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By electronic submission via www.regulations.gov

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Federal Trade Commission
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Assistant Attorney General Jonathan Kanter
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Re: Request for Information on Merger Enforcement

Dear Chair Khan and AAG Kanter:

Farm Action submits these comments in response to the Justice Department and Federal Trade Commission's (the "Agencies") request for information on how the agencies can modernize and strengthen enforcement against illegal mergers (the "RFI"). Farm Action is a nonprofit advocacy organization leveraging research, policy development, and political expertise to create a food and agriculture system that works for everyday people rather than a handful of powerful corporations. We applaud the Antitrust Agencies' decision to review the current merger guidelines "to ensure that they (1) reflect current learning about competition based on modern market realities and (2) faithfully track the statutory text, legislative history, and established case law around merger enforcement."[1]

We believe the current merger guidelines require "root-and-branch reconstruction."[2] Since 1982, the merger guidelines have centered a consumer-welfare framework that is profoundly antithetical to the antitrust laws and has facilitated unprecedented concentrations of corporate power in our economy. In this comment, we urge the Agencies to turn the page. Instead of continuing the past forty-years' "experiment of letting giant corporations accumulate more and more power,"[3] the Agencies should adopt new merger guidelines that apply the antitrust laws as written and intended by Congress.

This comment has four parts. Part I traces the legislative history and demonstrates that Congress enacted the antitrust laws applicable to merger enforcement to protect a fairly well-defined set of structural conditions—"competition"—as a way of promoting a consistent set of antimonopoly policy objectives. Part II highlights how the consumer welfare framework of the merger guidelines practically nullifies Congress's intent to preserve competition, ignores the policy objectives that Congress expressed, and inherently cripples merger enforcement. Part III examines how merger enforcement pursuant to the consumer welfare framework has failed to preserve competition in food system industries—with disastrous consequences for consumers, farmers, and workers, for the ability of small businesses and entrepreneurs to participate in our free enterprise economy, and ultimately, for the capacity of citizens and communities to "direct their economic welfare . . . [and] their political future." In Part IV, we conclude with several recommendations for reconstructing merger enforcement to accord with the law and congressional intent.

I. The Congressional Vision for Merger Enforcement

In recent decades, the debate over merger enforcement policy has often proceeded as if the antitrust laws were "blank checks" on which the Antitrust Agencies could write and enforce any conception of "competition" they want and any set of policy objectives they prefer.[4] As substantial scholarship has documented, however, that is not the case.[5] Although Congress did not provide detailed instructions, the statutory text and legislative history of the antitrust laws reveal a fairly well-defined concept of "competition" as a normative process and a reasonably consistent set of policy objectives that should guide enforcement. As the Supreme Court[6] has held and a number of enforcers[7] and scholars[8] have argued over the years, the Agencies can and should use these normative guideposts to rationally resolve statutory uncertainties, decide which interests are most entitled to protection under the Section 7 of the Clayton Act, and, ultimately, formulate enforcement standards that faithfully apply the law.

A. The Sherman Act: Structuring Markets in the Moral Economy Tradition

The conventional wisdom that antitrust statutes are "open-ended delegations" to the courts (and, by extension, to enforcers) is based primarily on the notion that, in adopting the phrase "restraint of trade" in the Sherman Act, Congress "invoke[d] the common law itself" and "authorize[d] courts to create new lines of [it]" without providing normative criteria to guide judicial decision-making.[9] This notion, however, is at odds with the legislative history of the Sherman Act and would certainly come as news to the coalition of farmers, workers, small producers, and local merchants whose concerns directly inspired its enactment.[10]

The central normative conception of markets that shaped the framing of the Sherman Act is that of markets coordinated and governed by numerous, competing centers of property ownership and decision-making instead of singular centers of aggregated wealth.[11] As the legal scholar Sanjukta Paul has shown in her cogent review of the Sherman Act's legislative history, Congress adopted the law's "restraint-of-trade" phrasing to invoke a set of common-law values around market regulation rooted in the "moral economy" traditions of local English and American markets.[12] Fundamentally, these "old notions of right" frowned upon the foreclosure of market opportunities and the consolidation of market control while encouraging social coordination around just prices and fair competition to keep markets open and diverse participants in business.[13]

This fundamentally moral vision of markets has little, if anything, to do with arbitrarily selected concepts from economic theory such as "perfect competition," "competitive pricing," or "allocative efficiency."[14] None of these economic concepts—or economists in general—had an appreciable bearing on the legislative process that framed the Sherman Act.[15] Instead, it has everything (or at least much more) to do with Congress using the law to consciously structure markets in alignment with the antimonopoly vision of the popular coalition that spurred its enactment.[16] Farmers, acting through cooperative organizations such as the National Grange and the Farmers' Alliance, were at the heart of this coalition.[17] Facing discriminating railroads and monopolistic food processors that exploited the atomization of farmers to impose unjust prices, the farmers' movement repurposed the "moral economy" traditions of socially coordinated markets to challenge the monopolists' centralization of power, on the one hand, and rally cooperation among farmers, workers, and small producers to protect their independence and bargaining power, on the other.[18] While initial versions of the Sherman Act focusing on consumer prices threatened to penalize such coordination, those versions were rejected in favor of language invoking the common law of restraints of trade.[19] This choice was not made without reason; as Sanjukta Paul has argued, Congress phrased Section 1 of the Sherman Act in terms of "restraints of

trade" because the normative values of that body of law—arising, as they did, from the moral economy tradition—were highly aligned with the vision of markets embraced by the antimonopoly coalition and its allies in Congress.[20]

As court decisions routinely recognized prior to the 1970s[21] and numerous scholars[22] have documented, "monopoly" as understood by the framers of the Sherman Act was, essentially, the flipside of this vision of decentralized, democratically-coordinated markets. A "monopoly" was not necessarily an economic monopoly, but an aggregation of capital—however organized—which had consolidated "some sort of unjustified power" over the lives and fates of other participants in the marketplace.[23] Against this background, Sections 1 and 2 of the Sherman Act are complementary. Where Section 1 established the normative values for restructuring unjustified consolidations of power by existing monopolies, Section 2 prohibited conduct seeking to accumulate or maintain such illegitimate power in the first place.[24] In this sense, the Sherman Act was understood by its congressional proponents as a "charter of liberty"[25] and sought to preserve a "proper distribution of power in the economic sphere."[26]

The idea of protecting decentralized markets governed by fair competition and fair dealing among numerous, independent participants against the consolidation of power by would-be monopolists underlies all of the antitrust laws which followed the Sherman Act—not to mention their "interlacing" statutes in agriculture, labor, procurement, and other areas of law.[27] As Judge Learned Hand stated in *United States v. Alcoa* in 1945, each of the core antitrust statutes carried an intent to "perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[28] In fact, this decentralizing vision only became more explicit and well-defined in the legislative histories of the later-enacted Clayton Act and Celler-Kefauver Amendment.

B. The Clayton & FTC Acts: Responding to Consolidation Waves After the Sherman Act

Congress enacted the Clayton and the Federal Trade Commission Acts in 1914 to preserve the dispersion of market coordination rights and prevent the concentration of private power over markets after the Sherman Act proved insufficient.[29] In 1890, the Sherman Act was passed in response to a pervasive national fear of the rapid assimilation of power by groups of financiers and "captains of industry" who had succeeded in consolidating a number of basic industries into holding companies or trusts.[30] When bare-minimum enforcement and unworkable judicial interpretation of the Sherman Act enabled yet another consolidation wave (the "Great Merger Movement" between 1897 and 1907),[31] Congress enacted the Clayton Act to establish a "legislative rule" for the prohibition of corporate mergers, tying arrangements, commercial discrimination and other "common and favorite method[s] of promoting monopoly."[32] Learning its lesson from the Sherman Act's lackluster implementation, Congress also created an independent agency—the Federal Trade Commission—to administer the Clayton Act in accordance with congressional intent and to proscribe new and unanticipated methods of unfair competition as they arise.[33]

Three years earlier, in *Standard Oil*, the Supreme Court had adopted the "Rule of Reason" standard to enable courts to balance the multiple values of the Sherman Act—aversion to centralized power, on the one hand, and accommodation of democratic coordination and fair competition, on the other—in judging market conduct.[34] Since this interpretation emasculated the Sherman Act by subjecting enforcement to wide-ranging economic evaluations of (at least) whether the conduct at issue constitutes fair coordination or illegitimate consolidation, Congress drafted the Clayton Act to specify narrow, unidirectional standards for certain

categories of conduct.[35] On the one hand, Congress declared "the labor of a human being is not a commodity or article of commerce."[36] It identified the specific rights of democratic coordination it sought to preserve in framing the Sherman Act—those of farmers and workers—and recognized them explicitly as beyond antitrust scrutiny.[37] On the other hand, Congress singled out certain business practices that had proven integral to the processes of monopolization and largely incompatible with democratic ends for prohibition based exclusively on one factor—the risk they posed of *lessening* competition or *tending* to create a monopoly.[38]

Congress selected the methods subjected to this prohibition—corporate mergers, tying arrangements, and commercial discrimination—based on what it had learned from a series of investigations over the previous quarter century into the "actual processes and methods of monopoly."[39] A fairly consistent pattern of monopolistic tactics emerged from these investigations.[40] Typically, the process of monopolization began with mergers.[41] Using aggregated capital or privileged access to financing, potential monopolists would merge with direct competitors until they consolidated a significant portion of their initial market.[42] The resultant market power would enable them to generate higher profits and mobilize even greater financial power—which they would then plow into yet more strategic mergers, extending their reach across their industry into a wide range of different products, separated geographic markets, and vertically related lines of commerce.[43] As they became significant operators in multiple markets, monopolists developed inherent advantages over their single-market competitors—including, critically, the power to exploit customer dependencies with tying arrangements and to subsidize predatory pricing in one market with profits in another.[44] Simultaneously, the growing scale and diversity of the monopolists' business enabled them to extract progressively more favorable treatment (and induce discriminatory treatment for competitors) from their suppliers.[45]

The development of monopoly, in other words, was understood as a dynamic process in which mergers, tying arrangements, and discriminatory dealing were the principal instruments for the progressive conversion of financial power into market power and market power into more financial power.[46] These methods were "monopolistic" because they inherently deployed financial or market power to "get competitors out of the way" by buying, excluding, or suppressing them—all without having to compete on the merits or "do the thing better."[47] Their role in the process of monopolizing was not to "singly or in themselves" create a monopoly, but to cumulatively, over time, displace competition and accrete power toward centers of aggregated wealth or existing dominance.

The centripetal nature of these methods and their integral function to the snowballing development of monopoly power meant they were largely incompatible with the democratic coordination of markets which the Sherman Act's restraint-of-trade formulation was adopted to accommodate. Accordingly, there was no justification for keeping the prohibition of these methods dependent upon a careful, multi-directional, case-by-case balancing of their potential benefits and potential harms to competition under the Rule of Reason. Seeking to "arrest the creation of trusts, conspiracies, and monopolies in their incipiency," Congress prohibited corporate mergers, tying arrangements, and commercial discrimination in any case where their use "may" displace competition or "may" contribute to the power-creation processes of monopoly—regardless of other considerations.[48]

Unfortunately for Congress, almost immediately after the Clayton Act was enacted, problems in Section 7's drafting led courts to weaken its prohibition on mergers. Because a literal reading of the original Section 7 would have prohibited mergers between even the smallest, most localized competitors, from the beginning courts tended to ignore its prohibitive language (on grounds of absurdity or constitutional avoidance) and revert

to the rule-of-reason in merger cases.[49] The decisive blow, however, came in 1926, when the Supreme Court held that Section 7 applied only to stock—not asset—mergers.[50] The provision was immediately considered a dead letter.[51] A wave of asset-based mergers took off that same year.[52] Within five years, 4,800 mergers were consummated—a record pace at the time.[53] Although the Great Depression soon brought merger activity to a temporary halt, another consolidation wave began in 1940 and accelerated in the wake of World War II.[54] Fearing the key role of corporate mergers in the processes of monopoly and concentration, Congress enacted the Celler-Kefauver Amendment in 1950 to establish a "new statutory formula for the legality of mergers"[55]—a formula which, according to its proponents, would "call a halt to the merger movement that is going on in this country."[56]

C. The Celler-Kefauver Amendment: Formulating an Effective Anti-Merger Policy

The legislative history of the Celler-Kefauver Amendment reveals a clear embrace of an antimonopoly vision of markets by lawmakers and their "reliance upon a structural theory of competition which stresses the advantages of a large number of small-sized firms."[57] The Amendment stemmed directly from the Temporary National Economic Committee's (TNEC) landmark 3-year investigation into the causes and effects of concentration in our economy.[58] Following the conclusion of its investigation in 1941, TNEC called for a legislative program of "economic restructuring" that would "stop the processes of concentration" and secure a "permanent decentralization" of economic power in American society.[59] Finding that mergers had "hastened the growth of the concentration of economic power and had contributed in major part toward the elimination of competition," TNEC recommended the passage of a law that would "halt the merger process in its inception."[60]

Senator Joseph O'Mahoney, who had served as TNEC's chair, immediately introduced the anti-merger legislation recommended by the committee.[61] Each subsequent Congress considered similar bills from Senator O'Mahoney and others in the House and Senate until 1950.[62] Meanwhile, Congress acted vigorously—through legislation, select committees, and hearings—to deconsolidate industries and strengthen small businesses.[63] In 1941, the House of Representative approved a resolution by Representative Wright Patman creating the Select Committee on Small Business to "study and investigate the National Defense Program in its relationship to small business in the United States."[64] Prior to this time, the term "small business" was not generally used and had no meaning in federal law and policy.[65] The House Small Business Committee's investigations stirred Congress to change that—in 1942, it passed the Small Business Mobilization Act.[66]

Consistent with the antimonopoly vision animating the Sherman and Clayton Acts, the Small Business Mobilization Act authorized small businesses to cooperate in war production without fear of violating the antitrust laws and established the Smaller War Plants Corporation to finance that cooperation.[67] Relying on this Act, millions of small, independent businesses (each with fewer than 500 employees) freely coordinated their resources to create productive capacities that rivaled, if not exceeded, the efficiency of the largest manufacturers.[68] Congress did not forget these achievements. As the war's end came near, Congress made reversing the processes of concentration and securing a permanent decentralization of economic power its explicit policy in the Surplus Property Act of 1944.[69] Federal agencies were instructed to distribute the government's enormous wartime industrial capacity with unequivocal objectives to "discourage monopolistic practices," to "strengthen and preserve the competitive position of small business concerns," to "foster the development of new independent enterprises," and, critically, to "develop the *maximum of independent operators* in trade, industry, and agriculture."[70]

Against this background, legislators viewed the accelerating merger wave of the post-war era as a profound threat to their vision "of a peace-time economy of free independent private enterprise."[71] In 1947 and 1948, the FTC delivered comprehensive 6(f) reports to Congress on the role of corporate mergers in promoting "the growth of giant corporations," "the disappearance of small business," and "a general increase in concentration and monopoly."[72] Centrally, these reports highlighted for Congress that corporate mergers: (a) originated "American industry['s] characteristic twentieth-century concentration of control" during the 1897-1907 merger wave; and (b) have served since 1940 as the primary vehicle for "the growth of giant corporations, by accretion, at the expense of small, independent firms" in the remaining "small business industries."[73] The two FTC reports—and the TNEC report—provided the core factual and intellectual premises on which legislators relied in passing the Celler-Kefauver Amendment and were thoroughly interwoven into its legislative history.[74]

This decade-long legislative process culminated in extensive Senate and House hearings on the nature and effect of corporate mergers that spanned the 79th, 80th, and 81st Congresses—the results of which were ultimately distilled into the committee reports, sponsor statements, and floor debates leading to the Amendment's passage.[75] Throughout this legislative history, the central theme of the Amendment's proponents was the historic, continuing, and central role of corporate mergers in the centralization of economic power within large corporations.[76] All who spoke in favor of the bill—and the committee reports—emphasized that the concentration of asset-ownership and market-control within large corporations (both in the economy as a whole and in specific industries) was both extremely high and still increasing. [77] The role of corporate mergers as a vehicle of economic concentration was highlighted invariably through examples of: (b) large corporations combining with each other; (a) new large corporations being created out of multiple smaller ones; or (c) small businesses being absorbed into large corporations.[78] Significantly, proponents unanimously argued that the 1940s merger wave had to be checked through passage of the Amendment precisely because it was pervaded by large corporations buying out small, independent businesses in traditionally fragmented industries.[79] Drawing on the FTC reports, legislators repeatedly hammered home their alarm that 93-percent of the firms acquired between 1940 and 1947 had less than $1 million in assets;[80] that more of these acquisitions occurred in "small business" industries such as textiles and food than in any other industries;[81] and that these acquisitions had taken 2,500 independent firms out of business and were gradually transforming "open and free" industries into oligopolies.[82] Almost none of these mergers had, on its own, significantly consolidated markets or harmed market performance. That was the point.

This legislative history reveals an unambiguous congressional intent to halt the concentrative mergers and acquisitions by large corporations that had pervaded contemporary and previous merger waves—and, especially, to prevent "large enterprises [from] extending their power by successive small acquisitions."[83] At the time of the Amendment's passage, the Sherman Act was interpreted to: (1) to prohibit mergers and acquisitions by monopolies accounting for 90-percent of the market *per se*; (2) to possibly prohibit mergers by oligopolists accounting for 64-percent of the market depending on case-by-case analysis under the rule of reason; and (3) to "certainly" not prohibit mergers involving market shares of 33-percent or less.[84] "[T]o cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding,"[85] the Amendment imported into Section 7 the tests of illegality applied to tying arrangements and commercial discrimination under Sections 2 and 3 of the Clayton Act (*i.e.*, the tests of substantially lessening competition and tending to create a monopoly).[86] In the 1949 *Standard Stations* case, the Supreme Court had decided that these tests of illegality must be applied through a structural presumption against all tying arrangements involving a "substantial" amount of commerce.[87] Although the Senate Report was issued before this

Supreme Court decision was handed down, the House Report was issued two months after—and the House Report stated directly that the Amendment's tests are intended to be applied similarly.[88]

To fortify this new standard against "the tendency of the courts in cases under [the original Section 7] to revert to the Sherman Act test," the Amendment further modified the original section to remove the main justifications that courts had used to ignore Section 7's original text in the past—namely, its potential to prohibit mergers between small, local businesses.[89] Specifically, the original Section 7 prohibited any merger that (1) lessened competition between the acquiring and acquired firm or (2) restrained commerce in any "community" in the country.[90] Since construing this language literally might have prohibited "any local enterprise in a small town from buying up another local enterprise in the [same] small town," lawmakers found it was practically never applied.[91] The Amendment sought to correct this defect by removing the "acquiring-acquired" and "community" phrasing from Section 7 and by prohibiting mergers based on their effect on competition (writ large) or tendency to create a monopoly "in any line of commerce in any *section* of the country."[92] As committee reports and sponsor statements indicate, the central purpose of these changes was to avoid prohibiting mergers between small, local businesses that were "inconsequential" or "economically insignificant," or "would [make] no perceptible change" in competition.[93] By dropping these provisions that had led courts to abandon the statutory text, lawmakers sought to clarify its "intent to give the [Amendment] broad application to acquisitions that are economically significant" and to "assure a broader construction of [Section 7's] more fundamental provisions . . . than had been given in the past."[94]

In this way, Congress structured the Celler-Kefauver Amendment to promote democratic coordination among small businesses while broadly constraining the ability of large corporations to use mergers to consolidate economic power.[95] Where the original Section 7 only prohibited mergers that affected "competition" as the immediate rivalry between the merging firms, the Amendment prohibited mergers that posed a threat to "competition" as the normative mechanism of market organization in any line of commerce.[96] In this context, competition is not a theoretical ideal; it is a real-world process of economic rivalry to be instantiated and preserved among actual competitors. For example, the House Report emphasized the following (non-exclusive) ways that competition might be lessened within the meaning of the Amendment:

> (1) The "elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition";
>
> (2) An "increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive";
>
> (3) An "undue reduction in the number of competing enterprises"; and
>
> (4) The "establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete."[97]

None of these guideposts for enforcement (except, perhaps, the first) is easily reconcilable with an ideal of "natural" or "perfect" competition as understood in economic theory. All of them, by contrast, are fully consonant with protecting Congress's moral vision of a "peacetime economy of free independent private enterprise"—an economy in which "monopolistic practices" (such as substantial corporate mergers) are discouraged, the "competitive position of small businesses" is preserved (against the growth of large-size firms), the "maximum of independent operators" is developed (by preventing undue reductions in their numbers), and

"discrimination against small and new enterprises" is prevented (by foiling the formation of unfair buyer-seller relationships)—from corporate merger waves.

The end result of the legislative process, in short, was an anti-merger law with "broad application to acquisitions that are economically significant"[98] and a strong preference for horizontal over vertical mechanisms of market organization. Legislators viewed corporate mergers as just another "road to monopoly"—some even called it a "highway to monopoly"—that Congress thought it had outlawed back in 1914.[99] During the floor debates, and in the committee reports, the words "monopoly" and "monopolistic" were not economic terms; they were almost invariably used to refer to the few large firms, or oligopolists, which shared the lion's share of a given market and the methods that facilitated their growth.[100] The "paradox" for legislators was that, by virtue of the "loophole" in Section 7, the antitrust laws were prohibiting the "weaker, less effective, cooperative methods of eliminating competition"[101] used to create and maintain oligopoly control—while permitting the "permanent and more effective method of consolidation under a single management."[102] By reshaping Section 7 to prohibit all mergers which detracted from competition as a process of market organization, lawmakers fashioned a single, broad standard that reached all mergers regardless of whether they were horizontal, vertical, or conglomerate—but left small, locally-oriented business free to coordinate and cooperate.[103] In this sense, the Celler-Kefauver Amendment was designed, in the words of the Senate Report, to "limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."[104]

D. The Policy Objectives of Merger Enforcement — As Defined by Congress

Against this background, it is clear that Congress enacted the core antitrust laws applicable to merger enforcement with "a strong prophylactic orientation against the concentration of private economic power."[105] "Distrust of power," as the legal scholar Eleanor M. Fox has written, "is the one central and common ground that over time has unified [congressional] support for antitrust statutes."[106] Enacted to stand *against* concentration, the antitrust laws are fundamentally intended to preserve a set of structural conditions—"competition"—characterized by the wide dispersion of market control and economic power among independent participants, both for its own sake and to achieve a variety of policy objectives and outcomes.[107] Centrally, these objectives include: (1) protecting liberty and self-government; (2) preventing large corporations from extorting wealth from consumers, farmers, workers, small producers, and local merchants; and (3) preserving open and fair markets for entrepreneurs and small businesses.[108]

Legislators sought to disperse economic power because they believed excessive concentration threatened our individual liberties and undermined our capacity for self-government.[109] There were at least three facets to this concern. First, lawmakers sought to restrict concentration because they believed outsized economic power created outsized political influence.[110] They feared how large corporations could use their aggregated wealth, control over people and resources, or sheer aggregate size to "intervene in politics"—to corrupt officials, defy the law, or extract favorable government policy and further entrench themselves.[111] Second, lawmakers worried that economic concentration enabled corporate giants to subject citizens to arbitrary control in their livelihoods and to preclude citizens from freely exercising their political and economic freedoms.[112] Finally, lawmakers argued that economic concentration should be curtailed because it centralized the ownership and control of economic life in national and international corporations.[113] In doing so, economic concentration eroded individual liberty and disempowered the States and local communities from "direct[ing] their own economic welfare . . . and political future."[114] This was a particularly salient premise for the proponents of the

Celler-Kefauver Amendment, who argued the bill was necessary to stop a "rising tide" of consolidation from hollowing the civic capacity of local communities and deepening Americans' dependence on absentee decision-makers.[115]

Congress also sought to prevent large corporations from consolidating the market power to unjustly extract wealth from consumers, farmers, workers, and other small producers.[116] The legislative history of the Sherman Act, for example, reveals a consistent recognition that trusts and monopolies "operate with a double-edged sword," exercising great power as both sellers and buyers to "rob" and "extort" ordinary Americans.[117] The exploitation of farmers by the trusts and monopolies of the food-processing industries was an especially salient concern for lawmakers in enacting the Sherman Act and the Clayton Act.[118] It is important to note, however, that neither raising prices nor lowering prices—be it for consumers or producers—was an end in itself for lawmakers.[119] Although prices were generally falling in the United States in the late 19th and early 20th centuries, legislators condemned the *power* of large corporations to raise prices arbitrarily and capture wealth from ordinary people.[120] As suggested in a floor speech by Senator Platt that was pivotal to the Senate's adoption of the Sherman Act's restraint-of-trade phrasing, the objective for Congress was to preserve a dispersion of power that enables coordination and bargaining for "prices [that are] just and reasonable and fair . . . [and] will render a fair return to all persons engaged in its production."[121]

Finally, the antitrust laws stand for "preserv[ing] the chances of the average man to make a place for himself in business."[122] The protection of small businesses from overweening economic power was an expressed goal of legislators.[123] They believed Americans had a right to economic liberty and sought to constrain the power of corporate giants to control, dominate, or exclude "small men, small capitalists, small enterprises" in the marketplace.[124] More broadly, legislators also intended the antitrust laws to prevent the concentration of economic power itself from eroding equal opportunity in business.[125] Members of Congress understood that concentration is a "dynamic force" in American business, and that mergers have cascading effects on industries and supply chains.[126] They also recognized that extreme concentrations of economic power in large enterprises—particularly when they manifest in too-big-to-fail institutions or vast conglomerate enclaves—create intractable inequalities and are inherently self-entrenching.[127] Congress sought to safeguard our "economic way of life" from these destructive dynamics by preserving "fragmented industries and markets" characterized by "small, viable, locally owned business."[128]

II. The Consumer Welfare Framework: Ignoring Congressional Intent & Crippling Merger Enforcement Since 1982

Throughout the mid-20th century, the Supreme Court and the Antitrust Agencies applied the antitrust laws with fidelity to Congress's design to check the consolidation of power in the hands of the few.[129] It was broadly understood that, although Congress had not given "specific definitions and directions" for their implementation, it had passed the antitrust laws with "a fairly consistent set of value premises" and a rough consensus around "broad political and economic objectives."[130] The role of judges and enforcers, in turn, was to resolve statutory uncertainties and formulate decision rules with an eye to creating a "workable system" for effectuating congressional intent through the available judicial and administrative mechanisms.[131] In this sense, midcentury antitrust was "guided by principles."[132] The law was "*for* diversity and access to markets; it was *against* high concentration and abuses of power."[133] Carrying this prophylactic orientation into practice, interpretation and enforcement adopted bright-line rules and structural presumptions designed to thwart the consolidation of economic power "in its incipiency."[134]

Since the 1980s, however, the interpretation and enforcement of the antitrust laws has "come to be unmoored" from congressional values and objectives and, indeed, "from any sense of legislative direction."[135] Instead, the conventional wisdom has become that antitrust is a "quasi-common law realm," in which statutes are "blank checks," inviting judges and enforcers to pursue their *own* normative vision for what makes "businesses and markets . . . work in socially efficient ways."[136] This shift has arguably been most profound in merger enforcement, which, in the words of legal scholars Harry First and Spencer Webber Waller, has become "so far removed from the legislative purposes that animated [the Celler-Kefauver Amendment] that it is hard to see the connection between the statute and current interpretation."[137]

A. Ignoring Congress's Intent to Preserve Competition

The merger guidelines today—as they have since 1982—adhere to a consumer welfare framework that substitutes microeconomic theory for congressional intent and cripples antitrust enforcement from the inside out. As is now widely agreed, consumer welfare's advocates always had their legislative history wrong.[138] Neither the Sherman Act nor any other antitrust statute was ever merely a "consumer welfare prescription"—no matter how narrowly or broadly that statement is interpreted.[139] Congress had a broader constituency in mind for antitrust than consumers and had no intention for enforcers to pursue lower prices or economic efficiency as ends in themselves.[140] But the welfare framework of the current guidelines does not simply narrow the *scope* of merger enforcement; more fundamentally, it warps—indeed, turns on its head—the legal standard for mergers that Congress enacted.[141]

The "unifying theme" of the 2010 Guidelines is that "mergers should not be permitted . . . to encourage one or more firms to raise price, reduce output, diminish innovation or otherwise harm customers as a result of diminished competitive constraints or incentives."[142] Under this framework, competition has no independent import or normative content. No state of competition is good or bad. The state of competition is relevant only if it has a discernible effect on the welfare of consumers; it is only important when those effects are discernably negative.[143] With competition thus sequestered as a normative standard for mergers, the 2010 Guidelines arbitrate the legality of mergers by applying an arbitrary set of analytical concepts drawn from microeconomic theory to measure (or attempt to measure) a merger's potential effect on consumers.[144]

This approach—placing competition in the service of welfare—is a "grotesque distortion of the antitrust laws that Congress passed."[145] Competition is a real-world process defined by certain structures and rules. Welfare is an economic outcome that doesn't much care about the process which achieves it.[146] But Congress *did* care about the process. That is *why* antitrust laws exist. By ignoring competition as a normative standard, the Guidelines open the door to freewheeling economic analysis that is based, largely, on conceptions of markets and market behavior that are at best irrelevant and at worst deeply antithetical to preserving competition.[147]

The Antitrust Agencies' consideration of "efficiencies" as a "pro-competitive" offset for the "anticompetitive" effects of a merger is the prime example in this regard. Because negative welfare effects are the touchstone of whether a merger is "anticompetitive" under the Guidelines, Section 10 provides that a merger's "potential to generate significant efficiencies" that "may result in lower prices, improved quality, enhanced service, or new products" will potentially remedy a merger's negative effects on "competition."[148] More structurally, the Antitrust Agencies have simply assumed that most mergers generate adequate efficiencies in order

to (a) set successively higher concentration thresholds in the Merger Guidelines, and (b) make dramatically fewer Second Requests when mergers breach those thresholds.[149]

Setting aside the questions of whether mergers typically generate efficiencies (they don't[150]) and whether we can meaningfully predict their effects on consumers (we can't[151]), the notion that a merger's potential efficiencies are "pro-competitive" flagrantly contradicts the text and intent of the Celler-Kefauver Amendment. To begin with, there is no ordinary-meaning interpretation of Section 7 under which the Agencies can simply "balance" efficiency against a lessening of competition or a tendency toward monopoly.[152] The legislative history is even less hospitable to efficiency: The Sherman, Clayton, and FTC Acts were all enacted before the concept of efficiency as economists use it today was even developed in the 1920s.[153] Moreover, Congress passed all three of these statutes over objections that restraining consolidation might reduce output or increase prices.[154] In the legislative process leading to the passage of the Celler-Kefauver Amendment specifically, "none of the justifications for mergers by big companies were accorded any significance by Congress."[155] Instead, "[e]fficiency, expansion, and the like were ignored or simply brushed aside in the deliberations."[156] This was not an accident. It reflected the considered economic policy of Congress after a decade of exhaustive congressional investigations into the nature and effects of corporate mergers in our economy.[157]

The basic economic conclusions that legislators derived from this decade of congressional study were that, in general, mergers: (a) did not generate productive efficiencies; (b) produced little, if any, economic value for the public; and (c) functioned primarily as a vehicle for large corporations to consolidate economic power at the expense of small, independent business.[158] Since consolidation slackened competitive pressures and diverted investment from new capacities and independent enterprises toward corporate empire-building, mergers were also found to have their *own* negative effects on efficiency.[159] Meanwhile, other methods for achieving economies of scale—such as internal expansion or cooperation between small businesses—were found to deliver all of mergers' alleged benefits without the concentrative baggage.[160] Accordingly, based (in part) on this policy judgment about the relative economic value of mergers compared to other business methods, lawmakers drafted the Amendment to prohibit all mergers whose effect "may be" to "substantially lessen competition" or "tend to create a monopoly" in "any line of commerce in any section of the country"—without exceptions.[161]

The fact that efficiencies *might* result from a merger, and *might* not be realizable in any of the other ways preferred by Congress, and *might* subsequently, if realized, be used by the merged firm in a way that conceivably *might* improve the competitive process in the future,[162] is simply irrelevant to applying the tests of illegality under Section 7—both of which, in the end, are simply about preserving the competition that exists.[163] Other concepts—such as rapid entrants, which are imaginary future competitors (however rapid) used to justify losing an existing one,[164] or the Herfindahl-Hirschman Index, which was developed to study pricing power, not competition, is inversely correlated with oligopoly market structures, and invites needless disputes over data sources and marginal competitors[165]—might not be as brazenly inconsistent with preserving competition, but they still amplify burdens for enforcers while adding little value from the standpoint of preserving competition. "[I]n seeking expertness," as the legal school Derek Bok warned in his seminal article on the Celler-Kefauver Amendment, it seems the Agencies have "only end[ed] in extravagance."[166]

B. Crippling Enforcement from the Inside Out

In 1967, Senator Clifford Hanson sent a letter to Thurman Arnold asking for his opinion on the emerging Chicago School of economics. Arnold said it was "fantastic nonsense."[167] Arnold was not wrong. One of

the ways the consumer-welfare framework has crippled merger enforcement is that it has been accompanied by "a series of neoclassical economic theories about how markets work" that are "overly simplistic and systematically bias against intervention."[168] These include, for example, the basic assumptions that market outcomes are natural and created by standalone market forces;[169] that firms are rational and profit-maximizing;[170] that abuses of market power necessarily generate higher profit margins;[171] that everyone has perfect information about markets and entry barriers do not really exist;[172] that dominant firms are always threatened by potential market entrants;[173] and that, as a result, markets are efficient and self-correcting without antitrust's crude interventions.[174] They also include a broader set of seemingly more applied yet just as sweeping theorems about how benign consolidation must be: Oligopolies compete. Cartels are unstable. Monopolies innovate. There is only a single monopoly profit. Vertical mergers eliminate double marginalization. Firms merge for efficiencies and mergers actually generate efficiencies.[175] All of these ideas disinvite enforcement and are used to frustrate enforcement when it is attempted. None of them has much basis in reality.

But the more fundamental reason that merger enforcement has atrophied under the consumer-welfare framework is simply that it has been pegged to welfare *effects* instead of the competitive *process*.[176] Regardless of the school of economics applied, predicting a merger's short-term effects on prices or output—let alone its longer-term effects or its effects on more nebulous phenomena like innovation or quality—is an inherently speculative exercise.[177] It requires the Antitrust Agencies to (attempt to) measure and balance incommensurate and largely unknowable quantities based on ever-contestable assumptions about the future behavior of complex ecosystems[178]—all of which only serves to shroud enforcement in "chronic epistemological doubt and uncertainty."[179] When microeconomic analysis is applied to help solve this chronic doubt, it gets worse. As ample scholarship has recently documented, microeconomic foundations are ill-founded, core microeconomic concepts—including "efficiency" and "incentives"—are subjective and value-laden, and microeconomic analysis itself tends to be highly idiosyncratic and assumption-driven. As a result, the economic modeling of welfare effects is bound to be contestable and malleable—and not particularly predictive to boot.[180]

In practice, the inherent uncertainty of welfare analysis has made bright-line rules and structural presumptions unworkable and the merger enforcement process dramatically more burdensome for the government. Since a merger's effects are indeterminate and economic analysis is malleable, ever-more sophisticated "dynamic competition models" can be used (and have been used) to defensibly rebut a presumption of negative welfare effects even in extremely concentrated markets.[181] When the Antitrust Agencies are forced to respond with their own competition models, technocratic disputes among opposing economists about assumptions, methods, data sources and so forth are practically unavoidable—leading a merger's evaluation inevitably down the rabbit hole of complex and interminable inquiries into market dynamics.[182] This not only makes enforcement unpredictable and case-dependent, but also extraordinarily costly and time-consuming, as the government is routinely forced to gather and analyze industry-wide data, conduct voluminous discovery, and litigate manifold evidentiary issues against sophisticated parties.[183] Since "[e]conomics is incapable of providing enforcers many of the definitive answers they seek" as to which mergers are *truly* harmful to consumer welfare,[184] enforcement actions have devolved into interminable and largely fruitless technocratic disputes—leading judges, in turn, to embrace a doctrinal preference for under-enforcement to avoid the "error cost" of condemning mergers that are potentially welfare-positive.[185]

This economic decision-making framework and the error-cost preference for under-enforcement it has fostered have flatly subverted congressional intent and turned the text of Section 7 on its head. To begin with, Congress enacted the Clayton Act and the Celler-Kefauver Amendment specifically to prohibit mergers that

pose a risk of harming competition or promoting monopoly—regardless of their other merits or their potential to somehow promote competition.[186] Although the probabilistic standard Congress fashioned in Section 7 requires more than "sheer speculation," it does not require "firm prediction."[187] The legislative history reveals a clear intent for this prohibition to apply without requiring enforcers "to speculate as to what is in the 'back of the minds' of those who a promote a merger" or as to whether the merged firm will have "the power to destroy or exclude competitors or fix prices."[188] Fundamentally, this means the rules governing corporate mergers must be "drawn in such a way that the burdens of our ignorance [will] fall upon the merging firms and not upon the public interest in maintaining competition and restraining monopoly power."[189] But the current framework does just the opposite. It requires enforcers to produce rigorous predictions of inherently speculative effects—and then gives merging firms a free pass when such prediction proves (predictably) impossible in the vast majority of cases.

That is not the law Congress passed. Reinterpreted through the looking glass of consumer welfare, "a once-populist and progressive law against exploitation has become the law for exploiters."[190] Characterized as the "Anti-Merger Act" by its proponents and commentators upon its passage, the Celler-Kefauver Amendment today "prohibit[s] almost nothing at all."[191] Because the current merger guidelines embrace inherently uncertain decision rules, leading oligopolists now confidently propose five-to-four and four-to-three mergers[192]—practically daring enforcers to challenge what have been called "facially illegal" transactions.[193] Because the Agencies have not been able to credibly enforce concentration thresholds, they have resorted to successively increasing them.[194] The 1982 merger guidelines established *de facto* legality for mergers in markets with HHI of less than 1,000, but stated that mergers which increased HHI by 100 points in markets with HHI greater than 1,000 would be presumptively illegal.[195] By 1992, that threshold had been raised to 1,800.[196] By 2010, it was 2,500—a level that roughly corresponds to C4 ratios in excess of 90-percent (and that is only if there is substantial inequality in market shares between the top four firms). Upon the adoption of the 2010 Horizontal Merger Guidelines, AAG Christine Varney indicated these increases simply "closed the gaps between the Guidelines and actual agency practice"—that is, the gap between the Guidelines and what the Antitrust Agencies were able or willing to prosecute.[197]

Interestingly, back in 1960, the legal scholar Derek Bok predicted that, if the tests of legality under Section 7 were pegged to the ability of economists to predict a merger's anticompetitive effects, none but the "very largest acquisitions" and "those which would support a finding of monopolistic intent" would be prohibited.[198] Bok found that outcome problematic because this limited set of acquisitions was, at the time, already prohibited by the Sherman Act[199]—and the Celler-Kefauver Amendment was intended to "reach far beyond the Sherman Act."[200] Under the consumer-welfare framework, Bok's prediction has come true. The Agencies are now forced to "undertake full-blown analyses of even the largest mergers for their specific anticompetitive potential—not only calculating shares and concentration, but evaluating all possibly offsetting factors, including claimed benefits from the merger, and developing a theory of how the merger is likely to result in competitive harm."[201] This has made merger analysis under Section 7 practically indistinguishable from rule-of-reason analysis under the Sherman Act—which, as Judge Posner once explained, is "little more than a euphemism for nonliability."[202]

The FTC's published merger record—covering the period from 1996 to 2011—reveals just how much enforcement has atrophied due to the Agencies' reversion to rule-of-reason analysis under the consumer-welfare framework. As of the first year for which data is available, 1996, the FTC was no longer challenging mergers in markets with eight or more significant competitors. This alone was a significant relaxation of enforcement

from midcentury practice and certainly a deviation from congressional intent. After 1996, however, things got worse. The likelihood that the FTC would challenge a merger leaving even *five or more* significant competitors declined consistently and precipitously—until it reached zero in 2008. In other words, by 2008, the FTC had "abandoned merger enforcement" in what even then-effective merger guidelines had called "high-to-moderately high concentration markets."[203]

Beyond horizontal mergers, the Antitrust Agencies have largely taken a hands-off, no-questions-asked approach to vertical and conglomerate mergers.[204] For example, in the case of one vertical merger, the DOJ found the consolidation would have no consumer benefit whatsoever—and still declined to challenge it.[205] Even when the Agencies have taken action against mergers—horizontal, vertical, or otherwise—the Agencies' strong preference has been to settle for divestitures or behavioral restrictions instead of seeking to enjoin the merger in its entirety.[206] The track record of these "remedies" in preserving competition has not been promising.[207] All in all, it "appears the agencies have achieved the worst of all possible worlds by embracing nebulous legal standards that produce neither procedural efficiency nor substantive accuracy."[208]

III. Merger Enforcement Since the 1980s Has Failed to Achieve Congress's Policy Objectives in Food System Markets

The Antitrust Agencies' embrace of the consumer-welfare framework and the resultant atrophy of merger enforcement has, according to economist John Kwoka, "contributed directly to the wave of consolidation in many U.S. industries" over the past four decades.[209] A careful study conducted by Chicago School scholar Sam Pelzman in 2014 reported that "concentration, which had been unchanged for all of the 20th century, began rising at the same time that merger policy changed"—namely, with the adoption of the consumer-welfare framework in the early 1980s.[210] Today, across the board, the policy objectives that Congress sought to achieve through the antitrust laws—especially the Celler-Kefauver Amendment—have been undermined. Oligopolies have become entrenched across our economy.[211] The economic fates of citizens and whole communities are being decided by "men on the 54th floor with only balance sheets and profit and loss statements in their hands," as Justice Douglas warned.[212] Dominant firms have increased markups for consumers,[213] depressed wages for workers,[214] and squeezed farmers and other small suppliers.[215] Markets have become closed and sclerotic, with investment "dead zones" spreading[216] and new business formation plummeting.[217] To paraphrase the FTC's 1948 report to Congress, the merger waves that have washed across the American economy over the past four decades have all but eliminated the "unseen hand of competition" in many markets—and replaced it with the "dead hand of corporate control."[218]

All of the above is true in our food system and then some. In the 1970s, President Nixon's Secretary of Agriculture Earl Butz infamously told farmers to "get big or get out." Butz's agriculture policies throughout the 1970's—followed by the atrophy of antitrust enforcement since the 1980s—opened the door to the heavily consolidated food system we now live in. While farmers dutifully followed Butz's exhortations, planting "fence row to fence row," taking on debt to buy land, machinery, and other inputs, Butz killed vital supply chain management programs and sold America's grain reserves on international markets. When the bubble inevitably burst in the 1980's, families across the Midwest lost their farms. The largest corporations grew progressively larger, gobbling up family farms at cut-rate prices, and expanding their reach into various adjacent and vertically-related markets through mergers. Against this backdrop, it was déjà vu for farmers in 2019 when then-Secretary of Agriculture Sonny Perdue told dairy farmers in Wisconsin that "in America, the big get bigger and the small

go out." Whether Butz and Perdue's statements were intended as prophecy, warning, or other, they accurately reflect the state of America's food system today.

A. Enabling Dominant Firms to Concentrate Political & Economic Power Across the Food System

i. Unrestrained Corporate Mergers Have led to Unprecedented Consolidation in Food System Markets

The entrenchment of oligopoly has been especially pronounced in food system markets. The legislative history of the Celler-Kefauver Amendment indicates unanimous concern among the bill's proponents about industries where the top four firms controlled a little over 30-percent of the market. In U.S. food system markets, CR4 ratios surge far beyond this percentage—nearly tripling it in some case—in such diverse sectors as soybean processing, beef processing, pork processing, poultry processing, cold cereal, soft drinks, beer, salty snacks, bread, ice cream, fresh cut salad, wine, retail grocery, and convenience stores.[219]

But horizontal consolidation does not capture the full extent of the economic power these corporations hold. Through a series of upstream and downstream mergers, dominant firms have gained extreme bargaining power over trading partners and unchallengeable capacity to foreclose or marginalize competition at every stage in various supply chains. Simultaneously, dominant firms have expanded across product markets—primarily through product-extension and conglomerate mergers—to insulate against cross-industry competition or to develop product-tying and other capacities for entrenchment and exclusion. Dominant meatpacking firms, for example, have acquired cross-industry competitors in pork and poultry to become dominant protein conglomerates. Similarly, after a series of mergers in 2015 and 2016, the number of significant agrochemical companies went from six to four and each acquired a dominant position in the adjacent seed market—creating a rigid interdependency between the two products.

It is also important to note that these numbers are often substantially more significant on the local or regional level. Many food system industries have geographic and transportation limitations; so, while something like poultry processing may have a CR4 of 54% nationally,[220] many poultry farmers have only one or, at most, two processors that they can access regionally—essentially stripping them of any bargaining power and forcing them to accept the terms of whatever processing contract is offered.

Consolidation has become a defining trait of the food system across all stages of production—globally, nationally, and regionally—and it shows no signs of slowing down.[221] Major mergers and acquisitions, with industry-shaping consequences, are still being announced. Just this past summer, Cargill and Continental Grain announced a joint venture to acquire Sanderson Farms.[222] Since Continental Grain already owns Wayne Farms, a vertically integrated poultry processor, this combination will raise that industry's CR4 from 54% to 60%. Since Wayne Farms and Sanderson Farms are particularly dominant in the Southeast, the implications of this merger for the chicken integrator's market power at the regional level are even more dire. Within days of the merger's announcement, farmers across the Southeast received notices that amounted to slashing their earnings by one-third.[223]

ii. Food System Concentration Has Made Rural Communities Dependent on Absentee Corporations & Atrophied Local Capacities for Self-Determination

Food system concentration has had far-reaching consequences, but rural communities in particular have been decimated by dominant corporations' production models. As corporations have consolidated through mergers and acquisitions, there has been a corresponding atrophy in the civic fabric of rural communities, marked by absentee ownership and disappearance of once thriving economic ecosystems.

Farm size and structure are major contributing factors to the changed rural landscape. Due to the pressures of an economies-of-scale driven market, farms have grown tremendously over the last few decades. The midpoint in farm size has grown from 650 acres in 1987 to 1,445 acres in 2017. Most of that growth came at the expense of the 100–999-acre farms: 85-90 million acres of cropland transitioned out of the mid-size class and into the largest class over 1987-2017.[224] As farms grow and consolidate, they are changing their structures dramatically, moving away from the historical family-owned and -operated model to an industrialized operation model, with corresponding increases in rates of absentee corporate ownership and vertical integration.[225]

There was a time when farming meant prosperity for the surrounding communities: producers bought their inputs from independent local suppliers, processed their foods at local processing facilities, banked at local community banks, and sold much of their product to locally-owned businesses. Indeed, counties in which farms are still predominantly family-owned and family-operated have better socioeconomic well-being, such as lower family poverty, higher median family income, lower unemployment, and lower infant mortality.[226] Counties where industrialized farming has become the predominant model show higher income inequality, lower family income, higher poverty, and higher income inequality over time.[227] Across the country, industrial agriculture has failed to deliver its promises of wealth and prosperity, and instead has left most communities with detrimental economic, civic, and environmental baggage. [228]

When consolidated food conglomerates push out independent farmers and local businesses, the populations and corresponding tax revenues for the area plummet. As property values drop,[229] schools lose funding and hospitals are forced to shut their doors. Loss of opportunity and critical care infrastructure inevitably leads to higher rates of poverty and food insecurity. These problems are further exacerbated by the additional stresses industrial farming places on rural communities' infrastructure–particularly their road systems, which were not built to handle the kind of heavy equipment traffic that support industrial operations. [230] Meanwhile, corporations extract enormous amounts of money in tax credits and rebates, profiting while community infrastructure crumbles.[231]

As corporations gain ever-greater control over America's farmland, land access issues and absentee ownership are further hollowing out rural communities. Nearly 40% of all U.S. farmland is either rented or leased—and 80% of the rented or leased farmland is absentee-owned.[232] Overall, the USDA estimates that 30% of all cropland is owned by non-operator absentee landlords.[233] Forced to fight with deep-pocketed corporations, new farmers often cite access to land and capital as a number one barrier to entry.[234] Many farmers are no longer responsible for the land they work and largely absent corporate landlords with little to no interest or investment in local communities dictate practices based on financial return.

This loss of accountability has dramatically impacted our environment. Farmers in short-term lease agreements (less than 2 years) are less likely to implement any form of conservation practice, due to the

associated longer-term payouts.[235] Agriculture is the leading contributor of pollutants to our freshwater systems, nearly half of which are too polluted to swim or fish in.[236] When local water systems are no longer safe, community members suffer, but it has no personal resonance or impact on absentee owners. Similarly, CAFO operations can cause the air quality to be so bad that for entire days or even weeks neighbors are unable to go outside. Unlike independent farms, whose owners live and participate in their local communities, corporate absentee owned operations are insulated from local community pressures.

Across the country, industrial agriculture has failed to deliver on its promises of wealth and prosperity. Instead, consolidation of the food system continues to drive rural communities to the brink of disaster by extracting all the wealth and resources, leaving them hollowed out and dependent on absentee corporations. Today, rural communities face higher rates of poverty than urban areas,[237] higher percentages of the population live below the poverty line than in urban areas[238], and higher rates of food insecurity.[239] Many communities have little to no access to basic needs, such as banks or healthcare, and other critical infrastructure for self-determination. Up to 40-percent of rural Americans have reported struggling with routine medical bills, food, or housing; nearly half of rural Americans have stated they could not afford to pay an unexpected $1,000 expense of any type.[240] Loss of local businesses that once served as the backbone of rural economic ecosystems has made rural communities less resilient and more prone to longer periods of recession,[241] while outside decision-makers exercise greater and greater control over their economic and civic destinies.

iii. The Control of Food System Markets by Dominant Firms Has Distorted Our Political Economy

Increased corporate size has been linked to increased political influence.[242] In the consolidated food and agriculture industry, the centralization of power in just a few corporate hands makes it easier for dominant firms to extract favorable political outcomes. Far from benevolent giants who promote market efficiency, corporations wield this power through revolving door policies, immense financial resources, control over critical supply chain infrastructure, and sheer size to further entrench their market positions.

One technique is to treat the USDA as a revolving door to the private sector: industry leaders routinely hold positions intended to protect producers and consumers from the industry's abusive practices. This door goes both ways, with those in the USDA moving on to positions responsible for industry interests as well as former industry leaders being named to critical USDA roles.[243] A prime example is John Boehner, former speaker of the House, who now sits on the board of JBS–one of the largest protein conglomerates in the world.[244]

Corporations further exert political muscle to affect legislation by creating and disseminating information designed to encourage a favorable regulatory environment, as well as to sway specific rules or laws.[245] Massive corporations embed themselves in academic institutions,[246] fund research,[247] and spend immense amounts on advertising,[248] lobbying,[249] and campaign contributions.[250] For decades, these giants have used their financial resources to influence political decision-making.[251] The result is a regulatory environment where just a handful of corporations control what information is accessible, how it is interpreted, and who is interpreting it.[252]

Both intentionally and otherwise, corporations in the food system dictate policy by virtue of their size alone. With fewer and fewer corporations responsible for the bulk of our food production, companies like Cargill–which alone generated .06-percent of the United States GDP in 2021[253]–have become, as one Biden

administration official put it, "basically too big to fail."[254] In some instances, this translates into one corporate decision *de facto* dictating industry policy.[255] In others, government decision-makers have almost no choice but to consider corporate interests when deciding policy. Especially in a sector as critical as food, the threat of failure could have far-reaching consequences–a fact exploited by some dominant firms during the Covid-19 pandemic.[256] Importantly, policy can also equate funding opportunities. For example, in 2020, Cargill—which reported record revenues of $134.4 billion that year[257]—and its subsidiaries extracted more than $11 million dollars from federal and state subsidies, tax rebates or credits, and grant programs.[258] Moreover, corporate size reduces risk of prosecution for wrongdoing, as DOJ may be reluctant to prosecute due to "collateral consequences."[259]

Not only can consolidated corporations harness the law for their protection[260] and side-step prosecution, they can also leverage fear of the legal system against their employees. A local District Attorney may be unlikely to prosecute a case of alleged animal cruelty on a factory farm if it means facing the deep pockets of a large corporation or angering constituents who rely on that corporation for employment. And in many instances, restrictive legislation like ag-gag laws[261] prevent effective legal enforcement at a corporate level. Where criminal activity, such as animal abuse, is documented, owners commonly foist responsibility onto one or two "bad apples."[262] Slaughter facilities frequently employ undocumented immigrants who may lack the political power to fight back against exploitive working conditions or unionize.[263] Corporate control over employees and contractors often prevents internal voices of dissent from speaking out for fear of retaliation.[264]

B. Enabling Dominant Firms to Establish and Exploit Market Power Against Consumers, Farmers, and Workers

i. Harms to Consumers: Higher Prices, Worse Food

Even when measured on its own terms, the framework of evaluating mergers and acquisitions around consumer welfare has failed. Instead of seeing clear efficiency gains leading to lower prices for consumers, a growing body of research demonstrates that increased measures of concentration and market dominance have led to higher prices, increased profit margins, productivity losses, and decreases in labor shares of gross domestic product.[265] Furthermore, as corporations gain market power and competition is decreased, so too is the incentive to innovate. Increasing research has demonstrated a direct link between concentration and R&D, as corporations focus on achieving gains through acquisitions, rather than through innovation.[266] In our food system, all of these broader trends are present and magnified—resulting in higher food prices, lower food quality, reduced diversity of products, and a less resilient food supply chain.

Food prices, which are often cited as a leading reason to prioritize economies-of-scale and specialization, have experienced significant spikes in the past two decades. While the early period of food system concentration saw some price decreases, the efficiency limits of increased scale in our food production system were reached decades ago.[267] Consequently, further increases in volume do not keep prices down, but rather serve to enhance corporate power and profits.[268] Several studies have linked these higher levels of concentration to higher food prices.[269] While the Consumer Price Index (CPI) calculates the overall rate of inflation since 2000 at 64.76-percent,[270] food prices have risen 73.57-percent,[271] and prices for red meat, poultry, and eggs have risen 94.07-percent.[272] In 2020, high retail beef prices versus below-cost-of-production live cattle prices spurred a probe into beef market collusion.[273]

The especially high prices seen in the protein industry today are the result of unprecedented consolidation and integration. Through mergers and acquisitions, meatpackers have transitioned from beef companies or chicken companies to protein conglomerates. JBS and Tyson are both dominant corporations in all three major protein industries—beef, pork, and poultry processing[274]—and are also expanding into other protein sectors, such as salmon[275] and alternative proteins[276]. Without the other protein industries to check prices, these corporations have been able to conduct coordinated price increases, such as those we are seeing today.

A highly concentrated food system has also led to a reduction in food quality. The consolidated industrial farm model has resulted in products that have increased our exposure to potentially lethal bacteria.[277] Despite new food safety protocols and the government's best efforts to regulate and prevent exposure to potentially lethal bacteria (*e.g.*, salmonella, e. coli, listeria, and campylobacter), rates of foodborne illness are on the rise.[278] Campylobacter is America's leading cause of foodborne illness, just ahead of salmonella, and yet between 2015 and 2020, US poultry companies sold tens of thousands of meat products contaminated with campylobacter and salmonella.[279] 12 major US poultry companies, including Perdue, Pilgrim's Pride, Koch Foods, Foster Farms, and Tyson have all exceeded USDA standards for acceptable levels of salmonella multiple times since 2018, when the government began reporting contamination rates at individual plants.[280]

Beyond high prices and lower food quality, consumers also experience food system concentration when choosing which groceries to buy and where to buy them. On store shelves, consumers are presented with the illusion of choice, as a single corporation may market the same product under a number of different brand names. Retail options, too, have been limited by consolidation: Up until the 1990s, grocery retail was a decentralized "small business" industry. But when courts and enforcers weakened the Robinson-Patman Act in the 1980s, they facilitated the formation of large warehouse clubs and discount general merchandise stores, ushering in a new era of unfair competition and growing consolidation.[281] Faced with these new players' sheer buying power, grocery retailers took advantage of the new leniency in merger enforcement to consolidate and boost their *own* leverage with suppliers. Between 1996 and 1999, there were 385 grocery mergers.[282] The share of groceries sold by the top four grocery retailers doubled between 1994 and 2004, jumping from 17% to 34%.[283] On a national level today, the top four grocery retailers control 45% of the market,[284] but on the local level, these numbers are often much higher. In 43 metropolitan areas and 160 micropolitan markets, Walmart captures 50% or more of grocery sales, and within 38 of those regions, Walmart's share of the grocery market is 70% or more.[285] These dominant retailers now use their buyer-power to dictate terms and conditions to suppliers, which in turn forces suppliers to discriminate against smaller independent retailers, further driving consolidation, and even greater reductions in consumer choice.[286]

Finally, consumers can no longer depend on the reliability of our food system, as concentration has stripped our food system of its resilience, leaving it vulnerable to supply chain disruptions caused by any number of global and domestic events. With our food supply so dependent on a handful of corporations, the temporary closures of a single processing plant can have implications for consumers across the country. When a COVID-19 outbreak forced Smithfield to close a plant that was responsible for 5% of all pork consumed in the U.S., Smithfield's Chief Executive, Ken Sullivan, perfectly encapsulated the dire situation: "It is impossible to keep our grocery stores stocked if our plants are not running. These facility closures will also have severe, perhaps disastrous, repercussions for many in the supply chain."[287] Without a substantial shift in merger review policy, in tandem with other efforts to help support and develop a more diversified food production system, sudden and catastrophic disruptions to the food supply will continue to plague our communities.

The consumer-welfare framework has failed the American food system and its consumer. Food prices are at record high levels, quality standards as well as options have diminished, and the lack of resiliency within our food system has gone beyond an inconvenience and turned into a national security risk.

ii. Harms to Farmers: Squeezed On All Sides

Squeezed somewhere in the middle of the monopolies and monopsonies that have grown to dominate the food system industries are the farmers. They are stuck in the narrowest section of an hourglass, surrounded by buyers on one side and sellers on the other, all with massive amounts of market control. This uncomfortable position has been made worse by vertical integration that has turned buyers into sellers and sellers into buyers. From seed to fertilizers to inputs to feed to processing to retail, dominant corporations control every step of the process of food production.

Growing corporate consolidation in all agricultural sectors has yielded a handful of buyers and a handful of sellers, leaving tens of thousands of farmers struggling in between without any market power. In this situation, farmers with extremely narrow margins that do not provide nearly enough cushion to account for nature's unpredictability and the market's volatility. As a result, median on-farm income has ranged from -$1,735 to $296 between 2018 and 2021 and is forecast to be -$1,385 in 2022.[288] Every year we see more farmers sell off their farms, resulting in a dangerous combination of declining farm numbers and increasing farm size.[289]

The fertilizer industry boasts some of the highest levels of consolidation, and its rising costs have far-reaching ramifications. Only two companies supply the entirety of North America with potash, a potassium-based fertilizer: Nutrien Limited and the Mosaic Company.[290] In 2019, four corporations represented 75% of the production and sale of nitrogen-based fertilizer in the US: CF industries, Nutrien, Koch, and Yara-USA.[291] These corporations use their dominant market positions to raise prices far beyond the measures required by their increased operating expenses.[292] Instead of tying their prices to cost of production and supply and demand models, these companies use a combination of collusive behaviors to control output and tie prices to rising commodity prices—thus stealing farmers' critical profits.[293] The fertilizer companies' very own financial statements support this conclusion. They report gross manufacturing margins that are as high as 13 times that of their reported increase in cost of goods. They boast of untapped production capacities. They even explicitly acknowledge that grain prices are a driving factor in their pricing schemes, as demonstrated in 2018 when Yara stated that "[v]ariations in grain prices (corn or wheat) explain approximately 50% of the variations in the urea price, making grain one of the most important factors driving fertilizer prices."[294] While these oligopolists invoke a range of pretexts for their price hikes—from rising labor costs to supply chain disruptions to, most recently, the Russian invasion of Ukraine—what actually appears to drive fertilizer prices is a collusive calculation of the maximum profit which can be extracted from their captive customers.

The recent fertilizer hikes have aroused sufficient suspicions to cause several elected representatives[295] and USDA Secretary Vilsack to request that the Department of Justice investigate.[296] Farming is full of highs and lows; bumper years help cushion the effects of disastrous years, and are critical to farms' long-term survival. If these corporations are using their market power to tie the price of their products to the farmer's ability to pay, rather than to supply and demand, that equates to an abuse of the market. Such abuses allow concentrated corporations to extract maximum value out of the supply chain, leaving the farmer with no hope of profitability.

In addition to horizontal consolidation, corporations have used vertical integration as another mechanism by which they can strip farmers of their margins and their independence. In the cattle industry, the largest meatpackers either own or control most of the livestock needed to meet their plants' demands, meaning livestock producers are in direct competition with the corporations they depend on to buy their livestock. The meatpackers can control the price paid to ranchers for their cattle by flooding the market with their own stock whenever they want to lower the market value. Due to simultaneous horizontal consolidation, there are rarely any other options and cattle feeders are forced to accept whatever price the meatpackers offer.

Since 1970, the top four meatpackers' share of the beef market has jumped from 21% to 85%, while the producer's share of the consumer dollar has plummeted from around 70% to 37%. In this transition, cattle producers have lost an estimated $1,500 per head of their share of the consumer beef dollar to the meatpacker.[297] Today, meatpackers are using the pandemic and its related supply chain disruptions to hike consumer prices. While farmers earn less and consumers pay more than ever, companies like Cargill and Tyson are reporting record-high profits.[298]

Poultry corporations (called "integrators") have seized control over nearly every aspect of the poultry supply chain, from genetic lines and hatcheries, to feed mills and medication, to transportation and processing—essentially every activity except raising the birds. These corporations have used a perverse combination of horizontal concentration and vertical integration to exercise near-complete control over poultry farmers (called "contract growers"). More than 95-percent of poultry production[299] occurs under contract for dominant processing firms. There is no open market for live poultry ready for processing, so commercial (non-specialty) poultry growers have no viable alternatives to the contract growing system.[300] While contract growers own everything that depreciates, such as infrastructure and equipment, integrators own the one thing on the poultry farm that accrues value: the actual bird. Contract growers incur significant debt to build facilities to the integrators' exacting standards.[301] In 2016, the average loan to a beginning chicken farmer was $1.4 million,[302] most commonly used to construct and update chicken housing. A report by the Small Business Administration found that without an integrator contract, the value of the grower's facilities plummeted anywhere from 62 – 94-percent, making the housing itself "worthless."[303] Without a contract, growers have no reasonable methods for making money with the highly specialized facilities they have gone into debt to construct.

The disparity between the level of commitment required by a contract grower (who frequently cannot walk away without facing bankruptcy) and the degree of commitment offered by an integrator is startling. While the growers take on millions of dollars in debt, most contracts are very short term, with 42% of them being only flock-to-flock, and only 31% being longer than five years.[304] Because broiler genetic lines, hatcheries, and feed are all owned by the integrator, growers have little control over the health or growth outcomes of their birds, and by extension, little control over their end income.[305] Almost a quarter of all growers only have one integrator doing business in the area,[306] but even where multiple integrators are available, options are limited. A new integrator may require a grower to construct expensive updates to existing facilities, or simply refuse to deal. At least one lawsuit alleges that overlapping integrators have informal no-poach agreements whereby each integrator declines to do business with a grower contracted with another firm in the region.[307]

When the vertically integrated model of contract growing was first introduced into the poultry industry in the 1950s, there was still competition in the market. The option of other processors helped to empower farmers in contract negotiations.[308] But following the shift in merger policy in the 1980s, this all changed. As concentration in the poultry industry grew, the contracts imposed by integrators became increasingly abusive.

Today, integrators exercise unmitigated monopsony power over their growers[309]—so much so that in 2018 the Small Business Administration determined that a contract poultry grower had no independence and operated practically as an employee of their processor.[310]

iii. Harms to Workers: Monopsony and Exploitation

Studies show that labor markets across the United States began concentrating in the 1970s[311] and have now reached very high levels.[312] Monopsonies, where there is a single potential employer in certain lines of work,[313] have become common. As industries consolidate and gain market power, they also gain control over their workers. Employer-side concentration has been directly linked to decreasing wages,[314] with concentration's negative impact on wages growing more pronounced at local levels and over time.[315] Upward or downward pressures placed on buyers or suppliers generally trickles down to the worker: For instance, as a dominant buyer puts pressure on its suppliers, the supplier must cut costs to maintain profitability—such as through reduced wages and benefits to their workers.[316] One study has attributed at least 10-percent of wage stagnation since the 1970s to increased concentration at the retail level.[317] This control can also lead to abusive working environments.[318]

The meatpacking industry provides a prime example of how employers' monopsony power leads to low wages and abusive working conditions. Today, there are approximately 2,700 slaughterhouses in the U.S.– down from 10,000 plants in 1967.[319] That staggering decrease has been accompanied by a dramatic decline in real wages. In 2015, the average hourly wage for poultry-processing workers was $11 per hour—nearly 40% lower than it was in the 1980s after adjusting for inflation.[320] In 2020, meat- and poultry-processing workers earned an average hourly wage of $15.53, nearly 25-percent lower than the average manufacturing employee at $20.08 per hour.[321] Working conditions have also worsened. Meat- and poultry-processing workers face *twice* the risk of amputations as the average worker in private industry—and more than 50-percent report other injuries such as carpal tunnel syndrome, "trigger finger," tendinitis, rotator cuff injuries, lower back injuries, and chronic pain and numbness.[322] The exploitation of these workers extends to rampant abuse by supervisors, who routinely deny workers bathroom breaks, use racial slurs, and deride workers for complaining about pain or illness.[323] With meat processing plants few and far between, employees have few options other than to accept the pitiful wages and abusive working environment.

Farm labor illustrates the kind of downward pressure that consolidated downstream industries have placed on farmers. The U.S. has a history of denying farmworkers the kinds of protections offered to other laborers, making them especially vulnerable to exploitation.[324] Farmworkers were specifically excluded from The National Labor Relations Act of 1935, which forbids employers from firing a worker for joining, organizing, or supporting a labor union.[325] They were also excluded from The Fair Labor Standards Act of 1938,[326] so they are not eligible for overtime pay (the exception being a handful of states that have recently enacted laws that support this eligibility). Many farmworkers do not enjoy other basic labor protections, such as workers' compensation, health insurance, and disability insurance,[327] and less than 1-percent of farmworkers belong to a union. With rampant consolidated markets controlling nearly all of farmers' costs of production (seed, agrochemicals, fertilizers, equipment, etc.), labor has become one of the only expenses that farmers can adjust to try to keep their books out of the red. As a result, farm labor rates are some of the lowest wages in comparable industries. In 2020, the farm wage for nonsupervisory crop and livestock workers was $14.62 - 59% of the average nonfarm private-sector nonsupervisory wage.[328]

C. Enabling Dominant Firms to Close Food System Markets to Independent Business

Consolidation across the food system has made market entry more costly and difficult for independent businesses. Empowered by their outsized control of agricultural markets, consolidated corporations erode competition through a variety of means: controlling supply of essential inputs, restricting rivals' access to markets through patents, licensing, or contractual agreements, and even undercutting rivals by controlling the flow of essential information. Vertical integration coupled with horizontal concentration creates dual or multi-market entry barriers that require potential rivals in any one market to enter at multiple points in the chain in order to compete.

Beginning with farm inputs, over 200 independent seed companies were lost between 1996 and 2009, due in large part to a series of aggressive acquisitions by the largest firms.[329] During that same time period, the price of seeds increased more than the price of any other agricultural input, and in recent years, has increased as much as 30-percent annually.[330] The cost of developing transgenic traits, identifying gene sequences, and obtaining permission to use patented genetic material poses a significant barrier to entry for new and smaller firms. Studies have shown that intellectual property lawsuits between agrochemical-seed companies are common, creating difficult to navigate "patent thickets" which reduce innovation and allow the largest firms control over proprietary technologies and information to prevent competition.[331] Pre-existing licensing agreements between dominant firms further disincentivize those firms from granting new licenses at a reasonable cost.[332]

Mergers between firms in adjacent markets further bottleneck the supply of agricultural inputs through perverse forms of product integration. Dominant firms across the food system, from farm input producers to food processing integrators, have leveraged their dominant positions in various markets to create complementary products that take customers away from unintegrated companies. For example, Monsanto's dominance of agrochemicals and seeds allowed them to create interdependent products in both. In 2015, Monsanto released a new dicamba-resistant batch of soybean and cotton seeds. Because of Monsanto's integrated seed-herbicide design, farmers wanting to use dicamba—a weed killing herbicide—had to buy Monsanto's seeds, while farmers wanting to use Monsanto's seeds were encouraged to spray dicamba. Because dicamba drifts across fields and destroys non-resistant crops, however, farmers who wanted neither dicamba nor dicamba-resistant seeds were forced to switch to Monsanto's seeds to prevent crop damage resulting from their neighbors' seed and herbicide choices.[333] Investigative reporting and a growing number of lawsuits against Monsanto suggest this was not an accident. Monsanto appears to have intentionally "released the dicamba-tolerant cotton and soybean seeds and accompanying herbicides knowing that it would likely drift and damage non-tolerant seeds in order to make farmers buy the companies' systems."[334] In the first of the dicamba-drift lawsuits to go to trial, a Missouri federal jury awarded a peach farmer $15 million in compensatory damages and $250 million in punitive damages after finding the Monsanto recklessly marketed the widespread use of dicamba knowing it would "force other farmers to use their expensive products to grow dicamba-tolerant GMO crops." Monsanto, in other words, foreclosed a substantial share of the seed market to potential rivals by creating a combination of products that, quite literally, killed the competition.

Beyond patents and licensing, corporate control of the stream of information forecloses rivals by allowing dominant firms to manipulate markets and increase costs for potential rivals, while keeping their own costs low. Vertically integrated corporations may leverage information from one section of the chain to undercut rivals in another. In other cases, a corporation's position of dominance may make it privy to information not otherwise accessible, serving as a market barrier for new entrants. For instance, while USDA publishes

expanses of statistics on most agricultural industries, the hyper-vertically integrated character of the poultry market eludes capture because of the reduced opportunity for commercial exchanges where data can be gathered.[335] Instead, poultry producers rely on pay-to-play weekly reports produced by the data company Agri Stats. These reports—which contain (purportedly anonymous) information on farmer pay, flock size, processing statistics, market prices, and other proprietary information—provide a mechanism for dominant firms to monitor industry activity and manipulate practices to exclude rivals. Importantly, while Agri Stats sends reports to industry executives who pay for the service, farmers or firms without the same financial resources are not granted access. Such inequitable access to data has made it impossible for independent farmers not privy to the same insider information to compete with dominant, vertically integrated firms in any meaningful way.[336]

In other cases, dominant firms employ restrictive contracts with suppliers to curtail rivals, or strong-arm suppliers into granting favorable terms and products not available to smaller competitors. Independent farmers and retailers all over the country shared similar stories at a recent FTC listening session: massive corporations leverage their outsize market share and financial power to gain bulk discounts and better terms for supply contracts, leaving suppliers no choice but to raise prices for smaller firms.[337] Some independent grocers even reported paying higher wholesale prices than Walmart's retail prices, as well as being categorically denied access to certain products. As consolidation has snowballed across the food system, small producers and merchants of all kinds are being increasingly crushed in the wake of large corporations.

IV. From Anti-Monopoly to Pro-Monopoly and Back: Constructing Merger Guidelines That Uphold the Law

"The capitalist system of free initiative is not immortal, but is capable of dying and of dragging down with it the system of democratic government." That was the FTC's warning to Congress in 1948. The FTC urged Congress to enact the Celler-Kefauver Amendment and "plug the Section 7 loophole" because economic power had already become dangerously concentrated. "Either this country is going down the road to collectivism, or it must stand and fight for competition as the protector of all that is embodied in free enterprise."[338] There is no doubt this country—and the Agencies—face a similar crossroads today.

We urge the Agencies to abandon the consumer welfare framework. It is inconsistent with the law. It cripples enforcement. And its policy consequences have been catastrophic for Americans as consumers, producers, businesses, and citizens. The Agencies have a responsibility to reconstruct a new, administrable framework for applying the law that creates certainty in enforcement and secures compliance in the business community. We recommend the following starting points for such reconstruction.

A. Streamline Enforcement with Bright-Line Rules

The legislative history of the Clayton Act indicates that Congress expected the FTC to translate the broad prohibitions of Sections 2, 3, and 7 into administrable rules of decision.[339] In passing the Celler-Kefauver Amendment, lawmakers purposefully sought to create a legislative record that would provide enforcers with a coherent and unambiguous set of value premises and policy objectives[340]—and entrusted the FTC and the DOJ with enforcing the statute through their administrative and judicial channels. Per the Supreme Court, this dual system of enforcement under the Clayton Act "contemplate[s] standards of proof capable of administration" and should not be interpreted to require "an economic investigation" that is "impracticable" for courts and agencies alike.[341] The Agencies should seek to apply Section 7 of the Clayton Act through bright-lines rules and

avoid standards that require "incredibly complicated and prolonged economic investigation[s] into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."[342]

There are a variety of bright-line rules the Agencies can adopt or revive. The lowest-hanging fruit is the structural presumption under *Philadelphia National Bank* that a merger which produces a firm with a market share greater than 30-percent—and possibly as low as 20-percent—is illegal absent legitimate business justifications.[343] Although *Philadelphia National Bank* has not been formally overruled, the Agencies shift toward rule-of-reason merger reviews has weakened its force.[344] Re-embracing the structural presumption along with a focus on the competitive process that makes it enforceable would go a long way toward simplifying merger reviews, reducing the Agencies' reliance on speculations about future market developments, and securing compliance (or deterrence) in concentrated industries.[345] Other bright-line rules—against mergers by leading or dominant firms, mergers in concentrated markets, and mergers in markets trending toward concentration—would also faithfully track the text of Section 7 and vindicate important objectives of the Celler-Kefauver Amendment.[346]

We propose a different bright-line rule — Mergers involving any firm that has been "a substantial factor in competition" should be considered presumptively illegal subject to a showing of credible business justifications by the merging parties. This bright-line rule has direct support in the text and the legislative history of the Celler-Kefauver Amendment (which is covered below), but it is also mandated by a rational balancing of interests based on the value premises and objectives of the Amendment.[347]

As we established above, in enacting the Celler-Kefauver Amendment, Congress was primarily concerned with the absorption and disappearance of many independent businesses into larger firms, without regard to how "dynamic" or "aggressive" each of these businesses were.[348] To protect against the continued loss of independent competitors, legislators imported into Section 7 the tests of illegality under Sections 2 and 3 of the Clayton Act—and indicated their intention that those tests be applied similarly to how they were applied in *Standard Stations*.[349] That case made liability under Section 3 of the Clayton Act turn on whether "competition may be foreclosed in a substantial share of the line of commerce affected" by virtue of the tying contract at issue, and it used the amount of commerce involved in the contract to determine substantiality.[350] In *Standard Stations*, that amount was $58 million and comprised less than 6.7% of the total volume of the relevant local market.[351]

The legislative history provides meaningful guidance on how the Agencies should approach drawing the line between "substantial" and "insubstantial" competitors. For one thing, the Amendment redefined "competition," as used in Section 7, from the direct horizontal rivalry between merging firms into the process of market organization and governance to be protected in every line of commerce—and did so for the express purpose of extending Section 7 to mergers that "result in the absorption of many small firms in different and [even] completely unrelated lines of activity."[352] Against this backdrop, although the "substantiality" of a firm as a "factor in competition" could be measured by their market share in any given horizontal market, it is more appropriately measured by their economic size—that is, by the amount of resources available to the firm as an independent center of ownership and decision-making in any given competitive ecosystem. This method of measurement would also have the benefit of aligning with the broader purpose of the Celler-Kefauver Amendment—preventing mergers from increasing the concentration of economic power.[353]

Several indications suggest that the line for substantiality should be drawn closer to "not insubstantial" than the opposite. First, as the Supreme Court recognized in *Standard Stations*, lawmakers adopted the word "substantially" in the original Sections 2, 3, and 7 simply to mirror language in *Addyston Pipe & Steel Company,* describing Congress's authority to regulate interstate commerce and not to "augment the burden of proof" beyond requiring the proscribed effect to be more than *de minimis*.[354] Second, Congress identified three specific categories of mergers that would not "substantially lessen competition" under the Amendment: (1) mergers between small businesses, (2) acquisitions of failing companies, and (3) transactions involving individuals and partnerships.[355] The common thread that ties these situations together is that each would produce "only a minimal effect on any further concentration of economic power" and "no perceptible change in the intensity of competition."[356] Third and finally, there is the fact that Congress viewed corporate mergers as "methods of monopoly" whose operation is "the antithesis of meritorious competitive development"—to be discouraged among all but small, independent businesses.[357] Since Congress structurally excluded those small businesses (for the most part) from the scope of Section 7 by restricting its application to corporations "engaged in the *flow* of interstate commerce" (not just "in activities within the federal commerce power"),[358] mergers by the interstate corporations to which Section 7 does apply must be considered inherently suspect.

B. Define Markets Instrumentally

Market definition is a means to an end—that is, a conceptual framework through which to understand how a merger might lessen the quality of competition or tend to create a monopoly in any of the various economic ecosystems in which the merging firms participate. As the committee reports and several sponsor statements on the Celler-Kefauver Amendment highlight, mergers are prohibited under Section 7 wherever they pose a "reasonable probability" of proscribed effects in any "appreciable segment of [a given product] market," provided that: (a) at least one of the merging firms "effectively competes" in that segment of the market; and (b) the segment "is largely [meaning not entirely] segregated from, independent of, or not affected by the trade in that product in other parts of the country."[359] Moreover, the Senate Report states that "although the section of the country in which there may be a lessening of competition will normally be one in which [one of the merged firms] may do business, the bill is broad enough to cope with [such effects] *in any other section of the country as well*."[360] Given this congressional intent, the Supreme Court has recognized that product and geographic markets should be defined practically by reference to the appreciable real-world patterns of trade a merger might affect.[361]

The hypothetical-monopolist test used under the current merger guidelines contradicts both established precedent and statutory intent. To begin with, this mode of market definition inherently requires a prediction of the merged-firm's future ability to "fix prices," which the House Report expressly stated was not required under Section 7. More fundamentally, by requiring a definition of markets that essentially includes the entire universe of existing and potential competitive forces that might constrain the exercise of pricing power by the merged firm, the current guidelines require the Agencies to demonstrate "anticompetitive" effects in the broadest possible area of product rivalry. Simultaneously, the hypothetical-monopolist test excludes from the relevant market any non-horizontal competition which may be affected by the prospective merger—effectively ignoring Section 7's redefinition of "competition" as a normative process. In this way, the hypothetical-monopolist standard uses existing or potential (horizontal) competition to stack the deck in favor of the would-be monopolist seeking merger, fails to recognize "competition where, in fact, competition exists," and opens the door to interminable conflicts over market boundaries.

The hypothetical-monopolist test should be abandoned. To the extent required for the application of bright line rules (see above), the Agencies should define markets instrumentally to identify the ecosystems of competitors, or appreciable segments of such ecosystems, in which competition may be lessened or a tendency to monopoly may be advanced if a proposed merger is allowed. In shifting the point-of-view of market definition from the would-be monopolist to the actual competition—and competitors—affected by mergers, the definition of markets should be geographically limited wherever geography limits the willingness or ability of some customers to substitute some products, of some suppliers to serve some customers, or some workers to provide labor.

C. Seek to Enjoin Unlawful Mergers In Their Entirety

We agree with AAG Kanter's recent announcement that, "in most situations [the Agencies] should seek a simple injunction to block the transaction."[362] There is little evidence to suggest the Antitrust Agencies are capable of fashioning divestitures that succeed in preserving competition or of monitoring the compliance of large corporations with complex conduct-based restrictions.[363] More importantly, as stated in the Senate Report on the Celler-Kefauver Amendment, Congress "intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, *whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition*."[364] The use of divestitures and conduct remedies plainly contradicts this intent and enables concentrative corporate mergers to proceed in spite of the broader purpose of Section 7 to "limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."[365] Seeking to enjoin unlawful corporate mergers in their entirety is "the surest way to preserve competition" and uphold the law.[366]

V. Conclusion

While the Senate was considering the Celler-Kefauver Amendment, then-Senator Lyndon Johnson said in a floor speech: "Reluctant, apologetic administration does not inspire public confidence, and it does not get the job done."[367] If the freedom of enterprise is to be restored in our economy, if communities large and small are to control their destinies again, if our democracy is to persevere—then the Antitrust Agencies must be neither reluctant nor apologetic in using our antitrust laws to halt the consolidation of corporate power. The tools are there if enforcers are willing to use them.

Sincerely,

Joe Maxwell
President & CEO
Farm Action

ENDNOTES

[1] *See* U.S. Department of Justice & U.S. Federal Trade Commission, Request for Information on merger Enforcement (January 18, 2022).

[2] *See* Sanjukta Paul, *Root and branch Reconstruction in Antitrust: A Symposium*, THE LAW & POLITICAL ECONOMY PROJECT (April 4, 2022).

[3] *See* Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021).

[4] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 181 (2021) (quoting Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702 (1986)).

[5] This conventional wisdom is increasingly being challenged. *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175 (2021); Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 (2021). Dissenting voices have also existed all along. *See, e.g.*, Daniel A. Farber & Brett H. McDonnell, *"Is There a Texas in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 610 (2004).

[6] *See, e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 6-8, 50 (1911) (engaging with the common-law tradition at length, discussing its roots in traditional market regulation, identifying the legislative purpose of the Sherman Act as curbing the concentrated power of business trusts and corporations, and deriving decision rules thereof); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 325 (1949) (applying Section 3 of the Clayton Act based on whether it restrains a "not insubstantial" amount of commerce because "Congress has authoritatively determined that those practices [tying arrangements and other proscribed methods under the Clayton Act] are detrimental where their effect may be to lessen competition" and "has not left at large for determination in each case the ultimate demands of the 'public interest.'").

[7] *See, e.g.*, Joseph E. Sheehy, FTC Litigation Director, *The Test of Illegality Under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491 (1958) (explaining adoption of test for illegality of mergers based on whether it forecloses a "substantial" amount of commerce based on the fact that "the legislative history of both the original statute [the Clayton Act] and its amendment [the Celler-Kefauver Amendment] establish clearly the intent of Congress," not to "place the [FTC] or the courts in the position of maintaining a nice balance between [different] factors," but to "reaffirm[] the basic principle of our antitrust law which is that the economic well-being of this country is best served through competition.").

[8] *See, e.g.*, Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226 (1960) (arguing that uncertainties in merger policy should be resolved consistently with basic value premises and broad political and economic objectives of Congress; and that the "burdens of our ignorance [should] fall upon the merging firms and not upon the public interest in maintaining competition and restraining monopoly power.").

[9] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 181 (2021) (quoting *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1985), *and* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983)).

[10] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 181-82 (2021)

[11] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 204-22 (2021); *See also* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 4, 37-42 (2020).

[12] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 204-22 (2021).

[13] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 183-190 (2021). *See also* Harlan Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 40-41 (1965).

[14] Any ideal of markets selected by enforcers from economic theory would be arbitrary because there has traditionally not been consensus on such ideals among economists. *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 238-249 (1960). *See also* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 473-74 (1968) (discussing "consequences of letting any economist formulate general rules under which the congressional standard in Section 7 will be enforced" by contrasting the normative economic understandings of different antitrust economists). But more fundamentally, there is no such thing as an "economic" ideal of markets at all because markets are always constructed by a variety of moral, political, and social choices and never by value-neutral, impersonal market forces independent of those choices. *See, e.g.*, Sanjukta Paul, *Charting the Reform Path*, 120 MICH. L. REV. 1265, 1270-80 (2022) (examining "the very idea of competitive markets"); Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 20(10) ANTITRUST BULL. 1 6-10 (2019).

[15] "Economists, we know, had very little to do with the passage of the Sherman Act. They played no role in seeking it, drafting it, or testifying or working in its behalf. If anything, the tendency of the American Economic Association was to question the wisdom of any legislation directed against "monopoly" in the economic sense, since the prevalent economists' view was that monopoly power, unbuttressed by legal supports such as patents, tariffs, licensing and the like, was by its nature rapidly eroded by market forces, and that legislative intervention would either impede that process or involve unnecessary social costs. Congress was not convinced, however, that the competitive system could survive without limitations upon the tactics available to the financially powerful. Thus, no attention was given to the possibility of formulating legal standards based upon economic performance." Harlan M. Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 576–77 (1973) (citing WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA (1965)) (emphasis added). The fact that economics and economists had little influence or interest in the development of the Sherman Act (and subsequent antitrust laws) has long been recognized. *See, e.g.*, HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 120-21 (1955); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153 n.71 (1981); 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, 1137 (1987); Anne Mayhew, *How American Economists Came to Love the Sherman Antitrust Act*, 30 HIST. POL. ECON. 179, 1881 (Supp. 1998); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 88-89 (1982); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 277 (2017).

[16] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 204-22 (2021).

[17] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 198-204 (2021). *See also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 774-75 (2019) (citing Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242 (1992) *and* WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 343 (1991)); 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, 940 (1987).

[18] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 198-204 (2021).

[19] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 204-22 (2021). *See also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 771-779 (2019).

[20] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 204-22 (2021). *See also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 780-82 (2019).

[21] *See, e.g., United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 322-24 (1897); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 50 (1911). The understanding of monopoly power embodied in Supreme Court decisions under the Sherman Act through the middle of the 20th century is carefully mapped in, Harlan M. Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 580-84 (1973); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 235-39 (2021).

[22] *See, e.g.*, HANS THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 201 (1955); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 59 (1965); Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 575-579 (1973); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 7616, 771-779 (2019); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 212-215 (2021); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1146-48 (1981).

[23] *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 59 (1965). *See also* Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 575-579 (1973); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 771-779 (2019); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 212-215 (2021).

[24] *See* Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 575-776 (1973) (explaining the relationship between Sections 1 and 2 of the Sherman Act and noting that "[i]t was not economic monopoly which was prohibited by the Sherman Act, but "monopolizing"—a course of conduct intended to consolidate or sustain power inconsistent with the competitive system and likely to be attained or preserved through economic power.").

[25] *See* ALAN DERRETT, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 421 (1960). *See also* Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 576 n.76 (1973)

[26] *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 17 (1959).

[27] *See infra* Parts I.B and I.C. In *United States v. Hutcheson*, 312 U.S. 219, 232 (1941), the Supreme Court described the Sherman, Clayton, and Norris-LaGuardia Acts as "interlacing statutes" and interpreted the former to accord with the policies expressed in the latter. Many other laws "interlace" similarly with the Sherman Act and Clayton Act, both reflecting and enhancing the congressional policy of economic decentralization and democratic coordination. *See, e.g.*, *United States v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Learned Hand, J.) (interpreting the Sherman Act in light of the Small Business Mobilization Act of 1942 and the Surplus Property Act of 1944). For a discussion that situates the core antitrust laws as allocators of coordination rights in the context of interlacing statutes across labor (the Wagner and Norris-LaGuardia Acts), agriculture (the Capper-Volstead Act and the Fishermen's Collective Marketing Act), and other fields, *see* Sanjukta Paul & Sandeep Vaheesan, *American Antitrust Exceptionalism*, in CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 141-157 (Paul, McCrystal & McGaughey, eds., forthcoming June 2022).

[28] *See United States v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945).

[29] The economic background and legislative history of the Clayton Act and the Federal Trade Commission Act are carefully mapped in, James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 507-514 (1968); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1147-49 (1981); EARL W. KINTNER, *Introduction: The Clayton Act of 1914*, *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 989, 989-996 (1978). Importantly, this understanding of the legislative background of the Clayton Act is the reflected in the committee reports, sponsor statements, and other important documents (such as the FTC's 1947 and 1948 6(f) reports on mergers) in the legislative history of the Celler-Kefauver Amendment. *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734); H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949 (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734); FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3437-39 (Earl W. Kintner, ed. 1978). *See*

also EARL W. KINTNER, *Introduction: The Celler-Kefauver Amendment of 1950*, *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978).

[30] *See* Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 575 (1973). *See also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 7616, 771-779 (2019); 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, 940 (1987); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L. J. 257, 283-84 (1989).

[31] For documentation of the roots of the Clayton Act in congressional concern over the Sherman Act's failure to stop the growth of consolidation, *see* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 507-514 (1968); DAVID D. MARTIN, MERGERS AND THE CLAYTON ACT 4-8, 13-19 (1959). *See also* U.S. FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3437-39 (Earl W. Kintner, ed. 1978). That proponents of the Clayton Act in Congress blamed this failure on the Department of Justice's disinterest in enforcing the Sherman Act, on the one hand, and the Supreme Court's interpretation of the Sherman Act has also been documented. *See, e.g.*, James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 507-514 (1968); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 231 (1980). This legislative background to the Clayton Act has also been recognized in the Supreme Court's merger jurisprudence. *See, e.g.*, *United States v. Von's Grocery Co.*, 384 U.S. 270, 274 (1966).

[32] The congressional desire to fashion a "legislative rule" for the proscription of monopolistic methods in the Clayton Act is exemplified by the report of the Senate Interstate Commerce Committee investigation, authorized by Senate resolution in response to the Supreme Court's decision in *Standard Oil* (1911), into "the control of corporations, persons, and firms engaged in interstate commerce." *See* SENATE COMM. ON INTERSTATE COMMERCE: CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE *in* S. REP. NO. 1326, 62d Cong., 3d Sess. (1913). The House Judiciary Committee's report on the Clayton act bill, H.R. REP. NO. 627, 63d Cong., 2d Sess. (1914), refers to corporate mergers forming holding companies as a "common and favorite method of promoting monopoly" and describes holding companies as "an abomination and in our judgement [] a mere incorporate form of the old-fashioned trust."

[33] *See* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 511-512 (1968). We note it was unambiguously indicated in the floor debates on the Clayton Act that the Federal Trade Commission would translate the broad prohibitions of Sections 2, 3, and 7 into administrable rules. *See, e.g.*, 51 Cong. Rec. 16317-18 (1914) (statement by Rep. Floyd, a House conferee and a framer of the original Clayton bill, indicating that Sections 2, 3, and 7, were restored in the conference committee on the Clayton Act at the insistence of the House conferees primarily in order to ensure that the Federal Trade Commission had the authority, under the Constitution, to enforce rules against contractual restraints of trade).

[34] *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 50 (1911). *See also* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 212-215 (2021) ("Chief Justice White's opinion in that decision [*Standard Oil*] in fact took the substantive content of the common law of restraint of trade quite seriously. Chief Justice white's opinion engaged with the common-law tradition at length, discussing its roots in traditional market regulation and in doctrines like forestalling and engrossing—and identifying the legislative purpose as curbing the concentrated power of business trusts and corporations, and the relatively few individuals who controlled them.").

[35] *See generally* S. REP. NO. 1775, 81st Cong., 2d Sess., June 2, 1950 (Report of the Senate Judiciary Committee on H.R. 2734).

[36] *See* 15 U.S.C. § 17.

[37] *See* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 782-83 (2019).

[38] *See* DAVID D. MARTIN, MERGERS AND THE CLAYTON ACT 43-46 (1959).

[39] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 174-75 (1961); DAVID D. MARTIN, MERGERS AND THE CLAYTON ACT 43-45 (1959). *See also* President Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies (January 20, 1914) ("We are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade . . . [which] can be explicitly and item by item forbidden by statute[.]").

[40] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 171-75 (1961).

[41] Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 171-75 (1961).

[42] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 171-75 (1961); Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 580-81 (1973); FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3454-55 (Earl W. Kintner, ed. 1978).

[43] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 171-75 (1961); Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 580-81 (1973).

[44] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 174-75 (1961); Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 580-81 (1973). *See also* Christopher R. Leslie, *Revisiting the Revisionist History of Standard Oil*, 85 S. CAL. L. REV. 573, 575-76 (2012); GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION 1900-1932, at 43 (2005); Louis D. Brandeis, *Cutthroat Prices: The Competition That Kills*, HARPER'S WKLY.: J. CIVILIZATION (Nov. 15, 1913). The legislative history makes plain that Section 2 of the Clayton Act "was born of a desire to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive positions of other sellers." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543 (1959).

[45] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 171-75 (1961).

[46] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 171-75 (1961); Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 580-81 (1973).

[47] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 171-75 (1961); Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 580-81 (1973).

[48] *See* Raymond P. Hernacki, *Mergerism and Section 7 of the Clayton Act*, 20 GEO. WASH. L. REV. 659, 659-661 (1952).

[49] *See* Raymond P. Hernacki, *Mergerism and Section 7 of the Clayton Act*, 20 GEO. WASH. L. REV. 659, 662-69 (1952). *See also* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3437-42 (Earl W. Kintner, ed. 1978); S. REP. NO. 1775, 81st Cong., 2d Sess., June 2, 1950 (Report of the Senate Judiciary Committee on H.R. 2734); H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949 (Report of the House Judiciary Committee on H.R. 2734).

[50] *See FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

[51] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 229-30 (1960).

[52] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 229-30 (1960).

[53] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 229-30 (1960).

[54] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 230-31 (1960).

[55] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 230-31, 306 (1960).

[56] *See* 95 CONG. REC. 11484, 11485 (81st Cong., 1st Sess., August 15, 1949) (statement of Rep. Celler).

[57] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 247 (1960); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 537-551 (1968). The legislative history of the Celler-Kefauver Amendment is carefully mapped in Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 766–67 (1952).

[58] *See* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 Fordham L. Rev. 461, 536-40 (1968); Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 766–67 (1952).

[59] TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, S. DOC. NO. 35, 77th Cong., 1st Sess. 691, at 4 (1941).

[60] TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, S. DOC. NO. 35, 77th Cong., 1st Sess. 691, at 38 (1941).

[61] James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 537 (1968).

[62] The following bills, accompanying documents and debates—relating to H.R. 2734, 81st Cong., 1st Sess. (1949), the only bill to reach the floor of either house—comprise the full legislative history of the Celler-Kefauver Amendment:

- *78th Congress:* S. 577, 78th Cong., 1st Sess. (1943)(O'Mahoney)—no action; H.R. 1517, 78th Cong., 1st Sess. (1943) (Sumners)—no action.

- *79th Congress*: S. 615, 79th Cong., 1st Sess. (1945)(O'Mahoney)—no action; H.R. 2357, 79th Cong., 1st Sess. (1945)(Kefauver); *Hearings before a Subcommittee of the Committee on the Judiciary on H.R. 2357*, 79th Cong., 1st Sess. (1945); reintroduced with amendments as H R. 4519, 79th Cong., 1st Sess. (1945)(Kefauver); reintroduced with amendments as H.R. 4810, 79th Cong., 1st Sess. (1946)(Kefauver); H.R. REP. NO. 1480, 79th Cong., 2d. Sess. (1946); reintroduced with amendments as H.R. 5535, 79th Cong., 2d Sess. (1946)(Kefauver); H.R. REP. NO. 1820, 79th Cong., 2d Sess. (1946).

- *80th Congress*: S. 104, 80th Cong., 1st Sess. (1947)(O'Mahoney) [Unpublished hearings, reprinted in part in *Hearings before a Subcommittee of the Committee on the Judiciary of the House of Representatives on H.R. 2734*, 81st Cong., 1st Sess. 60-94 (1949)]; H.R. 515, 80th Cong., 1st Sess. (1947)(Kefauver); *Hearings before a Subcommittee of the Committee on the Judiciary on H.R. 515*, 80th Cong., 1st Sess. (1947) [hereinafter referred to as *Hearings on H.R. 515*]; reintroduced with amendments as H.R. 3736, 80th Cong., 1st Sess. (1947) (Kefauver); H.R. REP. NO. 596, 80th Cong., 1st Sess. (1947); H.R. 7024, 80th Cong., 2d Sess. (1948)(Kersten)—no action.

- *81st Congress*: S. 56, 81st Cong., 1st Sess. (1949)(O'Mahoney and Kefauver); H.R. 988, 81st Cong., 1st Sess. (1949)(Jackson); H.R. 1240, 81st Cong., 1st Sess. (1949)(Mansfield); H.R. 2006, 81st Cong., 1st Sess. (1949)(Hobbs); H.R. 2734, 81st Cong., 1st Sess. (1949) (Celler); *Hearings before a Subcommittee of the Committee on the Judiciary of the House of Representatives on H.R. 2734*, 81st Cong., 1st Sess. (1949) [hereinafter referred to as *Hearings on H.R. 2734*]; H.R. REP. NO. 1191, 81st Cong., 1st Sess. (1949); debated in the House of Representatives under a suspension of rules, 95 CONG. REC. 11484-11507 (1949); passed House of Representatives, August 15, 1949, Yeas—223, Nays—92, Not voting—117, 95 CONG. REC. 11507 (1949); *Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate on H.R. 2734*, 81st Cong., 1st and 2d.Sess. (1949-50) [hereinafter referred to as *S. Hearings on H.R. 2734*]; SEN. REP. NO. 1775, 81st Cong., 2d.Sess. (1950); debated in the Senate, 96 CONG. REC. 16404-05, 16433-57, 16460-61, 16498-16508 (1950); passed Senate with amendments, Dec. 13, 1950, Yeas—55, Nays—22,

Not voting—19, 96 CONG. REC. 16508 (1950); House agrees to Senate amendments, 96 CONG. REC. 16573 (1950); approved by the President, Dec. 29, 1950, 96 CONG. REC. 17138 (1950).

[63] For a fuller history of the congressional effort to restructure the economy and rebuild a yeomanry of small, local, independent business during the 1940s and 1950s, *see* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169 (1961). For a discussion of how the Small Business Mobilization Act of 1942 and the Surplus Property Act of 1944 interlace with the antitrust statutes, *see* Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 UNIV. PENN. L. REV. 1076, 1077 (1979).

[64] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169 (1961).

[65] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169 (1961).

[66] *See* 56 Stat. 351 (1942); Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169 (1961).

[67] *See* 56 Stat. 351 (1942); Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169 (1961).

[68] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169 (1961); Jonathan J. Bean, *World War II and the "Crisis" of Small Business: The Smaller War Plants Corporation, 1942–1946*, 6(3) J. POL'Y HIST. 215 (1994).

[69] *See* 58 Stat. 765 (1944); Louis Cain & George Neumann, *Planning for Peace: The Surplus Property Act*, 41(1) J. ECON. HIST. 129 (1981).

[70] *See* 58 Stat. 765 § 2(b), 2(d), 2(p) (1944).

[71] *See* 58 Stat. 765 § 2(b); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1149-50 (1981).

[72] The quoted language is from the FTC's 1947 report. *See* FEDERAL TRADE COMMISSION, FTC REPORT TO THE CONGRESS: THE PRESENT TREND OF CORPORATION MERGERS AND ACQUISITIONS 5 (1947), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3418, 3421 (Earl W. Kintner, ed. 1978) ("In short, after studying the problem, the Federal Trade Commission, the Temporary National Economic Committee, and the House Judiciary Committee (all of which were bipartisan in membership) have agreed, in effect, that the present loophole [for asset mergers under the original Section 7 of the Clayton Act] creates a contradiction in law, promotes the growth of giant corporations, leads to the disappearance of small business, and results in a general increase in concentration and monopoly."). The FTC's 1948 report conveyed similar sentiments. *See* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 66 (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner, ed. 1978).

[73] *See* FEDERAL TRADE COMMISSION, FTC REPORT TO THE CONGRESS: THE PRESENT TREND OF CORPORATION MERGERS AND ACQUISITIONS 3-4 (1947), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3418, 3421 (Earl W. Kintner, ed. 1978) ("As a result of this anomaly [the loophole in Section 7 for asset mergers], a powerful impetus was given to the growth of giant corporations, by accretion, at the expense of small, independent firms."); FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 24 (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3452 (Earl W. Kintner, ed. 1978) ("It is often forgotten that many of the Nation's largest corporations were originally created as giant consolidations of numerous existing small firms. . . . [I]t was the consolidation movement at the turn of the century that "gave to American industry its characteristic twentieth century concentration of control.").

[74] *See, e.g.,* 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) (citing findings and conclusions of FTC reports as primary reasons to pass Act.); 96 CONG. REC. 16433, 16444 (Dec. 12, 1950) (statement of Sen. O'Mahoney) ("My attention was called to the need of such a measure during the hearings of the so-called Temporary National Economic Committee, which in 1938 undertook a searching and painstaking study of our economy and on March 31, 1941, filed its report. In that report was contained a unanimous recommendation for the enactment of a bill like this. The record

which was made by the Federal trade Commission, and by others who had studied this question when they appeared before the Temporary National Economic Committee, left no doubt of the fundamental fact that an innocent defect in the drafting of section 7 of the Clayton Act back in 1914 had resulted in creating a great opportunity for escape by flagrant violators of the law."). Even Senators in opposition to the Celler-Kefauver Act relied on the FTC and TNEC reports in their opposition. *E.g.,* 96 CONG. REC. 16433 (Dec. 12, 1950) (statements of Sens. Donnell and O'Mahoney) (the two Senators volleyed back and forth at length debating validity of the FTC conclusions as to the impact of mergers in industry concentration). Beyond floor debates, the FTC reports are heavily quoted in the Senate Judiciary Reports in both support and opposition of the Act. *See* S. REP. NO. 1775, at 6, 13, 14 (1950) (Majority describes type of problem Act was intended to resolve in words of FTC Report. Opposition uses FTC Report findings as premise for opposition). *See also* 95 CONG. REC. 11484 at 11486-87 (Aug. 15, 1949) (statement of Rep. Celler) (citing findings of TNEC as evidence in support of congressional action to preserve competition.)

[75] *See, e.g.*, 96 CONG. REC. 16436 (1950) (statement of Sen. O'Conor) ("As would be expected from this lengthy legislative history, the record on this bill is voluminous, consisting of three printed volumes of hearings before subcommittees of the House Judiciary Committee in the Seventy-Ninth, Eightieth and Eighty-first Congresses; approximately 700 typewritten pages of transcript of hearings before the subcommittee of the Senate Judiciary Committee of the Eightieth Congress; a printed volume of hearings before the subcommittee of the Senate Judiciary Committee of the Eighty-first Congress . . ."). *See also* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 306 (1960) ("It [the Celler-Kefauver Amendment] was enacted after very extensive hearings on the nature and effects of mergers, and was treated in the reports and debates as creating for the first time an effective antimerger policy.").

[76] *See generally* 96 CONG. REC. 16433 (Dec. 12, 1950). *See also* 95 CONG. REC. 11484 (Aug. 15, 1949).

[77] *See, e.g.,* 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) ("The immediate need for the passage of H.R. 2734 stems from the widespread merger activity which has been taking place since World War II."). *See also* 96 CONG. REC. 16433 at 16446-47 (Dec. 12, 1950) (statement of Sen. O'Mahoney) (quoting President Theodore Roosevelt and Taft in 1908 and 1910, respectively, on the increase in and evils of monopoly). *See also* 95 CONG. REC. 11484 at 11494 (Aug. 15, 1949) (statement of Rep. Carroll) ("Everyone who has studied this problem knows that competition has been weakened during the past several decades. Actually, we have lost rather than gained ground since the days of the great trust-busting operations . . . This movement has been especially serious since the end of the war, in industry after industry, three, four, five, or six huge corporations dominate prices, production, and employment.").

[78] 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) ("Moreover, in certain small-business industries, notably steel drums, tight cooperage, and wines, virtually all or a substantial part of the industry has been taken over by large corporations."). *See also* 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Mahoney) ("Of course the history of concentration in the steel industry, not at all confined to the earlier years, has been the history of acquisition by the United States Steel Corp. when it started, and by the Republic Steel Corp. and other later corporations, of competing concerns, so that today in the steel industry there has been built up what amounts to a monopolistic situation by which the entire production and distribution of steel in the United States are directed by common consent."); 96 CONG. REC. 16433 at 16451 (Dec. 12, 1950) (statement of Sen. Kefauver) ("Nevertheless, since the time Abraham Lincoln made the statement which I quoted, the control of industry of our Nation has become more and more concentrated in the hands of fewer and fewer persons and corporations . . . Today, control of industries which manufacture a great many of our basic products-steel, copper, lead, and many other products upon which our very economy depends – is held by a handful of corporations."). Similar conversations occurred in the House of Representatives. *E.g.*, 95 CONG. REC. 11484 at 11487 (Aug. 15, 1949) (statement of Rep. Celler) (using steel industry as an example of extreme concentration).

[79] 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) ("The evidence thus points to the conclusion that, insofar as its impact on concentration is concerned, the outstanding characteristic of the current merger movement has been the absorption of smaller independent enterprises by larger concerns."). 96 CONG. REC. 16433 at 16443 (referring to charts showing increase in acquisitions in grocery and food products, distilleries, wineries, farm-machinery, chemical, and steel companies). 96 CONG. REC. 16433 at 16450 (Dec. 12, 1950) (statement of Sen. O'Mahoney) ("The widespread entry of corporations into unrelated lines of manufacture is … because we have not taken the steps necessary to prevent this constant concentration which closes the door to enterprise by the citizen of the States which are represented by every Senator upon this floor."). *See also* 96 CONG. REC. 11484 at 11489 (Aug. 15, 1949) (statement of Rep. Keating) ("Unless

the bill is enacted, there is every reason to believe that, like the steel and copper industries, these traditionally small business fields of which I am speaking will also come under the control of a few large corporations. That this is indeed a very real and positive danger is revealed by the fact that most of the acquisitions during the recent merger movement have actually taken place in what have commonly been regarded as traditionally small business industries."); 95 CONG. REC. 11484 at 11494-95 (Aug. 15, 1949) (statement of Rep. Bryson) (discussing impact of merger movement on southern communities and loss of control of textile industry); 96 CONG. REC. 11484 at 11494-95 (Aug. 15, 1949) (statement of Rep. Boggs) (naming predominantly small-business fields such as food, textiles, apparel, and non-electrical machinery as those most impacted by merger movement).

[80] 96 CONG. REC. 16404, 16434 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11484 at 11506(Aug. 15, 1949) (statement of Rep. Byrne).

[81] 96 CONG. REC. 16404, 16434 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11484 at 11497-98 (Aug. 15, 1949) (statement of Rep. Boggs).

[82] 96 CONG. REC. 16404, 16434 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11484 at 11506(Aug. 15, 1949) (statement of Rep. Byrne).

[83] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 5 (June 2, 1950)(Report of the Senate Judiciary Committee on H.R. 2734) (quoting FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT, at 6-7 (1948)).

[84] *See* S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950), at 10 (Report of the Senate Judiciary Committee on H.R. 2734) (discussing the holding in *United States v. Aluminum Co. of America* (2d. Cir. 1945) providing that 90-percent control of an industry by one company was, *per se*, in violation of the Sherman Act but noting, in dicta, it was "doubtful" that 64-percent would be sufficient and that 33-percent was "certainly" not sufficient).

[85] *See* S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950), at 5 (Report of the Senate Judiciary Committee on H.R. 2734) ("The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.")

[86] *See* S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[87] *See Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949) ("[T]he qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."). *See also* Raymond P. Hernacki, *Mergerism and Section 7 of the Clayton Act*, 20 GEO. WASH. L. REV. 659, 659-661 (1952) (analyzing pre-1950 Supreme Court precedent under Sections 2 and 3 of the Clayton Act and finding the *Standard Oil of California* was a turning point in Clayton Act jurisprudence).

[88] *See, e.g.*, H. R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949 (Report of the House Judiciary Committee on H.R. 2734). *See also* Joseph E. Sheehy, FTC Litigation Director, *The Test of Illegality Under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491, 494-95 (1958).

[89] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[90] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[91] 96 CONG. REC. 16433 at 16446 (Dec. 12, 1950) (statement of Sen. O'Mahoney).

[92] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[93] *See, e.g.*, H. R. REP. NO. 1191, 81st Cong., 1st Sess., at 8 (August 4, 1949) (Report of the House Judiciary Committee on H.R. 2734); S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[94] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-5 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[95] S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 272 (2017); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 552-53 (1968).

[96] S. REP. NO. 1775, 81st Cong., 2d Sess., at 5 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[97] H. R. REP. NO. 1191, 81st Cong., 1st Sess., at 8-9 (August 4, 1949) (Report of the House Judiciary Committee on H.R. 2734).

[98] S. REP. NO. 1775, 81st Cong., 2d Sess., at 6 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[99] *E.g.*, 96 CONG. REC. 16404 at 16436 (Dec. 11, 1950); FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 15 (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner, ed. 1978); YALE BROZEN, MERGERS IN PROSPECTIVE 13 (1982).

[100] *See generally* 96 CONG. REC. 16404 (Dec. 11, 1950); 95 CONG. REC. 11484 (Aug. 15, 1949); S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734); H. R. REP. NO. 1191, 81st Cong., 1st Sess., (August 4, 1949) (Report of the House Judiciary Committee on H.R. 2734).

[101] 96 CONG. REC. 16404 at 16436 (Dec. 11, 1950 (statement of Sen. O'Conor).

[102] 96 CONG. REC. 16404 at 16436 (Dec. 11, 1950 (statement of Sen. O'Conor).

[103] S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 272 (2017); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 552-53 (1968).

[104] S. REP. NO. 1775, 81st Cong., 2d Sess., at 3 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[105] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 966 (2018).

[106] *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153 (1981).

[107] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 966 (2018).

[108] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 966 (2018). The legislative history of the antitrust laws taken as a whole is carefully mapped out in, John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65 (1982); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 774-75 (2019); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 265 (2017).

[109] *See* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 777-79 (2019).

[110] *See, e.g.,* Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, ANTITRUST BULL. 3 (2019); Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179, 185 fn. 14 (2018); Lina M. Khan & Sandeep Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 265 (2017); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1150-51 (1981).

[111] *E.g.,* Lina M. Khan & Sandeep Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 266 (2017).

[112] *E.g.,* 95 CONG. REC. 11484 at 11496 (Aug. 15, 1949) (statement of Rep. Bryson).

[113] 96 CONG. REC. 16404 at 16451 (Dec. 11, 1950) (statement of Sen. Kefauver); 95 CONG. REC. 11484 at 11495 (Aug. 15, 1949) (statement of Rep. Bryson); H.R. REP. NO. 627, 63d Cong., 2d Sess. at 20 (1914).

[114] 96 CONG. REC. 16404 at 16453 (Dec. 11, 1950) (statement of Sen. Yates); Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179, 233 (2018).

[115] *E.g.,* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 9 (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner, ed. 1978); 95 CONG. REC. 11484 at 11496 (Aug. 15, 1949) (statement of Rep. Bryson).

[116] *See, e.g.,* 95 CONG. REC. 11484 at 11507 (Aug. 15, 1949) (statement of Rep. Bennett); H.R. REP. NO. 627, 63d Cong., 2d Sess. at 9-10 (1914); Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, ANTITRUST BULL. 3 (2019); Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179, 191 (2018); Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. L. & PUB. POL'Y 57 (2014).

[117] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 212-16 (2021) (quoting 21 CONG. REC. 1768 (1890) (statement by Senator George). *See also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 774-75 (2019).

[118] *See* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 773-75 (2019).

[119] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 212-16 (2021).

[120] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 101 (1982); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 773 (2019).

[121] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 216-20 (2021).

[122] *See* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 777 (2019) (quoting 95 CONG. REC. 11506 (1949) (remarks of Rep. Bennett)).

[123] *See* 96 CONG. REC. 16404 at 16447-48 (Dec. 11, 1950) (statement of Sen. O'Mahoney) (quoting speech of President Taft given Jan. 7, 1910); 95 CONG. REC. 11484 at 11487 (Aug. 15, 1949) (statement of Rep. Celler); H.R. REP. NO. 627, 63d Cong., 2d Sess. at 10 (1914); Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179, 216-17, fn. 170 (2018); Lina M. Khan & Sandeep Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 270 (2017).

[124] *See* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 775 (2019) (quoting 21 CONG. REC. 2457 (1890) (remarks of Sen. George)).

[125] Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, ANTITRUST BULL. 3 (2019); Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179, 211(2018); Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. L. & PUB. POL'Y 64 (2014) (quoting CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 19 (1959)).

[126] *E.g.,* Maurics E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017) https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

[127] *E.g.,* 95 CONG. REC. 11484 at 11487 (Aug. 15, 1949) (statement of Rep. Carroll); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1150 (1981).

[128] *See, e.g.,* 96 CONG. REC. 16404 at 16451 (Dec. 11, 1950) (statement of Sen. Kefauver); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 966 (2018); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 504 (1968) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962)).

[129] *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1151 (1981); 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, 942-43 (1987).

[130] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 305 (1960).

[131] *See generally* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 257 (1960). *See also, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962) (developing a "usable frame of reference witin which to evaluate any given merger" from the legislative history of the Celler-Kefauver Amendment); *Standard Oil Co. of California v. United Stat*es, 337 U.S. 293, 311 n.13 (1949) (rejecting a test of liability under Section 3 of the Clayton Act that would "require a firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice" on the ground that it "would be a standard . . . most ill-suited for ascertainment by courts," and noting that "the dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission" and that "[o]ur interpretation of the Act, there-fore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance").

The Supreme Court's decision in *Philadelphia National Bank* provides a good example of this approach at work. 374 U.S. 321 (1963). The Court grounded its decision in "the intense congressional concern with the trend toward concentration" evident from the legislative history of the Celler-Kefauver Act. *Id.* at 363. Because Congress sought to *prevent* concentration, the Court instructed that judges should, "in the interest of sound and practical administration of justice," seek to "simplify the test of illegality" under Section 7 of the Clayton Act "in any case in which it is possible." *Id.* at 362-63. The Court also recognized that "economic data are both complex and elusive" and that, in the context of judicial proceedings, "permitting a too-broad economic investigation" risks "subverting congressional intent." *Id.* at 362-63. Accordingly, the Court held that a merger consolidating 30-percent of a relevant market — and potentially as little as 20-percent — was presumptively illegal and may be enjoined without "elaborate proof of market structure, market behavior, or probable anticompetitive effects." *Id.* at 362-64, n. 41.

[132] *See* Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2158 (2013).

[133] *See* Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2158 (2013).

[134] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 968 (2018).

[135] *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2548 (2013).

[136] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175, 181, 223 (2021); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2549 (2013).

[137] *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2551 (2013).

[138] *See* Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 924 & n.47 (citing the views of, among others, Kenneth G. Elzinga, Robert H. Lande, Herbert J. Hovenkamp, Peter J. Hammer, and William E. Kovacic for the proposition that:"[A] clear consensus exists among economic historians and legal scholars that Bork misconstrued the legislative history of the Sherman Act.").

[139] *See, e.g.*, James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J. LAW HUMAN., 263 (1991); Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Reexamination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65 (1982); 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 (1987).

[140] *See, e.g.*, Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Reexamination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65 (1982); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 774-75 (2019); Andreas Koutsoudakis, *Antitrust More Than A Century After Sherman: Why Protecting Competitors Promotes Competition More Than Economically Efficient Mergers*, 34 U. DAYTON L. REV. 223, 224 (2009); John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425 (2013).

[141] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 968 (2018).

[142] *See* U.S. DEP'T OF JUSTICE & FED. TRADE, 2010 HORIZONTAL MERGER GUIDELINES § 10.

[143] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 968, 971 (2018). *See also* Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 20 ANTITRUST BULL. 3, 5 (2019).

[144] *See* 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, 945 (1987) (harmonizing with the analysis presented here in a number of ways while analyzing the 1984 merger guidelines, particularly in terms of the consumer-welfare paradigm opening the door to economic analysis largely divorced from, and in some cases antithetical to, competition).

[145] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 968 (2018).

[146] *Cf.* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 965-70 (2018) ("Competition refers to a process. Efficiency, by contrast, refers to an economic outcome, and is silent on the means by which it is achieved.")

[147] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 965-70 (2018).

[148] *See* U.S. DEP'T OF JUSTICE & FED. TRADE, 2010 HORIZONTAL MERGER GUIDELINES § 10.

[149] *See* Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 UNIV. PENN. L. REV. 1941, 1944-46 (2020).

[150] *See* Peter C. Carstensen, Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 781, 814–15 (2018) (surveying available research on efficiency and mergers and concluding that, "[i]n sum, most studies have found that mergers do not on average increase net corporate efficiency."); Melissa Schilling, *Potential*

Sources of Value from mergers and Their Indicators, 63 ANTITRUST BULL. 183, 183 (2018) ("Firms engage in mergers for many reasons, some of which create value for both the firm's shareholders and society, some that create value only for the firm's shareholders, and some that fail even to do that. A considerable body of research concludes that most mergers do not create value for anyone, except perhaps the investment bankers that negotiated the deal.").

[151] *See* Peter C. Carstensen, Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 781, 814–15 (2018):

> [I]t is virtually impossible to predict with relative accuracy which mergers will cause significant efficiencies. This task is especially difficult because the vast majority of major mergers—perhaps up to ninety percent—result in no significant net efficiencies, or in losses[.] Moreover, those few merges that result in efficiencies are almost impossible to identify reliably in advance.
>
> [I]t is [also] incredibly difficult to predict reliably in advance whether the efficiencies generated by any particular merger would be likely to outweigh the probable market power gains from that merger. The complications in doing this tradeoff are intractable, and attempts to litigate them would unduly lower predictability and increase uncertainty, litigation costs, and delays, while providing no offsetting benefits.

[152] *See* Daniel A. Farber & Brett H. McDonnell, *"Is There a Texas in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 610 (2004).

[153] *See* Peter C. Carstensen, *Antitrust Law and the Paradigm of Industrial Organization*, 16 U.C. DAVIS L. REV. 487, 487–88 n.1 (1983); Lina M. Khan & Sandeep Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 270-71 (2017).

[154] *See, e.g.*, Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 774-77 (2019) (quoting 51 Cong. Rec. 4100 (1890) (statement of Rep. Mason)).

[155] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 307 n.252 (1960).

[156] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 307 n.252 (1960).

[157] *See* EARL W. KINTNER, *Introduction: The Celler-Kefauver Amendment of 1950*, *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 506-49 (1968).

[158] 95 CONG. REC. 11484 at 11489 (Aug. 15, 1949) (statement of Rep. Keating) (discussing consolidation in steel, copper industries and resulting economic concentration of power as well as increase in merger activity in traditionally small business fields).

[159] 95 CONG. REC. 11484 at 11494 (Aug. 15, 1949) (statement of Rep. Yates) ("When three or four producers take the places of 20 or 30, the chances are great that price competition will be crippled, that declining markets will be dealt with by restriction of output instead of by price reduction, that the big concerns will adopt a live-and-let-live policy toward each other at the sacrifice of their efficiency and their progress, and that the remaining small competitors will be either bought out or reduced to vassals who meekly follow the large enterprises."); 95 CONG. REC. 11484 at 11495 (Aug. 15, 1949) (statement of Rep. Bryson) ("Not only is this growing trend toward outside control of local enterprise damaging to civic welfare, but also it is harmful to the general welfare, as the heads of large concentrated organizations tend to follow the suicidal policy of maintaining prices and cutting production, rather than lowering prices and maintaining production."); 95 CONG. REC. 11484 at 11501 (Aug. 15, 1949) (statement of Rep. Evins) (discussing common practice among large corporations – particularly in steel industry – to channel supplies into own integrated corporations, denying smaller businesses essential inputs).

[160] 96 CONG. REC. 16433 at 16449 (Dec. 12, 1950) (statement of Sen. Kefauver) (discussing positive impact of small business cooperation on defense production during World War II).

[161] James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 506-49 (1968).

[162] The multiple orders of speculation that the Agencies or a court must reckon with in order to "isolate those cases in which increased competitive vigor would result from the cost savings made possible by [a] merger" are well described in Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 320-21 (1960) (emphasis added):

> Quite aside from matters of statutory interpretation, however, there are persuasive reasons for shrinking from any attempt to isolate those cases in which increased competitive vigor would result from the cost savings made possible by the merger. In order to provide for such cases, we must be able to ascertain with tolerable accuracy the existence of three separate circumstances. First, there must be actual cost savings resulting from the merger. Second, both of the merging firms must be either unwilling or unable to build internally in order to achieve these economies. Third, having achieved the cost savings, the merged companies must actually use them in such a way as to improve the competitive situation. The prospects for reaching firm conclusions on these points in actual cases seem remote.
>
> The first is probably the simplest of the three issues. Nevertheless, even this question is often partly speculative, for it may take considerable time before economies in advertising, distribution, or overhead can reliably be determined. There is also an inevitable risk of complicated and fruitless forays into the realm of cost accounting, where so much difficulty has been encountered elsewhere in the antitrust laws. Moreover, in order to understand the true importance of these savings for the competitive position of the merging firms, comparisons with the costs of rival companies would be necessary, thus adding another dimension to the accounting problem just mentioned.
>
> The second of the three issues would require still hazier estimates regarding the costs of building, which would then be used as a basis for assertions by defendant's management that the greater costs and risks of construction would be "too expensive" or "too hazardous" to be undertaken. Experience in the one case under section 7 in which this issue has arisen suggests that estimates and assertions of this sort can easily become controversial and inconclusive.
>
> Finally, the last of the three points into the realm of speculation. Savings in cost could be used to finance price cuts, research, or product innovation, but they could equally well be spent on packaging, advertis-ing, or higher dividends. Although evidence on this point could be taken from officials of the merging companies, the intentions expressed would inevitably be subject to change and difficult to appraise; nor would officials always wish to tip their hands by testifying very specifically on such matters.
>
> If all of these factors must be passed upon in order to reach a conclusion, it seems unlikely that judges and administrators can achieve any substantial precision in isolating those cases where more competitive rivalry will flow from lower costs. Conversely, there is every reason to believe that proceedings will be complicated and prolonged by the introduction of evidence on these points.

[163] *See*, *e.g.*, Joseph E. Sheehy, FTC Litigation Director, *The Test of Illegality Under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491, (1958):

> It must be borne in mind that the purpose behind the statute and the fundamental policy which prompted its enactment was the protection and preservation of competition. The question is not whether the competition adversely affected was good or bad; nor whether it needed strengthening or could withstanding some lessening without disastrous results. The question is simply whether existing competition may be substantially lessened by the merger or acquisition.

[164] *See* 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, 946, 970 (1987) (harmonizing with the analysis presented here with respect to the use of "potential competition" in the consumer-welfare framework to excuse growing market power).

[165] *See* Eleanor M. Fox, *The New Merger Guidelines—A Blueprint for Microeconomic Analysis*, 27(3) ANTITRUST BULL. 519, 557-560 569-575 (1982).

[166] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 349 (1960):

> An unwillingness to recognize the limits of our understanding hardens resistance to simple rules because of the false hope that more information can somehow dispel doubts about the consequences of a disputed merger. Similarly, the virtues of clarity and simplicity are foregone, for it is thought that rules that embody these characteristics are needlessly arbitrary when in fact they are no more so than their more complicated counterparts. . . . [I]n striving to be flexible we may simply be obscure; in seeming up to date we will be merely indiscriminate, and in seeking expertness we may only end in expertness.

[167] *See* Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 76 ST. JOHN'S L. REV. 569, 609 (2004).

[168] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 972 (2018).

[169] *See* Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, ANTITRUST BULL. 6-8 (2019).

[170] *See* Christopher Leslie, *Antitrust Made (Too) Simple*, ANTITRUST L. J. (2015).

[171] *See* Jonathan Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right,* ANTITRUST L. J. (2015).

[172] *See* Christopher Leslie, *Antitrust Made (Too) Simple*, ANTITRUST L. J. (2015). *See also* John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 5-6 (October 9, 2018).

[173] *See* Jonathan Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right,* ANTITRUST L. J. (2015).

[174] *See* Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, ANTITRUST BULL. 11 (2019).

[175] *See* Jonathan Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right,* ANTITRUST L. J. (2015).

[176] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 971 (2018).

[177] *See, e.g.*, Maurice E. Sucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis. L. Rev. 1375, 1385-86 (2009); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 971 (2018); Lina M. Khan & Sandeep Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 280 (2017); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 823 (2019); Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 255 (1960).

[178] *See, e.g.*, Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 17–22 (2016); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis. L. Rev. 1375, 1442 (2009); Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 Antitrust Bull. 455 (2018); Mark Glick, *American Gothic: How Chicago Economics Distorts "Consumer Welfare" in Antitrust* (Inst. For New Econ. Thinking, Working Paper No. 99, 2019). John M. Newman, *Reactionary Antitrust*, CONCURRENCES REV., Nov. 2019, at 66, 67–68; Lina M. Khan & Sandeep

Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 280 (2017).

[179] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 975 (2018).

[180] *See* Simon Torracinta, *Bad Economics*, BOS. R. (2022).

[181] *See* Steven C. Salop, *The Evolution and Validity of Merger Presumptions: A Decision-Theoretic Approach*, 80 Antitrust L. J. 269, 276 (2015); Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction,* 64 Fed. Comm. L.J. 47, 56 (2011); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis. L. Rev. 1375, 1454-56 (2009); Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, UTAH. L. REV. 159, 166 (2008).

[182] *See* Rebecca Allensworth, *Adversarial Economics in Antitrust Litigation*, 106 N.W. U. L. Rev. 1261 (2012); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2551 (2013) ("Ever more sophisticated economic theories have now led merger analysis down the rabbit hole in to a world where the government is forced to vigorously litigate mergers at very high levels of concentration.").

[183] *See* Maurice E. Sucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis. L. Rev. 1375, 1427, 1467 (2009).

[184] *See* Alan Devlin & Machael Jacobs, *Antitrust Error*, 52 Wm. & Mary L. Rev. 75, 83 (2010).

[185] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 974-76 (2018).

[186] *See* Part I.C. *supra*. *See also* Joseph E. Sheehy, FTC Litigation Director, *The Test of Illegality Under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491, 494-95 (1958).

[187] *See Standard Oil Co. of California v. United States*, 337 U.S. 293, 310 (1949) (interpreting analogous Section 3 of Clayton Act); Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 308 (1960) ("[T]he language [of Section 7's legislative history indicating that 'may be' means 'reasonable probability'] should be construed in light of the attempt in the Senate report to contrast the concept of reasonable probability with certainty, on the one hand, and possibility on the other. This sort of comparison suggests that Congress did not mean to impose some precise and inapposite statistical union, but only to convey a middle ground between sheer speculation and a rigorous and exacting prediction.").

[188] *See, e.g.*, H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949, at 8 (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734)

[189] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 308 (1960).

[190] *See* Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 269 (2017) (quoting 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)).

[191] *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153 n.71 (1981) (describing what a consumer welfare framework would mean for antitrust).

[192] *See, e.g.*, Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction,* 64 Fed. Comm. L.J. 47, 56 (2011).

[193] *See* Chair Lina Khan, 2021 Memorandum to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021) ("We need to find ways to deter unlawful transactions. The rate at which firms propose

facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives.”).

[194] *See* John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 19-23 (October 9, 2018).

[195] *See* U.S. DEP’T OF JUSTICE, 1982 MERGER GUIDELINES.

[196] *See* U.S. Dep’t of Justice, 1992 Merger Guidelines.

[197] *See* John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 23 n.43 (October 9, 2018).

[198] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 255 (1960).

[199] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 255 (1960).

[200] H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949, at 5 (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734).

[201] John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 25 (October 9, 2018).

[202] Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 14 (1977). *See also* Rebecca Allensworth, *Adversarial Economics in Antitrust Litigation*, 106 N.W. U. L. Rev. 1261, 1273 (2012); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 4 (2009).

[203] This analysis of the FTC’s published record is derived from, John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 19-23 (October 9, 2018). *See also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 823 (2019).

[204] *See* Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1, 4 (2015).

[205] *See* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 797 (2019) (citing Competitive Impact Statement at 29–30, Comcast Corp., 808 F. Supp. 2d 145 (No. 1:11-cv-00106).

[206] *See* John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 45-47 (October 9, 2018); WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 196-99 (2d ed. 2004) (criticizing the Antitrust Agencies for their narrow analytical framework and for playing a “consultant” role in facilitating mergers).

[207] *See* John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 45-47 (October 9, 2018) (“The implication of these considerations is that remedies have become substitutes for tougher but necessary policy. They have been used too often, too widely, too optimistically, too casually, and perhaps too strategically as policymakers may seek ways of avoiding challenging mergers but wishing to appear to be taking action. Sound merger control policy needs to adopt a far more realistic and cautious approach to the use of remedies, conduct remedies in particular. In practice that means to avoid their use except for very unusual cases where their success can be predicted with a very high degree of confidence.”)

[208] Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235, 269 (2017).

[209] *See* John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, at 45-47 (October 9, 2018).

[210] *See* Sam Pelzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. & Econ. 101 (2014).

[211] *See* Lina Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655, 1671 (2020) (collecting studies "reveal[ing] high concentration to now be a systemic, rather than isolated feature of our economy."). *See also* COUNCIL OF ECON. ADVISERS, ISSUE BRIEF: BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (2016); IAN HATHAWAY & ROBERT E. LITAN, BROOKINGS INST., WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION (2014); David Autor, David Dorn, Lawrence Katz, Christina Pattterson, and John Van Reenen, *Concentrating on the Fall of Labor Share*, 107(5) Amer. Econ. Rev. 180 (2017); Joshua Gans et al., *Inequality and Market Concentration, When Shareholding Is More Skewed than Consumption* (NBER Working Paper No. 25395, 2018); Gustavo Grullon, Yelena Larkin, and Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* (Swiss Finance Research Insitute Research Paper No. 19-41, 2016); "Too Much of a Good Thing: Profits Are Too High. America Needs a Giant Dose of Competition," The Economist (March 2016).

[212] *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 542-43 (1973) (Douglas, J., concurring in part). *See generally Rural Distress and the Concentration of Financial and Economic Power: Hearing on An Economy that Works for Everyone: Investing in Rural Communities Before S. Comm. on Banking, Housing, and Urban Affairs*, 117th Cong. 2 (Apr. 20, 2021) (Testimony of Stacy Mitchell, Co-Executive Director, Institute for Local Self-Reliance); Marc Edelman, *Hollowed Out Heartland, USA: How Capital Sacrificed Communities and Paved the Way for Authoritarian Populism*, 82 J. RURAL STUD. 505, 510-13 (2019); *see also* Troy C. Blanchard, Carson Mencken & Charles Tolbert, *The Health and Wealth of US Counties: How the Small Business Environment Impacts Alternative Measures of Development*, 5(1) CAMBRIDGE J. REGIONS, ECON. & SOC. 149 (2012); Thomas A. Lyson et al., *Civic Community in Small-Town America: How Civic Welfare Is Influenced by Local Capitalism and Civic Engagement*, 67(1) RURAL SOC. 90 (2002); Thomas A. Lyson et al., *Local Capitalism, Civic Engagement and Socioeconomic Well-Being*, 77(2) SOC. FORCES 401 (1998). For the effects of grocery and retail consolidation on social capital, civic capacity, and other aspects of community wellbeing, *see* STACY MITCHELL, BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES 73-127 (2006); Stephan J. Goetz & Anil Rupasingha, *Wal-Mart and Social Capital*, 88(5) AM. J. AGRIC. ECON. 1304 (2006). For the effects of agricultural consolidation, *see* FOODPRINT, THE ECONOMICS OF FOOD AND CORPORATE CONSOLIDATION (Oct. 2018); CURTIS W. STOFFERAHN, UNIVERSITY OF NORTH DAKOTA, INDUSTRIALIZED FARMING AND ITS RELATIONSHIP TO COMMUNITY WELL-BEING (Sept. 2006) (report prepared for State of North Dakota). For a broader discussion of the effect of corporate delocalization on social capital in American communities, *See* Charles H. Heying, *Civic Elites and Corporate Delocalization: An Alternative Explanation for Declining Civic Engagement*, 40(5) AM. BEHAV'L SCI. 657 (1997).

[213] *See* German Gutierrez & Thomas Philippon, Investmentless Growth: An Empirical Investigation, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2017, at 89, 95–97; Germ n Gutierrez & Thomas Philippon, Ownership, Concentration, and Investment, AEA PAPERS & PROCEEDINGS, 2018, at 432; German Gutierrez & Thomas Philippon, Declining Competition and Investment in the U.S. 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23583, 2017).

[214] Jose A. Azar et al., Concentration in US Labor Markets: Evidence from Online Vacancy Data 13 (Nat'l Bureau of Econ. Research, Working Paper No. 24395, 2018). Jose A. Azar et al., Labor Market Concentration 12 (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017). Simcha Barkai, Declining Labor and Capital Shares, J. FIN. (forthcoming) (manuscript at 2, 23–26).

[215] *See* Part III.B. *infra*.

[216] *See* Matt Stoller, How Monopolies Broke The Federal Reserve, BIG (August 13, 2019).

[217] *See* Stacy Mitchell, *The View from the Shop—Antitrust and the Decline of America's Independent Businesses,* 61 ANTITRUST BULL. 498, 502 (2016) (noting growth in the political power of large businesses and the decrease in small business formation); IAN HATHAWAY & ROBERT E. LITAN, BROOKINGS INST., WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION (2014),

[218] *See* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner, ed. 1978).

[219] Respectively, the CR4 concentrations for each industry are: 80, 73, 67, 54, 83, 82, 77, 63, 58, 54, 50, 46, 45, and 43 -percent. MARY K. HENDRICKSON ET AL., THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS: SPECIAL REPORT TO FAMILY FARM ACTION ALLIANCE 9 fig. 4 (2020) https://farmaction.us/concentrationreport/.

[220] MARY K. HENDRICKSON ET AL., THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS: SPECIAL REPORT TO FAMILY FARM ACTION ALLIANCE 9 fig. 4 (2020) https://farmaction.us/concentrationreport/.

[221] MARY K. HENDRICKSON ET AL., THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS: SPECIAL REPORT TO FAMILY FARM ACTION ALLIANCE 9 fig. 4 (2020) https://farmaction.us/concentrationreport/.

[222] Press Release, Cargill, Cargill and Continental Grain Company to Acquire Sanderson Farms for $203 per Share in Cash and Create a Leading Poultry Company (Aug. 9, 2021) https://www.cargill.com/2021/cargill-and-continental-grain-company-to-acquire-sanderson-farms.

[223] *Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on Americas Food Supply Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 117th Cong. 2 (2022) (testimony of Trina McClendon, owner, Trinity Poultry Farm).

[224] MARY K. HENDRICKSON ET AL., THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS: SPECIAL REPORT TO FAMILY FARM ACTION ALLIANCE 4 (2020) https://farmaction.us/concentrationreport/.

[225] CURTIS W. STOFFERAHN, INDUSTRIALIZED FARMING AND ITS RELATIONSHIP TO COMMUNITY WELL-BEING 5 fn. 6, 12 (Sept. 2006) (Report prepared for State of North Dakota).

[226] CURTIS W. STOFFERAHN, INDUSTRIALIZED FARMING AND ITS RELATIONSHIP TO COMMUNITY WELL-BEING 9 (Sept. 2006) (Report prepared for State of North Dakota).

[227] CURTIS W. STOFFERAHN, INDUSTRIALIZED FARMING AND ITS RELATIONSHIP TO COMMUNITY WELL-BEING 9 (Sept. 2006) (Report prepared for State of North Dakota).

[228] Linda Lobao & Curtis W. Stofferahn, *The Community Effects of Industrialized Farming: Social Science Research and Challenges to Corporate Farming Laws*, AGRIC. & HUM. VALUES 1, 7-8 (2007).

[229] John A. Kilpatrick, *Animal Operations and Residential Property Values*, THE APPRAISAL J. 41, 49 (2015) (estimating properties located within three miles of a CAFO can lose up to 25-percent of economic value and those properties immediately abutting an industrial animal agriculture facility could lose up to 88-percent).

[230] William J. Weida, Dep't of Econ., The Colorado Coll., The Glob. Res. Action Ctr. for the Env't (GRACE), Presentation at the International Conference on the Chicken – Its Biological Social, Cultural, and Industrial History at Yale University: The CAFO and Depopulation of Rural Agricultural Areas: Implications for Rural Economies in Canada and the US (May 18, 2002) (One Iowa community estimated that the presence of CAFOs finishing 45,000 hogs annually increased road gravel costs by $20,000 a year. Another Colorado study estimated that a 20,000-head cattle feedlot increased local repair costs by $6,447 per mile from trucks hauling feed and livestock).

[231] For instance, JBS and various subsidiaries have received $27,087,640 in subsidies from state and local governments in the U.S. since 2010. The majority of these subsidies came in the form of tax credits and rebates. *Subsidy Tracker Summary, Parent Company JBS*, GOOD JOBS FIRST, (last visited Apr. 14, 2022). Tyson Foods and its subsidiaries have received at least $282,136,902 from state and local governments. *Subsidy Tracker Summary, Parent Company Tyson Foods*, GOOD JOBS FIRST, (last visited Apr. 14, 2022).

[232] *Visualizing U.S. Farmland Ownership, Tenure, and transition*, ECON. RES. SERV., U.S. DEP'T OF AGRIC., https://www.ers.usda.gov/data-products/data-visualizations/other-visualizations/visualizing-us-farmland-ownership-tenure-and-transition/ (last updated Nov. 13, 2020).

[233] DANIEL BIGELOW ET AL., ECON. RES. SERV., U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 161, U.S. FARMLAND, OWNERSHIP, TENURE, AND TRANSFER (Aug. 2016) https://www.ers.usda.gov/webdocs/publications/74672/eib-161.pdf?v=3951.9.

[234] *See* Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695, 1700 (Jul. 2021); *see also* NAT'L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS II: RESULTS AND RECOMMENDATIONS FROM THE NATIONAL YOUNG FARMER SURVEY 32, 38 (2017) (top two challenges in accessing land were finding affordable farmland for sale, and concern that land costs more to purchase than value of food produced on land).

[235] Matthew Wilde, *farmland Leases Benefit Environment*, PROGRESSIVE FARMER (Apr. 10, 2022) https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2022/04/10/farmland-leases-least-two-years-spur.

[236] ENVT'L INTEGRITY PROJECT, THE CLEAN WATER ACT AT 50: PROMISES HALF KEPT AT THE HALF-CENTURY MARK 4, 12, 34, 35 (Mar. 17, 2022) (more than 700,000 miles of waterways, 11,168,767 acres of lakes, and 19,470 square miles of estuaries remain impaired).

[237] Econ. Res. Serv., *Rural Poverty & Well-Being*, U.S. DEP'T OF AGRIC., https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/ (last updated Mar. 7, 2022).

[238] *Hunger in Rural Communities*, FEEDING AMERICA, https://www.feedingamerica.org/hunger-in-america/rural-hunger-facts (last visited Apr. 19, 2022).

[239] *Hunger in Rural Communities*, FEEDING AMERICA, https://www.feedingamerica.org/hunger-in-america/rural-hunger-facts (last visited Apr. 19, 2022).

[240] *See* Lorie Konish, *Just 39% of Americans could pay for a $1,000 emergency expense*, CNBC (Jan. 11, 2021) https://www.npr.org/sections/health-shots/2019/05/21/725059882/poll-many-rural-americans-struggle-with-financial-insecurity-access-to-health-ca.

[241] *See* Tessa Conroy, et al., *It's a Wonderful Loan: Local Financial Composition, Community Banks, and Economic Resilience*, 126 J. BANKING & FIN. 1, 9, tbl. 3 (2020).

[242] Matthew D. Hill et al., *Determinants and Effects of Corporate Lobbying*, 42 FIN. MGMT. 931 (2013); Richard Borghesi & Kiyoung Chang, *The Determinants of Effective Corporate Lobbying*, 39 J. OF ECON. & FIN. 606, 619 (2014).

[243] In 2007 the head of USDA Agriculture Marketing Service's (AMS) Livestock and Seed Division, Barry Carpenter, became the head of the North American Meat Institute (NAMI). Joe Maxwell, *USDA Inc.: JBS is the Latest in Scandalous Job Swapping Between Government and Meat Industry*, ORGANIZATION FOR COMPETITIVE MARKETS (Aug. 4, 2017) https://competitivemarkets.com/usda-inc-jbs-is-the-latest-in-scandalous-job-swapping-between-government-and-meat-industry/.
Bill Sessions, the Director of Product Marketing and Promotion at NAMI was the former Associate Deputy Administrator of AMS Livestock and Seed Program. Joe Maxwell, *USDA Inc.: JBS is the Latest in Scandalous Job Swapping Between Government and Meat Industry*, ORGANIZATION FOR COMPETITIVE MARKETS (Aug. 4, 2017) https://competitivemarkets.com/usda-inc-jbs-is-the-latest-in-scandalous-job-swapping-between-government-and-meat-industry/. Another classic example is the story of Al Almanza, the former head of USDA's Food Safety and Inspection Service – the agency responsible for the safety of meat and poultry in the US – who was appointed as Global Head of Food Safety and Quality for JSA-SA, following his tenure at the USDA. This appointment is particularly concerning since months prior to it, the country of Brazil accused JBS of bribing Brazilian inspectors to allow the importation of rotten and unsafe meat to the U.S. and other countries. Suspiciously, of all the countries involved, the U.S. was the very last one to suspend the imports of the Brazilian beef. Joe Maxwell, *USDA Inc.: JBS is the Latest in Scandalous Job Swapping Between Government and Meat Industry*,

ORGANIZATION FOR COMPETITIVE MARKETS (Aug. 4, 2017) https://competitivemarkets.com/usda-inc-jbs-is-the-latest-in-scandalous-job-swapping-between-government-and-meat-industry/.

[244] Traci Eatherton, *JBS Appoints New Board, Including Former House Speaker John Boehner*, TRI-STATE LIVESTOCK NEWS (Mar. 21, 2017) https://www.tsln.com/news/jbs-appoints-new-board-including-former-house-speaker-john-boehner/.

[245] Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. L. & PUB. POL'Y 37, 46 (2014).

[246] Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. L. & PUB. POL'Y 37, 49 (2014).

[247] *See, e.g.*, Alison Moodie, *Before You Read Another Health Study, Check Who's Funding the Research*, THE GUARDIAN, (Dec. 12, 2016) https://www.theguardian.com/lifeandstyle/2016/dec/12/studies-health-nutrition-sugar-coca-cola-marion-nestle (156 of 168 studies funded by food and beverage companies in 2015 showed biased results in funder's favor); NAT'L DAIRY COUNCIL, DAIRY RESEARCH FOR YOUR BUSINESS: NUTRITION, PRODUCT AND SUSTAINABILITY RESEARCH PROGRAM OVERVIEW 2014-2019 (2019) (listing studies and programs funded by NDC from 2015-2019); Jessica Fu, *In the Most Popular Nutrition Journals, 1 in 7 Articles Have Food Industry Involvement*, THE COUNTER, (Dec. 16, 2020) https://thecounter.org/food-industry-involvement-nutrition-journals-studies/ (one of every seven studies published in nutrition journals report some involvement with food industry. In Journal of Nutrition, that jumps to one in every three studies. Studies reporting industry involvement are six times more likely to have results favoring food industry). *See also* Mélissa Mialon et al., *Conflicts of Interest for Members of the U.S. 2020 Dietary Guidelines Advisory Committee*, PUB. HEALTH NUTRITION 9 (Mar. 21, 2022) (accepted manuscript) (19 out of 20 members of Dietary Guidelines for Americans advisory committee for 2020-2025 reported at least one conflict of interest with food and pharmaceutical industry actors. A full 60-percent of conflict reports stemmed from researching funding and membership on advisory/executive boards, calling into question objectivity of the resulting guideline recommendations).

[248] Food, Beverage, and restaurant companies spend almost $14 billion each year on advertising in the U.S. *Food Marketing*, UCONN RUDD CTR. FOR FOOD POL'Y & HEALTH, https://uconnruddcenter.org/research/food-marketing/ (last visited Apr. 19, 2022). In 2021, Tyson Foods alone spent $246 million dollars in advertising. M. Shahbandeh, *Advertising Expenses of Tyson Foods Worldwide 2012-2021*, STATISTICA (Nov. 25, 2021) https://www.statista.com/statistics/375730/advertising-expenditure-of-tyson-foods/.

[249] Nina Lakhani, Aliya Uteuova & Alvin Chang, *Investigation Shows Scale of Big Food Corporations' Market Dominance and Political Power*, THE GUARDIAN (July 14, 2021) https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation (during 2020 election cycle, entire food industry spent $175 million in political contributions, including lobbying by PACs, individuals, and other contributions); *U.S. Meat and Dairy Companies Spend Millions Lobbying Against Climate Legislation*, PHYSICIANS COMMITTEE FOR RESP. MED.: BLOG (Apr. 14, 2021) https://www.pcrm.org/news/blog/us-meat-and-dairy-companies-spend-millions-lobbying-against-climate-legislation ("The National Cattlemen's Beef Association, the National Pork Producers Council, the North American Meat Institute, the National Chicken Council, the International Dairy Foods Association, and the American Farm Bureau Federation and its state groups—have collectively spent approximately $200 million in lobbying since 2000, lobbying yearly on climate-related issues like cap-and-trade, the Clean Air Act, and greenhouse gas regulations."). *Meat Processing & Products: Lobbying 2021*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/lobbying.php?ind=G2300 (last visited Apr. 19, 2022) (meat processing companies spent over $4.4 million for lobbying in 2021).

[250] Since 2005, the meat processing industry has spent over $65 million on lobbying and nearly $9 million supporting political campaigns. In 2018 alone, Tyson Foods contributed $341,995 to political campaigns and spent over $1.1 million on lobbying. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019). *See also Meat processing & Products: Summary: Money to Congress,* OPENSECRETS.ORG https://www.opensecrets.org/industries/indus.php?ind=G2300 (last visited Apr. 19, 2022); Marta Zaraska, *This is Why You Crave Beef: Inside Secrets of Big Meat's Billion-Dollar Ad and Lobbying Campaigns*, (Apr. 3, 2016) (Excerpt from MEATHOOKED: THE HISTORY AND SCIENCE OF OUR 2.5-MILLION-YEAR OBSESSION WITH

MEAT (Basic Books, 2016)) ("The Center for Responsive Politics estimates that during the 2013 election cycle, the animal products industry contributed $17.5 million to federal candidates.").

[251] In the 1990's, Tyson paid $6 million in fines after pleading guilty to making illegal gifts to then Secretary of Agriculture, Mike Espy during the overhaul of the USDA meat and poultry inspection system. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019). Tyson paid another $5.2 million in fines in 2011 as part of a settlement agreement with the DOJ connected to bribing government officials inspecting processing plants in Mexico. William Neuman, *Tyson Settles U.S. Charges of Bribery*, N.Y. TIMES (Feb. 10, 2011) https://www.nytimes.com/2011/02/11/business/11tyson.html.

[252] An example of this in action is the industry's response to a 2010 proposed rule to update the Packers and Stockyards Act which would have "closely policed how meatpackers and processors wield their market power against farmers, and reigned in abusive practices, such as the payment scheme known as the 'tournament system.'" Tyson submitted a 355-page legal brief challenging nearly every single provision of the proposed rule. The National Chicken Council produced a report estimating the proposed rule would cost the broiler industry over $ 1 billion over the course of the next five years. The National Meat Association funded research stating the rule would cost 23,000 jobs. The American Meat Institute released a report estimating the rule would cost $14 billion GDP, $1.36 billion in lost revenue, and 104,000 jobs. In response to these dire predictions of lost jobs and profit, USDA agreed to conduct a cost-benefit analysis, and by the time the final rule was published, over half of the proposed provisions were either severely diluted or eliminated entirely – including one that would have made it easier for farmers to bring suit over unfair or deceptive practices. Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. L. & PUB. POL'Y 37, 47-48 (2014). *Compare* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338 (June 22, 2010) (proposed rule), *with* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration, 76 Fed. Reg. 76,874 (Dec. 9, 2011) (codified at 9 C.F.R. pt. 201) (final rule).

[253] Ben Shapiro, *Can the Future of Food be Sustainable in a Rapidly Growing World? Cargill's CEO Says They're Investing in It*, TIME (Aug. 21, 2021) https://time.com/6089480/cargill-ceo-david-maclennan-agriculture/.

[254] Meredith Lee, *'Too Big to Fail': White House Careful Not to Target Food Companies as it Pressures Putin*, POLITICO (Mar. 25, 2022) https://www.politico.com/news/2022/03/25/white-house-food-companies-russia-00020293.

[255] The brief rise and fall of Zilmax—a feed hormone used to bulk cattle up during the final few weeks before slaughter—is particularly enlightening on this issue. When Zilmax was first introduced to the market in 2007, beef producers tended to stay away because of the drugs potentially negative effect on beef quality. Once Tyson, Cargill, JBS, and The National Beef Packing Company announced they would begin accepting Zilmax-fed cattle, the drug's use rapidly spread throughout the industry. In 2013, reports spread that Zilmax-fed cattle sometimes struggled to walk or displayed "strange symptoms. On August 9, 2013, Tyson announced it would no longer accept Zilmax-fed cattle at its processing plants. Despite denying the drug's connection to any health issues in cattle, the manufacturer, Merck—another leading corporation—made its own announcement only seven days later: the company was suspending sales of Zilmax. *See* Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. L. & PUB. POL'Y 37, 54 (2014).

[256] *See, e.g.*, Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA, (Sept. 14, 2020) https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open (contents of "Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19" issued April 28, 2020 mirrored agenda and, in some cases, exact language provided by Meat Institute less than a week prior). *See also* Rebecca Boehm, *Tyson Spells Trouble for Arkansas*, UNION OF CONCERNED SCIENTISTS, (Aug. 11, 2021) https://www.ucsusa.org/resources/tyson-spells-trouble#read-online-content ("The mayor of Springdale [Arkansas]—the city in which Tyson has its global headquarters—worked hand in hand with Tyson government affairs and public relations staff to respond to national media inquiries about COVID-19 cases in the Springdale region at a time when the area led the nation in virus case growth.").

[257] CARGILL, EXTRAORDINARY: 2021 ANNUAL REPORT 2 (2021) https://www.cargill.com/doc/1432194192294/2021-cargill-annual-report.pdf.

[258] *See Subsidy Tracker Summary, Parent Company Cargill*, GOOD JOBS FIRST (last visited Apr. 19, 2022).

[259] U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.1100, cmt. B ("In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, have been unable to prevent it, or have been victimized by it.").

[260] This includes insulation from the risks of bankruptcy. When Pilgrim's Pride went through bankruptcy proceedings in 2008-2009, closure of processing complexes resulted in the termination of 200-300 farmer contracts. Rather than selling the processing complexes, Pilgrim's Pride worked through the bankruptcy court to block the entry of a competitor which would have put the plants back in production and saved the livelihoods of the few hundred farmers whose contracts had been terminated. In court, Pilgrim's Pride explicitly stated that they were terminating the complexes to reduce production and increase price–exactly the kind of behavior prohibited by the Packers and Stockyards Act as well as the Antitrust laws. While contract farmers lost their livelihoods and local banks lost millions, Pilgrim's Pride emerged "a stronger, leaner company with a growing customer base," with stock and $800 million from JBS as part of a corporate reorganization plan. *See* C. ROBERT TAYLOR & DAVID A. DOMINA, RESTORING ECONOMIC HEALTH TO CONTRACT POULTRY PRODUCTION 21 (May 13, 2010) (Report prepared for Joint U.S. Dep't of Just. and U.S. Dep't of Agric./ GIPSA Public Workshop on Competition Issues in the Poultry Industry, May 21, 2010); Emily Chasan & Bob Burgdorfer, *Pilgrim's Pride Exits Bankruptcy Under JBS Deal*, REUTERS (Dec. 26, 2009) https://www.reuters.com/article/us-pilgrimspride/pilgrims-pride-exits-bankruptcy-under-jbs-deal-idUSTRE5BR2O820091228.

[261] CTR. FOR CONST. RIGHTS & DEFENDING RIGHTS & DISSENT, AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS 6 (2017).

[262] *E.g.,* Kenny Torrella, *Most Animal Cruelty is Legal on the Farm. A Judge is Questioning That*, VOX (Mar. 9, 2022) https://www.vox.com/future-perfect/2022/3/9/22967328/animal-cruelty-laws-state-federal-exemptions-pennsylvania-martin-farms-dairy-calves-dehorning; Caitlyn O'Kane, *Fair Oaks Farms Under Investigations After Undercover Video Exposes Animal Abuse,* CBS NEWS, (June 7, 2019) https://www.cbsnews.com/news/after-undercover-video-exposes-animal-abuse-at-fair-oaks-farms-grocery-store-removes-products/ (Fair Oaks Farm owner quoted as saying "the employees featured in the video exercised a complete and total disregard for the documented training that all employees go through to ensure the comfort, safety and well-being of our animals.").

[263] Some estimates put nearly one half of the entire slaughter industry work force as undocumented immigrants who either entered the U.S. illegally or have overstayed their visas. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019) https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat; *see also* Stephen Groves & Sophia Tareen, *U.S. Meatpacking Industry Relies on Immigrant Workers. But a Labor Shortage Looms*, L.A. TIMES (May 26, 2020) https://www.latimes.com/food/story/2020-05-26/meatpacking-industry-immigrant-undocumented-workers.

[264] Leading up to a proposed 2010 rule change in the Packers and Stockyards Act, then Attorney General Eric Holder and Secretary of Agriculture Tom Vilsack held a series of hearings across the U.S. to "assess the state of consolidation in agricultural markets." Tyson, Pilgrim's Pride, and others, attempted to prevent contracted farmers from attending hearings or speaking out by threatening potential retaliation by the corporation. *E.g.,* Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. L. & PUB. POL'Y 37, 50-51 (2014). In at least one documented instance, Koch Foods followed through on that promise. Isaac Arnsdorf, *How a Top Chicken Company Cut Off Black Farmers, One by One*, PROPUBLICA (June 26, 2019) https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one (Koch Foods canceled Mississippi contract poultry farmer's contract the same day he testified at a hearing in Alabama).

[265] *See, e.g.,* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (MIT Press, 2015); Simcha Barkai*, Declining Labor and Capital Shares*, 75 J. of Fin. 2421, 2458 (2020); Gustavo Grullon, Yelena Larkin, & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* 23 REV. OF FIN. 697, 699, 700, 709 (Apr. 23, 2019); Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 10, 17, 29, 31 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017); Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 22750, 2016).

[266] Andrea Manera, *Competing for Inventors: Market Concentration and the Misallocation of Innovative Talent* 62 (Dec. 17, 2021) (unpublished manuscript) (on file with Massachusetts Institute of Technology, Department of Economics).

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[268] Chelsea Dinterman, *New Bayer Herbicide Registered by EPA*, SUCCESSFUL FARMING (Mar. 2, 2022) https://www.agriculture.com/crops/crop-protection/new-bayer-herbicide-registered-by-epa.

[269] RICHARD SEXTON, MINGXIA ZHANG & JAMES CHALFANT, USDA-ERS CONTRACTORS & COOPERATORS REP. NO. 2, GROCERY RETAILER BEHAVIOR IN THE PROCUREMENT AND SALE OF PERISHABLE FRESH PRODUCE COMMODITIES 3 (Sept. 2003); 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).

[270] *Value of $20 from 2000 to 2022,* IN2013DOLLARS.COM https://www.in2013dollars.com/us/inflation/2000?amount=20 (last visited Apr. 19, 2021).

[271] *Food Inflation Calculator*, IN2013DOLLARS.COM https://www.in2013dollars.com/Food/price-inflation/2000-to-2022?amount=20 (last visited Apr. 19, 2021).

[272] *Meats, Poultry, Fish, and Eggs Inflation Calculator*, IN2013DOLLARS.COM https://www.in2013dollars.com/Meats,-poultry,-fish,-and-eggs/price-inflation/2000-to-2022?amount=20 (last visited Apr. 19, 2021).

[273] *Meat Prices are Going Up, But Not as Fast as in 2021*, FOOD & ENV'T REP. NETWORK: FERN'S AG. INSIDER (Jan. 25, 2022) https://thefern.org/ag_insider/meat-prices-are-going-up-but-not-as-fast-as-in-2021/.

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[275] Cliff White, *JBS Moves to Acquire 100 Percent of Australia's Huon Aquaculture*, SEAFOODSOURCE (Aug. 6, 2021) https://www.seafoodsource.com/news/business-finance/jbs-acquires-100-percent-of-australia-s-huon-aquaculture.

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[277] Stephanie Maxine Ross, *Food for Thought, Part I: Foodborne Illness and Factory Farming*, 24 HOLISTIC NURSING PRAC. 169 (May 2010). Just in the past two months, at least four infants were hospitalized, and another died after consuming cronobacter- and salmonella- contaminated baby formula manufactured by Abbott Laboratories, Inc. Abbott is one of the largest formula manufacturers in the U.S. The resulting recall of powdered versions of Similac, Alimentum, and Elecare brands has exacerbated an already strained supply chain and reinforces the risks of relying on an increasingly consolidated food system. For the week of April 3, retailers across the U.S. reported baby formula out-of-stock 13-percent of the time. An out-of-stock rate of 10-percent is considered a problem. Sharon Terlep, *Baby-Formula Shortage Prompts Rationing at Target, Kroger, Walgreens, and CVS*, WALL STREET J. (Apr. 12, 2022) https://www.wsj.com/articles/baby-formula-shortage-prompts-rationing-at-target-kroger-walgreens-and-cvs-11649781594.

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[279] Susannah Savage et al., *Superbugs on the Shelves: Diseased Chicken Being Sold Across America*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Mar. 16, 2022) https://www.thebureauinvestigates.com/stories/2022-03-16/superbugs-on-the-shelves-diseased-chicken-being-sold-across-america.

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[297] Mike Callicrate, *Story of the Steer and a Theft of Epic Proportions,* NO-BULL FOOD NEWS (Nov. 16, 2021) https://no-bull.mikecallicrate.com/2021/11/16/story-of-the-steer-and-a-theft-of-epic-proportions/.

[298] Javier Blas, *Crop Giant Cargill Reports Biggest Profit in 156-Year History*, BLOOMBERG (Aug. 6, 2021) https://www.bloomberg.com/news/articles/2021-08-06/crop-giant-cargill-reports-biggest-profit-in-156-year-history; Tom Polansek & Ananya Mariam Rajesh, *Tyson Food Shares Set Record as High Meat Prices Fatten Profits*, REUTERS (Feb. 7, 2022) https://www.reuters.com/business/retail-consumer/tyson-foods-beats-revenue-estimates-higher-meat-prices-2022-02-07/.

[299] *See, e.g.,* JAMES M. MACDONALD, ECON. RES. SERV., U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 126, TECHNOLOGY ORGANIZATION, AND FINANCIAL PERFORMANCE IN U.S. BROILER PRODUCTION (June 2014) https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=7733.2 (97-percent of broilers raised under contract in 2011 in U.S.); *Broiler Chicken Industry Key Facts 2021*, NAT'L CHICKEN COUNCIL https://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/ (last visited Apr. 19, 2022) (Approximately 95 percent of broiler chickens are produced on [contract] farms, with the remaining 5-percent raised on company-owned farms); Dan Nosowitz, *After a Decade, the USDA 'Addresses' Unfairness in Meat Production*, MODERN FARMER (Jan. 23, 2020) https://modernfarmer.com/2020/01/after-a-decade-the-usda-addresses-unfairness-in-meat-production/ ("In the poultry sector, the big producers—Tyson, Pilgrim's, Perdue—have an incredible amount of control over the farmers who actually raise their chickens. Those farmers aren't technically employees; usually, they're contract growers, theoretically independent but in practice totally dependent on the whims of the big corporations. These companies provide the chicks, the feed and the medicine; the farmers raise the birds. Roughly 97-percent of chicken in the US is raised this way.").

[300] C. ROBERT TAYLOR & DAVID A. DOMINA, RESTORING ECONOMIC HEALTH TO CONTRACT POULTRY PRODUCTION 3 (May 13, 2010) (Report prepared for Joint U.S. Dep't of Just. and U.S. Dep't of Agric./ GIPSA Public Workshop on Competition Issues in the Poultry Industry, May 21, 2010).

[301] *What Debt in Chicken Farming Says About American Agriculture*, RURAL ADVANCEMENT FOUND. INT'L (July 12, 2016) https://www.rafiusa.org/blog/what-debt-in-chicken-farming-says-about-american-agriculture/.

[302] OFF. OF INSPECTOR GEN., EVALUATION REP. NO. 18-13, EVALUATION OF SBA(A) LOANS MADE TO POULTRY FARMERS 5 (Mar. 6, 2018).

[303] OFF. OF INSPECTOR GEN., EVALUATION REP. NO. 18-13, EVALUATION OF SBA(A) LOANS MADE TO POULTRY FARMERS 8 (Mar. 6, 2018).

[304] RURAL ADVANCEMENT FOUND. INT'L, UNDER CONTRACT: FARMERS AND THE FINE PRINT, VIEWERS GUIDE 17 (2017) https://rafiusa.org/undercontractfilm/wp-content/uploads/2017/01/Under_Contract_Viewers-Guide_2017_ReducedFileSize.pdf.

[305] It is worth noting that broiler genetics itself is a highly concentrated industry. Only two companies supply over 91-percent of commercial breeding stock for broilers globally: Tyson sub subsidiary Cobb-Vantress, and EW Group/

Aviagen. PAT MOONEY, ETC GROUP, BLOCKING THE CHAIN: INDUSTRIAL FOOD CONCENTRATION, BIG DATA PLATFORMS AND FOOD SOVEREIGNTY SOLUTIONS 20 (2018).

[306] OFF. OF INSPECTOR GEN., EVALUATION REP. NO. 18-13, EVALUATION OF SBA(A) LOANS MADE TO POULTRY FARMERS 2 (Mar. 6, 2018).

[307] *See, e.g.,* Complaint, *In re* Broiler Chicken Grower Litigation, No. 6:17-CV-00033-RJS (E.D. Okla. 2017).

[308] Lina M. Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov. 9, 2012) https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/.

[309] C. ROBERT TAYLOR & DAVID A. DOMINA, RESTORING ECONOMIC HEALTH TO CONTRACT POULTRY PRODUCTION 1 (May 13, 2010) (Report prepared for Joint U.S. Dep't of Just. and U.S. Dep't of Agric./ GIPSA Public Workshop on Competition Issues in the Poultry Industry, May 21, 2010).

[310] OFF. OF INSPECTOR GEN., EVALUATION REP. NO. 18-13, EVALUATION OF SBA(A) LOANS MADE TO POULTRY FARMERS 7, 9 (Mar. 6, 2018).

[311] [311] José A. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 9-10, 14 (Nat'l Bureau of Econ. Research, Working Paper No. 24395, 2018); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018).

[312] José A. Azar et al., *Concentration in US Labor Markets: Evidence From Online Vacancy Data* 9-10, 14 (Nat'l Bureau of Econ. Research, Working Paper No. 24395, 2018); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018).

[313] U.S. DEPT' OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION i, 4 (Mar. 7, 2022).

[314] José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017).

[315] Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018).

[316] Sandeep Vaheesan, *Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law* 1 J. L. & POL. ECON. 28, 37 (2020).

[317] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213, 213, 222-23 tbl. 2, 231 (2018).

[318] Sarah Miller & Krista Brown, *To Save Jobs and Slow Inequality, Stop the Merger Frenzy*, AM. ECON. LIBERTIES PROJECT (Jan. 11, 2022) https://www.economicliberties.us/our-work/merger-frenzy/.

[319] Monica Nickelsburg, *The Pandemic Has the Potential to Finally Transform Meat Processing in the U.S.*, CIVIL EATS (Oct. 19, 2020) https://civileats.com/2020/10/19/the-pandemic-has-the-potential-to-finally-transform-meat-processing-in-the-u-s/.

[320] OXFAM, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN 19 (Oct., 2015).

[321] Eli Hoff, *GRAPHIC: Meat Processing Workers earn an Average of $15.53 Per Hour*, THE COUNTER (July 23, 2021) https://thecounter.org/graphic-meat-processing-workers-average-15-53-per-hour/.

[322] Between January 2015 and August 2018, the Department of Labor's Occupational Safety and Health Administration (OSHA) received 770 reports of amputations, in-patient hospitalizations, or eye loss from meat and poultry plants. These figures do not cover injuries from employers in the 22 states which have state-based OSHA programs covering private sector workers. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019). Of the tens of thousands of companies who report injuries to OSHA, Tyson Foods is ranked fifth, Pilgrim's Pride is thirteenth, Cargill Meat Solutions is sixteenth, and JBS USA is seventeenth. Smithfield, National Beef, and Koch foods round out the top thirty. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019). Workers are often exposed to noxious chemicals, environmental contaminates, and biological hazards, such as feces, blood, and pathogens – workers have even been known to develop antibiotic resistance from absorbing antibiotics from chicken flesh. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019); OXFAM, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN 26 (Oct., 2015).

[323] OXFAM, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN 35 (Oct., 2015). Being denied a bathroom break is so common that workers often intentionally reduce their fluid intake, or wear diapers at work to avoid urinating on themselves. OXFAM, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN 35 (Oct., 2015). One survey of 266 slaughter workers in Alabama found that nearly 80-percent were not allowed to take bathroom breaks when needed. Another survey of Minnesota slaughter workers revealed that 86-percent of workers were allowed fewer than two bathroom breaks per *week*, on average. OXFAM, NO RELIEF: DENIAL OF BATHROOM BREAKS IN THE POULTRY INDUSTRY 3 (May, 2016); HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019).

[324] Gosia Wozniacka, *Less Than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIVIL EATS (May 7, 2019) https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/.

[325] Gosia Wozniacka, *Less Than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIVIL EATS (May 7, 2019) https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/.

[326] Gosia Wozniacka, *Less Than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIVIL EATS (May 7, 2019) https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/.

[327] Gosia Wozniacka, *Less Than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIVIL EATS (May 7, 2019) https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/.

[328] Econ. Res. Serv. *Farm Labor*, U.S. DEP'T OF AGRIC., https://www.ers.usda.gov/topics/farm-economy/farm-labor/#wages (last updated Mar. 15, 2022).

[329] Aleksandre Maisashvili et al., *Seed Prices, Proposed Mergers and Acquisitions Among Biotech Firms*, 31 CHOICES 2 (2016).

[330] Aleksandre Maisashvili et al., *Seed Prices, Proposed Mergers and Acquisitions Among Biotech Firms*, 31 CHOICES 4 (2016).

[331] Aleksandre Maisashvili et al., *Seed Prices, Proposed Mergers and Acquisitions Among Biotech Firms*, 31 CHOICES 4 (2016).

[332] Aleksandre Maisashvili et al., *Seed Prices, Proposed Mergers and Acquisitions Among Biotech Firms*, 31 CHOICES 3, fig. 2 (2016).

[333] MARY K. HENDRICKSON ET AL., THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS: SPECIAL REPORT TO FAMILY FARM ACTION ALLIANCE 15 (2020) https://farmaction.us/concentrationreport/.

[334] Midwest Ctr. For Investigative Reporting, *Dicamba on Trial: Internal Docs Show Monsanto, BASF, Prepared for Drift Complaints Prior to Dicamba Launch*, SUCCESSFUL FARMING (Jan. 29, 2020) https://www.agriculture.com/crops/pesticides/dicamba-on-trial.

[335] Christopher Leonard, *Is the Chicken Industry Rigged?* BLOOMBERG: BUSINESSWEEK (Feb. 15, 2017) https://www.bloomberg.com/news/features/2017-02-15/is-the-chicken-industry-rigged.

[336] *See generally* PAT MOONEY, ETC GROUP, BLOCKING THE CHAIN: INDUSTRIAL FOOD CONCENTRATION, BIG DATA PLATFORMS AND FOOD SOVEREIGNTY SOLUTIONS (2018).

[337] *Listening Forum on Firsthand Effects of Mergers and Acquisitions: Food and Agriculture, Fed. Trade Commission, U.S. Dep't of Just.* (Mar. 28, 2022) (statement of Sarah Lloyd, Dairy Farmer, Nelson Dairy Farm) ("Then the guy that sells us the semen for our artificial insemination for our dairy cows came and said, 'Well, I'm going to have to raise our prices to you, because I had to give a volume discount to that really big farm.' And so these cascading effects come down onto the smaller entities,"); (statement of Anthony Peña, Owner, Super Fresh & Save-A-Lot grocery stores) ("Just months ago, I was buying a 59-ounce orange juice just north of $4 a unit, where we couldn't get the supplier to sell it to us simply because there are none or their limited quantities are available to us. Meanwhile, I go to the bigger box like a Walmart or a club store. Not only do they have it fully stocked, but they have it about half the price that I would buy it for at cost,"); (statement of Tom Charley, Owner, Shop N Save grocery stores) ("I work with one of the largest wholesalers in the entire country, and we still can't touch their prices that Walmart secures for itself.").

[338] *See* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456-57 (Earl W. Kintner, ed. 1978).

[339] *See* 51 Cong. Rec. 16317-18 (1914) (statement of Mr. Floyd). *See also* EARL W. KINTNER, *Introduction: The Clayton Act of 1914*, *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 989, 1021-22 (Earl W. Kintner, ed. 1978).

[340] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 306 (1960).

[341] *See Standard Oil Co. of California v. United States*, 337 U.S. 293, 311 n.13 (1949).

[342] *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[343] *See United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 363 (1963). *See also* n. 131*supra*.

[344] *See* Lina M. Khan & Sandeep Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 281 (2017) (citing Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L. J. 269, 276 (2015)).

[345] Lina M. Khan & Sandeep Vahessan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 281-82 (2017).

[346] We highly encourage the Antitrust Agencies to review Derek Bok's seminal 1960 article on the proper role of economics in merger analysis and deriving bright-line decision rules from the text, legislative history, and value premises of the Celler-Kefauver Amendment. *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226 (1960) (cited approvingly in *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 362 (1963)).

[347] *See generally* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226 (1960).

[348] *See, e.g.*, H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949 (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734). *See also* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 331 n.308 (1960).

[349] *See* Part I.C. *supra*.

[350] *See Standard Oil Co. of California v. United States*, 337 U.S. 293, 314 (1949).

[351] *See Standard Oil Co. of California v. United States*, 337 U.S. 293, 305 (1949)

[352] *See e.g.*, H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949 (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734); 95 Cong. Rec. 11484, 11496, 11501 (House Debate); 96 Cong. Rec. 16433, 16449 (Senate Debate); FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3450 (Earl W. Kintner, ed. 1978); FEDERAL TRADE COMMISSION, FTC REPORT TO THE CONGRESS: THE PRESENT TREND OF CORPORATION MERGERS AND ACQUISITIONS (1947), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3418, 3427 (Earl W. Kintner, ed. 1978).

[353] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734) ("The purpose of the proposed bill, H. R. 2734, is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions.").

[354] *See Standard Oil Co. of California v. United States*, 337 U.S. 293, 312-13, n.15 (1949).

[355] *See* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 547-551 (1968)

[356] *See* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 558-59 (1968)

[357] *See, e.g.*, 96 Cong. Rec. 16404, 16453 (statement of Sen. O'Mahoney).

[358] *See United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, (1975) ("[W]e hold that the phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power.").

[359] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 6-7 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734)

[360] *See* S. REP. NO. 1775, 81st Cong., 2d Sess., at 6-7 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734)

[361] The Supreme Court's jurisprudence on market definition is carefully mapped in Harlan M. Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 580-84 (1973).

[362] We support the approach to merger review and antitrust enforcement announced in Assistant Attorney General Kanter's recent remarks to the New York State Bar Association Antitrust Section—particularly, in connection with merger reviews, that the Antitrust Division intends to "remain faithful to the plain language of the Clayton Act," ground merger review in "market realities," challenge mergers that "tend to create a monopoly" based on incipiency considerations, and favor "simple injunction[s] to block" unlawful mergers over partial divestitures and complex settlements. *See* Jonathan Kanter, Assistant Attorney General, Antitrust Division, Department of Justice, Remarks to the New York State Bar Association Antitrust Section (January 24, 2022).

[363] *See supra* n. 207.

[364] *See* S. REP. NO. 1775, 81st Cong., 2d Sess., at 5-6 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[365] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 1 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734).

[366] *See* Jonathan Kanter, Assistant Attorney General, Antitrust Division, Department of Justice, Remarks to the New York State Bar Association Antitrust Section (January 24, 2022).

[367] *See* 96 Cong. Rec. 16460 (1950) (remarks of Sen. Johnson).