficiency based goals is sizable and comprehensive, only a brief review of these animating goals is necessary. First, the legislative history reveals that key lawmakers viewed antitrust through a political lens. When the Sherman Act passed the U.S. Congress in 1890, Senator John Sherman called it "a bill of rights, a charter of liberty," and stressed its importance in both economic and political terms.[294] Senator Sherman viewed the monopolist as just another form of monarch. On the floor of the Senate in 1890, he declared,

> If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[295]

One way to understand the political valence of antitrust is through an integrated conception of power—namely, the notion that the distribution of economic ownership and control is intimately bound up in, and has deep implications for, the distribution and exercise of political power. There are at least two facets to this. First is the idea that concentration of economic power concentrates political power through, for example, the accrual of wealth, which can be used as a lever of political influence. Second is the belief that the effects of concentrated economic power are, themselves, fundamentally political, given that excessive economic concentration tends to "breed antidemocratic political pressures," whereas "reducing the range within which private discretion by a few in the economic sphere controls the welfare of all" enhances individual and business freedom.[296] Leading up to the passage of the Clayton Act, for example, Senator George Hoar warned that monopolies were "a menace to republican institutions themselves."[297]

A second motivating goal was to prevent unjust wealth transfers from consumers to firms with market power.[298] Throughout the debates, lawmakers denounced monopolies for extracting wealth from consumers and turning it into monopoly profits. Senator Sherman, for example, called overcharges by monopolists "extortion which makes the people poor,"[299] while Congressman Richard Coke described them as "robbery."[300] Representative John Heard declared that trusts had "stolen untold millions from the people,"[301] and Representative Ezra Taylor noted that the beef trust "robs the farmer on the one hand and the consumer on the other."[302] As Senator

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[294] 21 Cong. Rec. 2461 (1890).
[295] *Id.* 2455, 2457 (1890).
[296] Pitofsky, *supra* note 287, at 1051.
[297] 51 Cong. Rec. 8850 (1914).
[298] Lande, *supra* note 290, at 92–96.
[299] 21 Cong. Rec. 2461 (1890).
[300] *Id.* 2614.
[301] *Id.* 4101.
[302] *Id.* 4098.

James George observed, "They aggregate to themselves great enormous wealth by extortion which makes the people poor."[303]

Strikingly, this concern with wealth transfers was not simply economic. As Robert Lande has explained, prior to the passage of the Sherman Act, price levels in the United States were stable or slowly declining.[304] If the primary concern had been steep prices, then Congress could have focused on industries where prices were high. Congress's choice to denounce unjust redistribution in and of itself suggests that the public was "angered less by the reduction in their wealth than by the way in which the wealth was extracted," through excesses of market power.[305]

A third distinct goal was the preservation of open markets, to ensure that independent entrepreneurs had an opportunity to enter. A number of Congressmen supported the creation of the Federal Trade Commission Act with the idea that it would help protect small business. Senator Reed stated that Congress passed the law to keep markets open to independent businesses.[306] Predicting what would happen if big business was permitted to expand unchecked, Senator George warned that it would "crush out all small men, all small capitalists, all small enterprises."[307]

In summary, ample scholarship documents that Congress had multiple political economic goals when enacting the Sherman Act, the Federal Trade Commission Act, and the Clayton Act. None of the central sponsors of these laws spoke of the need to increase allocative efficiency in the terms that Bork would later insist. Insofar as "efficiency" appeared in the debates at all, it was used in the context of arguing that purchasers should receive a "fair share" of these benefits.[308] When interpreting antitrust laws, the antitrust agencies and courts should hew to this expansive intent.

B. Simpler Legal Standards Should Govern Mergers, Monopolization, and Vertical Restraints

If antitrust law is to be revived and protect consumers and suppliers from powerful sellers and buyers, maintain open markets, and disperse economic and political power, antitrust enforcers and courts must eschew the open-ended rule of reason and adopt simple presumptions for many forms of anticompetitive conduct. Agencies and courts cannot achieve the pluralistic vision Congress had when it enacted the antitrust statutes by applying the rule of reason. For example, it is not possible to balance the cost savings from a merger against the costs of the enhanced long-term economic and political power of the larger corporation. Rules and presumptions would promote the multiple goals that the Congresses of 1890 and 1914 sought to

[303] *Id.* 1768.
[304] Lande, *supra* note 290, at 96–97.
[305] *Id.* at 98.
[306] 51 CONG. REC. 13,231 (1914).
[307] 21 CONG. REC. 2598 (1890).
[308] Lande, *supra* note 290, at 93.

advance, reduce the complexity and cost of antitrust investigations and litigation, and simplify legal compliance for businesses. Specifically, simple presumptions of illegality, subject to rebuttal through the introduction of credible business justifications, should govern, at a minimum, horizontal mergers in concentrated markets, monopolization, and vertical restraints.

As a basic matter, it is far from clear that the agencies and courts can apply the rule of reason standard effectively *even* when they focus on promoting efficiency. Weighing short-term efficiency gains against price effects, let alone long-term losses in dynamic and productive efficiencies, is a largely speculative undertaking and involves balancing incommensurate and largely unknowable quantities.[309] This infirmity is especially acute in the realm of prospective merger reviews.[310] The merits of current agency practice and court decisions have not been empirically confirmed.[311] The agencies and courts continue to assume, on the basis of very thin evidence, that the complex and interminable inquiries demanded by the rule of reason and other standards produce superior outcomes.[312] But mounting evidence suggests just the opposite: that this approach has neither lowered prices nor led to efficiency gains.[313] In other words, the efficiency-based approach has failed even on its own terms. It appears that the agencies have achieved the worst of all possible worlds by embracing nebulous legal standards that produce neither procedural efficiency nor substantive accuracy.[314]

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[309] Stucke, *supra* note 273, at 1442.

[310] *See* Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction*, 64 Fed. Comm. L.J. 47, 56 (2011); Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1, 4 (2016) ("Antitrust law often must trade off one kind of competition for another, or one salutary effect of competition (such as price, quality or innovation) for another. And in so doing, antitrust courts must make judgments between different and incommensurate values.").

[311] *See* Marc Allen Eisner & Kenneth J. Meier, *Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 Am. J. Pol. Sci. 269, 277 n.7 (1990) ("The triumph of the Chicago school was not related to empirical evidence. The Chicago school, in fact, declared a variety of empirical tests irrelevant and argued that its position was closer to the heart of the microeconomic price theory. The Chicago school victory was a political victory not an empirical one.") (citation omitted).

[312] Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 Utah. L. Rev. 159, 163–69 (describing the profound challenges and uncertainties of current merger review practice).

[313] *See* John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy 155 (2015) ("Of all mergers that resulted in price increases, the agencies acted in only 38 percent of cases, suggesting substantial under-enforcement. Incorrectly cleared mergers on average resulted in price increases in excess of 10 percent."); Bruce A. Bloningen & Justice R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2016-082, 2016) ("We find that evidence for increased average markups from [mergers and acquisitions] activity [in the manufacturing sector] is significant and robust across a variety of specifications and strategies for constructing control groups that mitigate endogeneity concerns. In contrast, we find little evidence for plant- or firm-level productivity effects from M&A activity on average, nor for other efficiency gains often cited as possible from M&A activity, including reallocation of activity across plants or scale efficiencies in non-productive units of the firm.").

[314] *See* Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs. Rule of Reason,"* 2 J. Competition L. & Econ.

In the realm of merger law, the Supreme Court's presumption in *United States v. Philadelphia National Bank* should be reinvigorated. The Court held that a horizontal merger that produces a firm with a market share of greater than thirty percent is presumptively illegal.[315] While *Philadelphia National Bank* involved a merger in which the two firms had combined shares well above twenty percent,[316] the Court indicated that a merger exceeding this lower threshold could be presumptively illegal as well.[317] The merging parties could rebut this presumption by establishing business justifications for their combination.[318] Although the *Philadelphia National Bank* decision has not been formally overruled, the agencies' shift toward increasingly fact-driven merger standards has weakened the force of this precedent.[319]

An agency and judicial re-embrace of this previous standard[320] would simplify and enhance the transparency of merger law and restore its role as a deterrent. This structural presumption would advance the incipiency standard in merger law and prevent harms from mergers before they occur.[321] While agencies would still have to define relevant markets under the *Philadelphia National Bank* rule, the complexity of merger reviews would be greatly diminished. For one, these reviews would be significantly shortened and be much less dependent on competing speculations about the future development of markets. Armed with a simple rule rather than a standard that demands an exhaustive industry study and impossible projections of the future, the antitrust agencies, for example, would not have to spend more than a year investigating mergers in highly concentrated markets—as they routinely do now.[322]

Importantly, firms in highly concentrated markets would be put on clear notice: a merger that created an entity with a share greater than twenty per-

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215, 241 (2006) ("The highest benefits can be reaped by finding simple and robust rules, which are able to solve most of the competition problems without causing high regulation costs.").

[315] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963); *see also* John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?* 48 (Ne. Univ. Dep't of Econ., Working Paper, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782152 (finding that structural presumptions of illegality are highly accurate in identifying anticompetitive mergers under the efficiency standard).

[316] Philadelphia Nat'l Bank, 374 U.S. at 364.

[317] *Id.* at 364 n.41.

[318] *Id.* at 363.

[319] *See* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 Antitrust L. J. 269, 276 (2015).

[320] The agencies and courts, on occasion, still rely on the *Philadelphia National Bank* structural presumption. *See, e.g.*, Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1216 (11th Cir. 2012).

[321] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *supra* note 252, at § 1 ("[C]ongressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.").

[322] *See, e.g.*, Emily Steel, *Under Regulators' Scrutiny, Comcast and Time Warner Cable End Deal*, N.Y. Times (Apr. 24, 2015), http://www.nytimes.com/2015/04/25/business/media/comcast-time-warner-cable-deal.html [https://perma.cc/2WEF-FVRQ].

cent would have to show credible business justifications to overcome the presumption of illegality.[323] A simple rule that lay observers could understand would prevail. Leading oligopolists would have less confidence pursuing five-to-four or four-to-three mergers and would be less likely to propose them in the first place. Sophisticated corporate counsel would no longer be able to manipulate the amorphous and subjective Horizontal Merger Guidelines to the advantage of large firms in concentrated markets.[324] For example, if *Philadelphia National Bank* were the governing merger test today, it is hard to imagine that two firms with a joint national market share in excess of forty percent would even contemplate merging,[325] let alone propose to merge with high confidence in completing the deal.[326]

In the realm of monopolization, presumptions should replace the current rule of reason and other unstructured inquiries, including in the context of exclusive dealing, predatory pricing, refusals-to-deal, or tying. To an extent, U.S. law already recognizes the logic of this stricter test for monopolists. The courts have stated that monopolists have less freedom of action because "there is no market constraint on the monopolist's behavior."[327] The late Justice Scalia, despite being an ardent critic of antitrust law generally and monopolization claims specifically,[328] stated that "[b]ehavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."[329] Moreover, something akin to a presumption of illegality applies in the area of tying (conditioning the purchase of one product on the purchase of another). The Court has held that tying by a firm with market power in the tying product market is per se illegal because "anticompetitive forcing is likely."[330]

Applying a presumption of illegality to exclusive dealing, refusals-to-deal, and below-cost pricing by dominant and near-dominant firms would further the goal of protecting consumers and small suppliers and maintaining open markets. For instance, U.S. law should treat pricing below short-term

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[323] *See* Salop, *supra* note 319, at 273–74.

[324] *See* Frankel, *supra* note 312, at 166; Stucke, *supra* note 273, at 1454–56.

[325] Grunes & Stucke, *supra* note 310, at 54.

[326] *Cf.* Vipal Monga, *AT&T Is Paying the Biggest Breakup Fee Ever*, WALL ST. J. (Dec. 19, 2011), http://blogs.wsj.com/deals/2011/12/19/att-is-paying-the-biggest-breakup-fee-ever/.

[327] LePage's, Inc. v. 3M, 324 F. 3d 141, 152 (3d Cir. 2003) (en banc) (citation omitted).

[328] *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 412 (2004) (describing antitrust as "sometimes [having] considerable disadvantages"); *id.* at 407 (describing monopoly power as "an important element of the free-market system").

[329] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (citation omitted).

[330] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984), *abrogated in part by* Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); *see also* Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 271–72 (6th Cir. 2015) ("The tie falls foul of antitrust law if the seller has appreciable economic power in the tying product market and the arrangement affects a substantial volume of commerce in the tied market. . . . A tying arrangement that falls foul of these criteria and lacks a valid business justification is anticompetitive because it tends to force more efficient competitors out of the tied product market.") (internal citations omitted).

cost by dominant or near-dominant firms as illegal in the absence of credible business justifications.[331] Similar presumptions of illegality should apply when a firm possessing dominance or on the cusp of dominance ties up distributors or final customers through exclusive dealing arrangements, refuses to grant access to essential facilities, or ties two distinct products through contractual or technical means. These forms of conduct may be neutral or even beneficial when practiced by a non-dominant firm in a competitive market. However, they take on a radically different complexion when undertaken by a monopolist or near-monopolist and should be permitted only under extraordinary circumstances.[332]

The antitrust agencies and courts should look to European Union abuse of dominance law for a model to emulate. The European Union applies a presumption of illegality to conduct practiced by a monopolist that has exclusionary potential.[333] EU law has imposed special obligations on dominant firms that preclude them from erecting artificial market barriers.[334] Competition law in the European Union establishes "a principle of freedom of non-dominant firms to trade without artificial obstacles constructed by dominant firms, and carries an assumption that preserving this freedom is important to the legitimacy of the competition process and is likely to inure to the benefit of all market players, competitors and consumers."[335] Dominant firms can engage in certain types of conduct only if they have credible business reasons for doing so.[336] Otherwise, they run afoul of the presumption in favor of markets open to all comers. The EU's focus on protecting both consumers and rivals from powerful businesses is consonant with the objectives expressed by the drafters of U.S. antitrust laws.[337]

Exclusive territories, resale price maintenance, and similar distributional restraints have immediate and longer-term anticompetitive effects and theoretical business justifications of limited real-world relevance. As a practical matter, these distributional restraints give large retailers and manufacturers the power to dictate the development of consumer goods markets.[338] For example, resale price maintenance, under which a manufacturer sets a contractual floor on the retail price of its products, can limit intrabrand com-

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[331] *See generally* Sandeep Vaheesan, *Reconsidering* Brooke Group*: Predatory Pricing in Light of the Empirical Learning*, 12 Berk. Bus. L.J. 81 (2015).

[332] *See, e.g.*, Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 355 (2002) ("At the extreme, an exclusive dealing arrangement can create or maintain a complete monopoly.").

[333] *See, e.g.*, Case T-155/06, Tomra Sys. ASA v. Comm'n, 2010 E.C.R. II-4361 ¶ 208 (holding that exclusivity rebates by a dominant firm are illegal in the absence of an objective justification); Case 85/76, Hoffmann-La Roche v. Comm'n, 1979 E.C.R. 461 ¶¶ 89–90 (same).

[334] *See, e.g.*, Case T-65/98, BPB Indus. v. Comm'n, 1993 E.C.R. II-389 ¶¶ 65–68.

[335] Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 Antitrust L.J. 371, 395 (2002).

[336] *See, e.g.*, *Hoffmann-La Roche*, 1979 E.C.R. 461 ¶¶ 89–90 (same).

[337] *See supra* Part V.A.

[338] *See* John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. Rev. 1125, 1144 (1987).

petition, raise consumer prices, and impede new entry in the retail sector.[339] Used in sectors with dominant retailers that play a gatekeeper function, resale price maintenance can have a pro-competitive effect.[340] But in other instances it can be misused. This is because with protected profits, retailers are likely to put less pressure on wholesalers and manufacturers to cut their prices over the longer term.[341] Furthermore, under a resale price maintenance regime, retailers with a lower cost structure cannot pass their cost advantages through to consumers in the form of lower prices and expand their market share using their most potent sales tool—discounting.[342] This restriction on price competition impedes the emergence of lower-cost retail formats and can preserve non-competitive retail market structures.[343]

Yet, based on a stylized view of retail competition and the purported threat of "free-riding" on point-of-sale services such as product demonstrations at a store, the Supreme Court has held that these restraints on competition should be subject to the rule of reason and has made them de facto legal.[344] For the small fraction of products requiring retail sales support, the promotion of point-of-sale services, such as product demonstrations, can be achieved through other less restrictive means, such as manufacturers granting promotional allowances for full-service retailers.[345] The beneficial uses of distributional restraints, including resale price maintenance, have not been sufficiently documented—or are limited to sufficiently few circumstances—to warrant the permissive standard that currently exists.[346]

Exclusive territories have similar anticompetitive effects. By limiting the geographical proximity of retailers selling the same brand, exclusive territories limit all forms of intrabrand competition—both price and non-price

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[339] *See* Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 Loy. Consumer L. Rev. 32, 43 (2007).

[340] One example of such a situation is e-books, where Amazon initially controlled ninety percent of the market. By introducing agency pricing—a form of vertical pricing restraint—publishers were able to make the e-book market more competitive. *See* Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. (forthcoming 2017).

[341] *See* Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 Antitrust L.J. 407, 441–42 (1997).

[342] Warren S. Grimes, *A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retailer Innovation*, 55 Antitrust Bull. 101, 126–27 (2010).

[343] Marina Lao, *Resale Price Maintenance: The Internet Phenomenon and Free Rider Issues*, 55 Antitrust Bull. 473, 509 (2010).

[344] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 891–92 (2007); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977).

[345] *See* Warren S. Grimes, *The Path Forward After* Leegin*: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 Antitrust L.J. 467, 478 (2008).

[346] *See* Alexander MacKay & David Aron Smith, *The Empirical Effects of Minimum Resale Price Maintenance* 3 (2014), http://home.uchicago.edu/mackay/files/The%20Empirical%20Effects%20of%20MRPM.pdf [https://perma.cc/Y4PF-MENT] ("Our results indicate that prices and quantities have indeed changed as a result of *Leegin*. We find that 8.4 percent of products exhibited a statistically significant price increase in our treatment states, with a median increase of 5.3 percent. Additionally, 9.4 percent of products experienced declining quantities. As a result of *Leegin*, products were most likely to see a price increase combined with a quantity decrease. This combination indicates movement along the demand curve and suggests the exercise of market power.").

competition.[347] Due to the greater distance between rival sellers, retailers have a diminished incentive to compete on both price and non-price dimensions.

Given the likely loss of retail competition from vertical restraints and low likelihood of offsetting consumer benefits, practices such as resale price maintenance and exclusive territories should be subject to a relatively strict legal standard or, at minimum, a structured legal test. For example, the agencies and courts could hold resale price maintenance and exclusive territories to be presumptively illegal. This standard would reflect the high risk of harm from these practices. The European Union applies such a standard to resale price maintenance and to exclusive territories.[348] Unlike the per se standard that governed resale price maintenance until 2007 and established conclusive illegality,[349] however, a presumption of illegality would allow businesses to rebut the presumption by offering credible business justifications.[350] They could overcome the presumption by showing that the restraint is reasonably necessary to achieve a beneficial end, such as the provision of point-of-sale services.

C. Possession of Highly Damaging Monopoly and Oligopoly Power Should Be Challenged

The antitrust agencies should use their existing legal authorities or seek additional authorities from Congress to challenge the possession of damaging monopoly and oligopoly power by firms. The specific types of monopoly and oligopoly power that should be challenged are those that last for an extended period of time or result in substantial harm, such as in a market for essential goods and services with highly inelastic demand. In contrast to the present law governing dominant firms, this legal power would not require "bad acts" on the part of the firm possessing market power;[351] rather, an uncompetitive market structure that imposes substantial injury on the public would itself be challenged. Under the proposed "no-fault" monopoly and oligopoly doctrine, firms found to possess monopoly or oligopoly power that inflicts substantial injury and cannot be justified on operational grounds, such as economies of scale, would face antitrust liability.

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[347] *See* William S. Comanor, *Vertical Arrangements and Antitrust Analysis*, 62 N.Y.U. L. Rev. 1153, 1160 (1987).

[348] Commission Regulation 330/2010 of Apr. 20, 2010, 2010 O.J. (L 102), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:cc0006&from=EN [https://perma.cc/3WNT-95PS].

[349] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[350] Lao, *supra* note 343, at 511; *see also* Polygram Holding, Inc. v. FTC, 416 F. 3d 29, 35–36 (D.C. Cir. 2005) ("[T]he Commission must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers. If so, then the restraint is deemed 'inherently suspect' and, unless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint, summarily condemned.").

[351] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

Market power that persists for an extended period of time—say, for at least five years—imposes substantial costs on the public in the form of overcharges on consumer prices or depressed payments to producers or workers. Sometimes this monopoly or oligopoly power persists due to a discrete set of bad acts by the monopolists or oligopolists that exclude competitors. Examples of such bad acts include below-cost pricing and preventing rivals from accessing customers or essential distribution channels. In these instances, eliminating these artificial barriers to competition can restore competition to the market. In other cases, monopoly and oligopoly power persist due to no apparent bad practice[352] or myriad bad practices enabled by the firms' underlying power.[353] Under these circumstances, the options under current law are either to do nothing or to initiate lengthy litigation that guarantees little except steady income for lawyers and economists.[354] Because current law is ill-equipped to tackle these particular problems, let alone quickly, the public suffers under the burden of monopoly[355] and oligopoly power that persists.

In other instances, monopoly or oligopoly power may arise intermittently or only temporarily but inflict tremendous harm. A classic example is market power in restructured electricity markets. Due to the highly inelastic nature of demand for electricity, generators with market power can unilaterally raise market prices. During the California electricity crisis in 2000 and 2001, generators created artificial shortages of electricity to drive up its price—without any indication of collusion.[356] Similar unilateral withholding could occur in markets for essential medicines.[357] The dramatic increase in the price of the EpiPen, for example, appears to be the product of monopoly power.[358] Although, as currently interpreted, the antitrust laws require evidence of collusion or other bad act before condemning this type of withholding behavior,[359] the harm to the public is real and often severe. The electricity price spikes and rolling blackouts that hit California fifteen years

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[352] *See* John J. Flynn, *Do the Proposals Make Any Sense from a Business Standpoint? Pro No-Conduct Monopoly: An Assessment for the Lawyer and Businessman*, 49 Antitrust L. J. 1255, 1264–65 (1980) (the fixation on conduct in monopolization cases can lead to courts finding "no monopoly power where there is monopoly power").

[353] *See, e.g.*, United States v. AT&T Co., 552 F. Supp. 131, 167–68 (D.D.C. 1982) ("There is evidence which suggests that AT&T's pattern during the last thirty years has been to shift from one anticompetitive activity to another, as various alternatives were foreclosed through the action of regulators or the courts or as a result of technological development.").

[354] *See* Flynn, *supra* note 352, at 1265.

[355] *See* Alfred F. Dougherty, Jr. et al., *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 Wash. & Lee L. Rev. 83, 87 (1980).

[356] *See* Wolak, *supra* note 191, at 430.

[357] *See* Albert A. Foer, *Section 5 as a Bridge Toward Convergence*, 8 Antitrust Source 1, 5 (2009).

[358] Carolyn Y. Johnson & Catherine Ho, *How Mylan, the Maker of EpiPen, Became a Virtual Monopoly*, Wash. Post (Aug. 25, 2016), https://www.washingtonpost.com/business/economy/2016/08/25/7f83728a-6aee-11e6-ba32-5a4bf5aad4fa_story.html [https://perma.cc/DQ2K-GXQ2].

[359] Foer, *supra* note 357, at 4.

ago,[360] and the monopolistic pricing of the EpiPen, illustrate the consumer costs of market power.[361]

The focus on durable monopoly and oligopoly would also shift the focus of current dominant firm law away from bad acts and toward market structure. The antitrust agencies should only challenge the market power of firms that impose substantial injury on the public, due either to persistent market power over a prolonged period of time or to large magnitude of harm in a short period of time. And even firms found to possess this type of market power would be allowed to show that asset divestitures and other restructurings would result in the loss of operational efficiencies.[362] Given these demanding legal standards for when firms could be found liable, the risk that no-fault monopoly and oligopoly cases would diminish the competitive zeal of businesses—most of which are unlikely ever to possess anything even approaching injurious monopoly or oligopoly power—appears remote.[363]

D. Merger and Monopoly Remedies Should Focus on Maintaining and Restoring Competitive Market Structures

Stronger antitrust rules must be paired with effective remedies in public enforcement actions if markets are to be competitive. Even very strong restrictions on conduct are unlikely to be effective if the subsequent remedies are weak. Legal victories are certain to be pyrrhic when "liability is found; but ineffective remedies are imposed and competitive outcomes are not altered very much."[364] For example, even under a stricter merger enforcement regime, companies may pursue anticompetitive mergers if they need to make only minor concessions to get through the nominally tough merger review process. To promote competitive markets and the citizen interest standard, the antitrust agencies must seek to maintain and restore competitive market structures. In the merger context, an effective approach would mean enjoining mergers in their entirety rather than accepting divestitures or conduct remedies. In monopolization matters, structural remedies must be favored over complex, quasi-regulatory behavioral solutions.

While the agencies wisely prefer divestitures to conduct remedies in the case of horizontal mergers, the defects of this approach—even from an efficiency perspective—are apparent. Retrospective studies suggest that structural remedies often fail to maintain competition.[365] A landmark FTC study in 1999 found that, in a quarter of reviewed divestitures, "the buyers [were]

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[360] *See* Wolak, *supra* note 182, at 29.

[361] Johnson & Ho, *supra* note 358.

[362] If the defendant cannot be split into competing entities without the loss of important operational efficiencies, policymakers should consider price regulation or public ownership as a means of controlling the persistent market power.

[363] *See* Dougherty et al., *supra* note 355, at 94.

[364] William S. Comanor, *The Problem of Remedy in Monopolization Cases: The* Microsoft *Case as an Example*, 46 ANTITRUST BULL. 115, 132 (2001).

[365] KWOKA, *supra* note 313, at 120.

not operating viably in the relevant market"[366] and so competition was not preserved following a merger.[367]

While FTC divestiture remedies may have improved following the study, two spectacular failures in recent years raise continued doubts about their efficacy. In the mergers between Hertz and Dollar Thrifty in 2012[368] and Albertsons and Safeway in 2015,[369] the FTC required the merging entities to divest assets to address competition concerns in local markets. In both instances, the acquiring entities proved to be incapable of replacing the lost competition and filed for bankruptcy less than a year after the FTC blessed the divestitures. And in the cruelest of ironies and a stinging rebuke to the FTC, in both instances the merging firms ended up buying back some of the entities originally divested.[370]

Importantly, neither remedy's failure came as a surprise to observers. In Hertz/Dollar Thrifty, the entity that Hertz divested—Advantage Rent a Car—did not appear to be viable from the beginning. Advantage was stripped of cars and the support of being under the Hertz umbrella.[371] A rental car consultant described the divestiture as akin to "taking a two-year old and saying 'OK, now you've got to go to kindergarten and play Little League."[372] On top of inadequate financial and logistical capabilities, Advantage's new management and ownership appeared to lack the knowhow to run a successful car rental business.[373] In the meantime, as Advantage floundered, the Big Three in the car rental market raised prices at the highest

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[366] Bureau of Competition of the Fed. Trade Comm'n, A Study of The Commission's Divestiture Process 10 (1999), https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf [https://perma.cc/4FRV-5KKV].

[367] The FTC is in the process of conducting a follow-up merger remedies study that "will focus on 90 merger orders issued by the Commission between 2006 and 2012." *Remedy Study*, Fed. Trade Comm'n, https://www.ftc.gov/policy/studies/remedy-study [https://perma.cc/G78J-Y8WQ] (last visited Dec. 14, 2016).

[368] Press Release, Fed. Trade Comm'n, FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets (Nov. 15, 2012), https://www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertzs-proposed-23-billion-acquisition [https://perma.cc/33RJ-MUW6].

[369] Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger [https://perma.cc/E47H-5YKR].

[370] David McLaughlin, *Hertz Set to Buy Advantage Locations, Undercutting FTC*, Bloomberg (Apr. 18, 2014), http://www.bloomberg.com/news/articles/2014-04-17/hertz-set-to-buy-advantage-locations-undercutting-ftc [https://perma.cc/7A57-DZ45]; Brent Kendall & Peg Brickley, *Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway*, Wall St. J. (Nov. 24, 2015), http://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193.

[371] Brent Kendall & Jacqueline Palank, *How the FTC's Hertz Antitrust Fix Went Flat*, Wall St. J. (Dec. 8, 2013), http://www.wsj.com/articles/SB10001424052702303330204579246281764302824.

[372] *Id.* (quoting Neil Abrams).

[373] *See* David McLaughlin et al., *Hertz Fix in Dollar Thrifty Deal Fails as Insider Warned*, Bloomberg (Nov. 29, 2013), http://www.bloomberg.com/news/articles/2013-11-29/hertz-fix-in-dollar-thrifty-deal-fails-as-insider-warned [https://perma.cc/PX6X-PHR3].

rate since the start of the Great Recession.[374] Perversely, Hertz went on to reacquire some of the Advantage locations it had divested.[375]

The remedy in the Albertsons/Safeway case is arguably even harder to fathom. To allay the FTC's concerns, the merging entities sold 146 Albertsons stores in towns and cities in the Western United States, where they competed with a Safeway, to a small supermarket chain called Haggen.[376] Following this acquisition, the number of Haggen stores increased from 18 to 164.[377] Even a casual observer could have predicted that Haggen would have great difficulty expanding its storefronts nearly ten-fold in a very short period of time. The skeptics have been proven right. Haggen struggled to integrate the new stores and, despite its reorganization efforts in bankruptcy, may be forced to liquidate.[378] Underscoring how the remedy backfired, Albertsons has reacquired a number of the stores it sold through the bankruptcy process.[379]

Even if divestitures could be perfectly tailored and if they preserved competition in narrow markets in every instance, they would fail to advance the citizen interest standard. As they have in recent decades, large companies would still grow larger through consolidation, notwithstanding minor modifications to address the antitrust agencies' efficiency concerns. Businesses could use their greater size to coordinate with rivals across a number of markets and also to engage in exclusionary conduct to preserve their market power. In addition, their greater size would give them more power over our general political economy—an outcome that the congressmen and senators debating and drafting the antitrust statutes sought to forestall.[380]

To promote Congress's broad vision of protecting consumers and suppliers, maintaining open markets, and dispersing private power, the antitrust agencies should establish a strong presumption in favor of enjoining mergers in concentrated industries. This remedy would be more effective in ensuring that competition does not wane. As a practical matter, it is not apparent that the antitrust agencies are capable of crafting good remedies—especially given that as the economy becomes more and more concentrated, the number of credible buyers of divested assets steadily diminishes.[381] If, for example, Haggen was indeed the most qualified buyer of Albertsons supermarkets

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[374] *Id.*

[375] McLaughlin, *supra* note 370.

[376] Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J. (Oct. 9, 2015), http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.

[377] *Id.*

[378] *Id.*

[379] David Dayen, *Antitrust Incompetence from the FTC, as Albertson's/Safeway Divestiture Goes Awry*, NAKED CAPITALISM (Nov. 17, 2015), http://www.nakedcapitalism.com/2015/11/antitrust-incompetence-from-the-ftc-as-albertsonssafeway-divestiture-goes-awry.html [https://perma.cc/GN5Y-RKFH].

[380] *See supra* Part V.A.

[381] *See, e.g.*, Grunes & Stucke, *supra* note 310, at 82 (discussing the difficulty of finding a buyer that is both a viable competitor and not a large incumbent in the wireless industry to remedy the competition problems in the AT&T/T-Mobile transaction).

in Western cities for the sake of maintaining competition, it would raise serious doubts about the general pool of capable supermarket operators that are not already oligopolists in their own right. More importantly, the current focus on horizontal market overlaps reflects an unduly narrow conception of competitive harms. Stopping mergers would help maintain market structures that are not only more conducive to protecting consumers, producers, and workers from market power, but would also preserve open markets and prevent excessive concentration of private power in the economy and society.

In addressing monopolization of markets, structural solutions should be favored.[382] They allow for a one-time fix and create or restore a market in which multiple firms exist and competition can develop. Conduct remedies, in contrast, may treat only the symptoms of the problematic monopoly,[383] and are prone to being incomplete, ambiguous, and vulnerable to evasion.[384] Companies subject to these ongoing remedies have a powerful motive to sidestep them, including through the exercise of overt and subtle power over regulators,[385] as a means of perpetuating their profitable dominance.[386] While the challenges are not necessarily insurmountable, the antitrust agencies and courts are not institutionally well-suited to monitor and enforce complex conduct remedies.[387] This task, insofar as it is feasible, is more appropriate for industry regulators and public utility commissions.[388]

The conduct remedies in the Microsoft litigation in both the United States and Europe exemplify this quasi-regulatory approach. Mandatory interoperability and licensing agreements appear to have fostered greater competition in the desktop operating system and applications markets.[389] Yet, major questions remain on whether the complex regulatory undertaking was worth all the effort.[390]

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[382] To be sure, conduct remedies may be sufficient or the only viable fix in some cases. In simple monopolization cases focused on discrete instances of bad conduct, the agencies may be able to craft a straightforward conduct remedy that addresses the defendant's exclusionary conduct. In other instances, a structural solution may be infeasible due to the operations of the monopolist—for example, splitting a monopolist with a single centralized factory may be difficult and impractical. *See* Peter C. Carstensen, *Remedies for Monopolization from Standard Oil to Microsoft and Intel: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. Cal. L. Rev. 815, 842 (2012) (noting important distinction between "cases challenging the conduct of a monopolist whose monopoly is itself not being challenged and those that challenge that monopoly itself.").

[383] *See* Comanor, *supra* note 364, at 124.

[384] *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies Evaluation and Implications for Antitrust Enforcement*, 57 Antitrust Bull. 979, 1002 (2012) (observing that "the antitrust agencies do not have the resources of sector regulators to monitor and oversee compliance").

[385] *See* K. Sabeel Rahman, *What Clinton and Sanders Are Really Fighting About*, Atlantic (Feb. 5, 2016), http://www.theatlantic.com/politics/archive/2016/02/the-allure-and-limits-of-managerialism/460146/ [https://perma.cc/22R3-7F7B].

[386] *See* Comanor, *supra* note 364, at 124–25.

[387] *See* Kwoka & Moss, *supra* note 384, at 1002.

[388] *Id.* at 1001–02.

[389] *See* Carstensen, *supra* note 382, at 838.

[390] *See* Harry First & Andrew I. Gavil, *Re-Framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 Utah L. Rev. 679, 759 ("[M]ore than a decade after the

In cases in which the monopolist's power gives it a host of options to exclude competitors, enforcers and courts must address the root of the problem—the monopolist's very existence. Rather than undertake a game of "whack-a-mole" that is often beyond their institutional capabilities, they should restructure the monopolist's business operations. Structural remedies include dividing a monopolist into multiple horizontal competitors, as some commentators proposed in the United States' case against Microsoft.[391] Another option is to separate a monopolist in vertically related lines of business into separate entities.[392] Structural remedies typically do require some supervision to ensure compliance. This oversight would involve bright lines—meaning, for example, that the monopolist could not re-enter a certain market following a divestiture—and would not be nearly as complicated and intrusive as regulating terms of interconnection or licensing terms over an extended timeframe.

The vertical separation approach is embodied in the settlement in the monopolization case against AT&T, in which the phone giant agreed to separate its local phone monopoly from its long-distance and equipment operations.[393] The purpose of this remedy was to prevent AT&T from leveraging its then-natural monopoly in local phone service into the potentially competitive long-distance and equipment markets.[394] For twelve years—from 1984 until the passage of the Telecommunications Act of 1996—Judge Harold Greene monitored the local phone companies' compliance with line-of-business restrictions that prevented them from expanding into the long-distance and equipment markets.[395] Judge Greene appears to have performed his duties well and ensured the continued effectiveness of the original structural remedy.[396]

E. The Antitrust Agencies Must Be Subject to Greater Transparency Duties

Increasing agency accountability is vital for ensuring that greater agency resources and stronger legal standards will lead to more vigorous enforcement. Improvements in substantive law are likely to be toothless if

Justice Department reached its first consent decree with Microsoft, Microsoft's share of the Intel-compatible PC operating system market remains above ninety percent.").

[391] *See, e.g.*, Robert J. Levinson, R. Craig Romaine & Steven C. Salop, *The Flawed Fragmentation Critique of Structural Remedies in the* Microsoft *Case*, 46 ANTITRUST BULL. 135, 136–37 (2001).

[392] *See, e.g.*, United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64 (D.D.C. 2000), *vacated* 253 F.3d 34, 101–03 (D.C. Cir. 2001) (ordering Microsoft to be split into operating system and application software entities).

[393] United States v. W. Elec. Co., 552 F. Supp. 131, 226 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[394] *See* W. Elec. Co., 552 F. Supp. at 187.

[395] Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1413–14 (1999).

[396] *Id.* at 1472.

the antitrust agencies can continue to operate behind a veil of secrecy. Antitrust watchers and other members of the public must be allowed to determine whether the agencies are acting in accordance with substantive law. At present, the antitrust agencies remain some of the least accountable in government. Officials are not required to explain to the public why they did not challenge a particular merger, or reckon with cases in which a merger that they did not challenge led to predicted harms.[397] Nor do agencies have to explain why they ended extensive investigations with no action. A prominent antitrust attorney has remarked that "[t]here are few government functions outside the CIA that are so secretive as the merger review process."[398]

Two recent matters illustrate the opacity surrounding antitrust investigations. In 2012, for example, the Justice Department quietly closed a three-year investigation into Monsanto, whose anti-competitive activities had been documented by journalists and described by state officials as egregious.[399] Upon shutting down its inquiry, the DOJ made no public announcement; only a short press release from Monsanto conveyed the news.[400] In the matter involving Google's search practices, the FTC terminated its investigation with some voluntary agreements, effectively clearing the company of all antitrust wrongdoing.[401] Only through an inadvertent Freedom of Information Act (FOIA) leak did the public later learn that the FTC's antitrust lawyers had concluded that Google likely violated antitrust laws on three counts, and had recommended bringing a suit.[402]

One way to make agencies more accountable would be by requiring them to conduct publicly available retrospective reviews, assessing how their merger predictions actually played out. The President could create antitrust inspector general units within the DOJ and FTC, whose job would involve evaluating how specific mergers had affected factors like choice, quality, profit margins, and conduct with suppliers. This would be especially

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[397] *See* Jesse Eisinger & Justin Elliott, *These Professors Make More than a Thousand Bucks an Hour Peddling Mega-Mergers*, ProPublica, Nov. 16, 2016, https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers [https://perma.cc/D4KM-GQ8W] ("Once a merger is approved, nobody studies whether the consultants' predictions were on the mark. The Department of Justice and the Federal Trade Commission do not make available the reports that justify mergers, and those documents cannot be obtained through public records requests.").

[398] *Id.*

[399] *See* Christopher Leonard, *Monsanto Seed Biz Role Revealed*, Associated Press (Dec. 14, 2009); Lina Khan, *How Monsanto Outfoxed the Obama Administration*, Salon (Mar. 15, 2013), http://www.salon.com/2013/03/15/how_did_monsanto_outfox_the_obama_administration/ [https://perma.cc/KGX5-29PZ].

[400] Ian Berry & David Kesmodel, *U.S. Closes Antitrust Investigation into Seed Industry, Monsanto*, Wall St. J. (Nov. 16, 2012), http://www.wsj.com/articles/SB10001424127887324735104578123631878019070.

[401] Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc [https://perma.cc/G3EQ-CGVY].

[402] *See* Brody Mullins, Rolfe Winkler & Brent Kendall, *Inside the U.S. Antitrust Probe of Google*, Wall St. J. (Mar. 19, 2015), http://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274.

useful for identifying errors in judgment when designing merger remedies, a particular site of recent failure. In two instances discussed earlier—the Hertz/Dollar Thrifty and Albertsons/Safeway mergers—divestiture remedies that the FTC predicted would sufficiently preserve competition proved totally ineffective. In each case, not only did the firm acquiring the divested assets bleed money as a result of the acquisition—weakening it as a competitor—but also the *divesting* firm ended up re-acquiring some of the original assets.[403] For this magnitude of failure to go entirely unexamined—both within and outside the agency—is a recipe for weak and repeatedly feckless antitrust policy.

Another way to enhance agency transparency is to pass comprehensive FOIA reform—as Congress attempted through the FOIA Oversight and Implementation Act of 2014. If adopted, the legislation would have codified the mandate for government agencies to "adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA and to usher in a new era of open Government."[404] Congress's reform agenda included a focus on Exemption 5, which protects from mandatory disclosure inter-agency and intra-agency documents that would be privileged from discovery in litigation.[405] In practice, the FTC and other agencies liberally use Exemption 5 to keep documents privileged or highly redacted.[406]

Calls to make the antitrust agencies more transparent and accountable to the public are not new.[407] Instituting as routine mechanisms by which the public can track the agencies' actions and document the long-term results of action or inaction would help both identify and recognize the public payoffs of successful enforcement and let public interest groups, advocacy organizations, and journalists both celebrate victories and hold the agencies accountable.

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[403] *See* Kendall & Palank, *supra* note 371; Kendall & Brickley, *supra* note 370; *see also* Brent Kendall & Jacqueline Palank, *How the FTC's Hertz Antitrust Fix Went Flat*, WALL ST. J. (Dec. 8, 2013), http://www.wsj.com/articles/SB10001424052702303330204579246281764302824; Brent Kendall & Peg Brickley, *Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway*, WALL ST. J, (Nov. 24, 2015), http://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193.

[404] *See* Jason Leopold, *It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform*, VICE (Mar. 9, 2016), https://news.vice.com/article/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform [https://perma.cc/JE54-BQ5X].

[405] H.R. Rep. No. 89-1497 (1966), S. Rep. No. 89-813 (1965), and S. Rep. No. 88-1219 6-7, 12-14 (1964), *cited in* ELEC. PRIVACY INFO. CTR., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 2010, at 144 (Harry A. Hammitt et al. eds., 2010).

[406] Leopold, *supra* note 404.

[407] For example, in its extensive review of U.S. antitrust enforcement in the 1970s, Ralph Nader's Study Group suggested that top antitrust officials disclose to the public meetings between business representatives and enforcement officials. *See* MARK J. GREEN, ET AL., THE CLOSED ENTERPRISE SYSTEM 62 (1972).

Conclusion

Amid discussions exploring the factors contributing to the extreme economic inequality we face today, the role of monopoly and oligopoly power is underappreciated. It is as if the disregard of distributional consideration in current antitrust analysis has blinded scholars and policymakers to the connection altogether. Our argument is not that antitrust should embrace redistribution as an explicit goal, or that enforcers should harness antitrust in order to promote progressive redistribution. Instead we hold that the failure of antitrust to preserve competitive markets contributes to regressive wealth and income distribution and—similarly—that restoring antitrust is likely to have progressive distributive effects. As we have sketched out, oligopolistic market structures and anticompetitive practices in a host of key industries may be transferring billions of dollars upwards—a politically, socially, and economically troubling outcome.

It is important to trace contemporary antitrust enforcement and the philosophy underpinning it to the Chicago School intellectual revolution of the 1970s and 1980s, codified into policy by President Reagan. By collapsing a multitude of goals into the pursuit of narrow "economic efficiency," both scholars and practitioners ushered in standards and analyses that have heavily tilted the field in favor of defendants. Critically, though, this counterrevolution can be undone. Executive and judicial action can revive antitrust policy to promote competitive markets—by protecting consumers and small suppliers from wealth-redistributing monopolies, oligopolies, and cartels; maintaining open markets; and dispersing economic and political power.

Over the last year, politicians and policy elites have started to recognize the fact that current antitrust policy has failed, yielding high concentration and low competition across sectors.[408] In June 2016, Senator Elizabeth Warren urged Americans to revive an antitrust movement, a return to our foundational belief "that concentrated power anywhere was a threat to liberty everywhere."[409] Even the top antitrust official at the Justice Department recently made comments distancing herself from the consumer welfare standard in favor of something closer to the "citizen interest" standard we outline.[410] Antitrust reform carries the potential to elicit bipartisan support.[411] Adopting the approach we detail would not only keep with Congress's original intent, but also advance the economic, political, and social interests of the vast majority of Americans.

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[408] *See Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (2016); *see also Oversight of the Antitrust Enforcement Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2015).

[409] Elizabeth Warren, Sen. from Mass., Remarks at the 2016 Global New America's Open Markets Program: Competition in the American Economy (June 29, 2015).

[410] Acting Assistant Attorney Gen. Renata Hesse of Dep't of Justice Antitrust Div., Opening Remarks at 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016).

[411] Dayen, *supra* note 3.