Rolling Back Corporate Concentration:

How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power

By Stacy Mitchell and Ron Knox
June 2022

ILSR INSTITUTE FOR Local Self-Reliance

About the Institute for Local Self-Reliance

The Institute for Local Self-Reliance (ILSR) is a national research and advocacy organization that partners with allies across the country to build an American economy driven by local priorities and accountable to people and the planet. Whether it's fighting back against the outsize power of monopolies like Amazon, ensuring high-quality locally driven broadband service for all, or advocating to keep local renewable energy in the community that produced it, ILSR advocates for solutions that harness the power of citizens and communities. More at www.ilsr.org.

About the Authors

Stacy Mitchell is co-director of the Institute for Local Self-Reliance and directs its Independent Business Initiative, which produces research and analysis, and partners with a broad range of allies to design and implement policies to reverse corporate concentration and strengthen local economies. She's written several influential reports and articles about Amazon's power. Find her on Twitter @stacyfmitchell.

Ron Knox is a Senior Researcher and Writer for ILSR's Independent Business team. His work has appeared in *The Washington Post*, *The American Prospect*, *Wired* and elsewhere, and he has authored and co-authored numerous ILSR reports on monopoly power. He's on Twitter: @ronmknox.

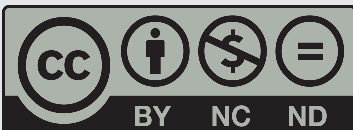
More Resources from ILSR's Independent Business Initiative:

Monopoly Power and the Decline of Small Business:
https://bit.ly/MonopolyPower

Amazon's Toll Road:
https://bit.ly/AmazonTollRoad

Rebuilding Small Business for a Robust Recovery: A Federal Policy Agenda:
https://bit.ly/SmallBizRecoveryPolicyAgenda

For monthly updates on our work, sign up for the Hometown Advantage Bulletin: http://hometownadvantage.org



This report is licensed under a Creative Commons license. You are free to replicate and distribute it, as long as you attribute it to ILSR and do not use it for commercial purposes.

Table of Contents

Introduction and Summary 4

PART ONE

With the Passage of the Clayton Act's Antimerger Provisions, Congress Sought to Foster a Decentralized Economy 8

PART TWO

The Antitrust Agencies' Current Merger Guidelines Deviate Radically from the Law and the Aims of Congress 11

PART THREE

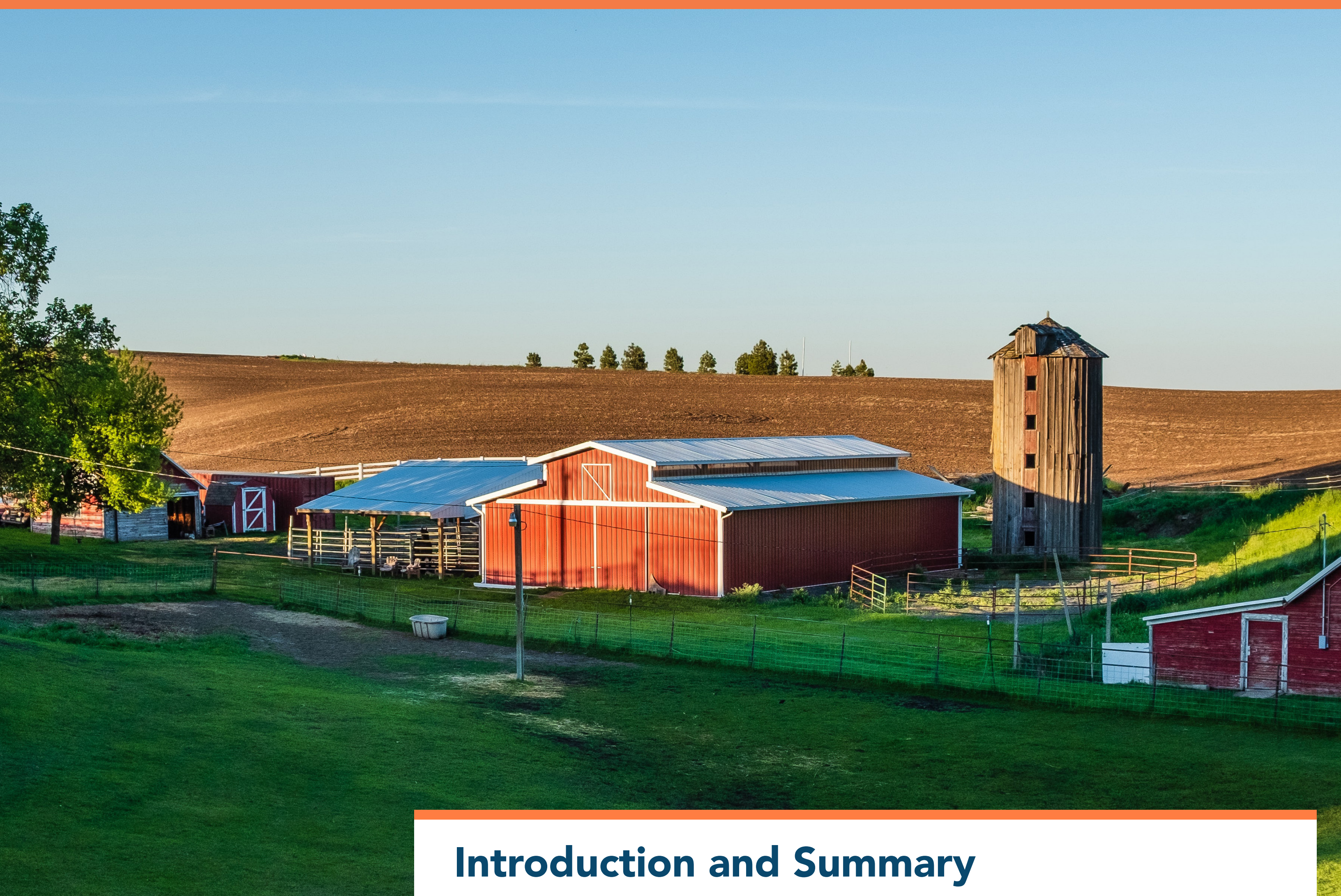
Current Merger Policy has Led to Extreme Concentration Across the Economy and Precipitated the Very Harms Congress Intended to Prevent 15

- Eliminating independent businesses, economic diversity, and resilience 16
- Transferring wealth to the few 18
- Destabilizing communities and democracy 19

PART FOUR

Ten Principles for New Antimerger Guidelines 23

Notes 32



Introduction and Summary

A major shift is afoot in the federal government's stance on big business. Earlier this year, the two agencies in charge of enforcing the antitrust laws, the Federal Trade Commission and Department of Justice, announced that they plan to revise their merger guidelines. That may sound like a minor technicality, but in fact, it heralds a sea change in the workings of antitrust law. The new guidelines, expected later this year, will likely make it much harder for large corporations to amass power by buying other companies. Over time the guidelines will also shape how judges understand and apply the antitrust laws in their rulings.

Had this shift in enforcement policy come about years ago, Americans wouldn't be contending with a host of debilitating problems caused by consolidation. Mergers in the food industry, for example, have allowed dominant meatpackers and other processors to slash the incomes of farmers and food workers, while raising grocery prices. Mergers among manufacturers of everything from appliances to beer cans have led to the shuttering of plants, costing communities thousands of jobs. Hospital mergers have sent health care costs soaring, while dozens of rural communities have lost their hospitals altogether, as big hospital chains bought and then closed

The headquarters of the Federal Trade Commission is flanked by the statue "Man Controlling Trade," which was dedicated in 1942.

small facilities. Meanwhile, Amazon, Facebook, and Google have used acquisitions to thwart potential competition and lock in their dominance, to the detriment of small businesses, local newspapers, and others seeking to communicate or sell products online.

New merger guidelines hold the promise of putting a stop to these kinds of domineering moves by powerful corporations. But their potential isn't limited to simply preventing America's monopoly problem from getting worse. Strong merger enforcement would create a fairer playing field for small businesses and allow more startups to gain a toehold, deconcentrating industries over time. And as we've noted, the merger guidelines provide a framework for understanding the antitrust laws that history shows can significantly influence how the courts apply the law, and not only in merger cases.

The agencies' announcement heralds a sea change in the workings of antitrust law.

We anticipate that the new guidelines will bring the agencies' enforcement policies back in line with the law as written by Congress. The key legislation in this case is the Celler-Kefauver Antimerger Act, a major amendment to the nation's existing antitrust laws, which passed with overwhelming support in 1950 after more than two years of study and debate. The legislation's name tells its story: lawmakers intended to put the brakes on mergers. To this end, the law bars any merger that *may* lessen competition in any line of commerce in any region. Its intent is to head off consolidation before it begins, when the trend toward industry concentration is "still in its incipiency."

Congress was alarmed by a surge of mergers in the aftermath of the war and the inadequacy of existing law to stop the wave of consolidation. Drawing on the legislative record, this report shows that, by passing the antimerger act, lawmakers aimed to halt further concentration and ensure that economic power would be widely dispersed across a multitude of independent businesses. Doing so would protect competition and its benefits. It would also address a much deeper worry that drove Congressional debate: Having witnessed the link between monopoly control of industry and fascism in Nazi Germany, lawmakers were keenly aware of how rising concentration threatened American liberty.

By outlawing many mergers, Congress sought to prevent corporations from growing so powerful that they could overshadow and manipulate government. Lawmakers also intended the law to safeguard democracy at its most elemental level. Throughout the debate, they underscored the importance of community self-determination and how its absence bred alienation and a loss of faith in democratic government. The antimerger act would promote a decentralized economy, ensuring that communities had sufficient local control of business to direct their own affairs, free from the tyranny of decisions made in distant boardrooms.

If all of this sounds wildly unfamiliar — like the law of an alternate universe, and not that of the United States — that's because in 1982, the Department of Justice, with a stunning degree of hubris, cast aside the antimerger act's provisions and issued new guidelines for mergers that explicitly welcomed consolidation, declaring that "mergers generally play an important role in a free enterprise economy." As a result, within the living memory of most Americans, antitrust enforcers have followed a radically different set of principles than those set out by Congress. They've dismissed the law's concern with power, and even its commitment to

competition, and instead defined greater efficiency as the overriding objective in reviewing mergers, with the presumption that large-scale corporations are inherently superior.

The 1982 Merger Guidelines were a calculated bid by the Reagan Administration to gut the antitrust laws without involving Congress.[1] Nevertheless, this drastic shift in policy was also embraced by subsequent Democratic administrations. Updates to the merger guidelines issued under Presidents Clinton and Obama veered even further in favor of concentration. As we detail in this report, the 1997 guidelines gave additional weight to assumptions about the advantages of bigness. The 2010 guidelines sharply raised the threshold for what counts as a merger in a "highly concentrated" market and thus deserving of scrutiny.

Reagan's advisors correctly predicted that their revamping of the guidelines would not only enfeeble enforcement at the DOJ and FTC, but also influence how the courts approached antitrust cases. This occurred not only in merger cases. The guidelines' deference to narrow economic theories and disregard of questions of power, liberty, and democracy have shaped how judges interpret and apply the antitrust laws broadly.[2]

With the 1950 antimerger act, lawmakers aimed to halt further concentration and ensure that economic power would be widely dispersed across a multitude of independent businesses.

We know how this story turned out. Decades of mergers and lax antitrust enforcement have left most sectors – from broadband service to book publishing, news media to airlines – in the hands of a few dominant corporations. Lacking meaningful competition, these corporations have stripped many industries of their productive capacity. They've shuttered facilities, curtailed research and investment, cut jobs and wages, muscled out small businesses, and stifled startups. All of this has made the U.S. economy weaker and more brittle. As the recent supply chain failures have demonstrated, concentration has compromised the very thing that market economies should excel at: nimbly adapting to disruptions.

Lina Khan, chair of the Federal Trade Commission, is co-leading a comprehensive revision of the federal merger guidelines, together with Jonathan Kanter, head of the Justice Department's Antitrust Division.

Consolidation has also opened wide disparities in American society. Mergers have centralized power and wealth in a few "superstar" cities, mainly on the coasts, where big banks, tech giants, and other larger corporations reside. Small towns and urban centers that once housed vibrant local economies have suffered amid the disappearance of local businesses, the closure of hospitals and factories, and the loss of advertising, insurance, and other white-collar firms that once served regional markets before being swallowed up. These effects have been especially severe in communities that have been marginalized by redlining and other hallmarks of systemic racism.

The architects behind this radical reengineering of the U.S. economy dismissed the political concerns that motivated the antitrust laws, ridiculing them as "a jumble of half-digested notions and mythologies." But today those concerns have emerged as alarming realities. Communities find themselves at the mercy of distant, unaccountable monopolies that control the provision of essential services, provide and eliminate jobs as they see fit, and set the local political agenda. This has sowed widespread discontent and alienation, undermining trust in government and destabilizing democracy.

Having witnessed the link between monopoly control of industry and fascism in Nazi Germany, lawmakers [in 1950] were keenly aware of how rising concentration threatened American liberty.

With the new guidelines, the antitrust agencies can bring merger enforcement back in line with the broad economic and political goals set by Congress, while also applying those goals to new areas of the economy, from big tech to private equity. Just as the 1982 guidelines, and their subsequent iterations, influenced how judges approached antitrust cases, we can expect the 2022 guidelines to do the same.

The goal of the new guidelines should not be simply to stop a small number of the worst corporate mergers. Their long-term success should be measured by the degree to which concentrated markets become less concentrated over time. The new guidelines should establish bright-line rules that categorically block mergers that exceed certain thresholds. They should instruct enforcers to sharply scrutinize mergers in sectors that already show signs of a lack of healthy market diversity, including small business activity. They should eliminate efficiency claims as a determinative factor and deter large corporations from pursuing mergers in the first place. Broadly speaking, new guidelines should foster an approach to antitrust enforcement that decentralizes power, invigorates new business formation, enhances community agency, promotes fair competition, and safeguards the liberty of Americans.

This report is organized into four parts:

PART ONE

Examines the text and legislative history of the Celler-Kefauver Antimerger Act and goals articulated by Congress.

PART TWO

Looks at how the agencies' guidelines and enforcement practice over the last forty years have radically deviated from the law and fostered concentration.

PART THREE

Documents the consequences of this approach. It focuses in particular on how failed merger policies have sapped the economy of its resilience, led to the decline of independent businesses, transferred wealth to the few, undermined community self-determination, and destabilized democracy.

PART FOUR

Offers ten principles and provisions that should be embodied in the new guidelines.

PART ONE

With the Passage of the Clayton Act's Antimerger Provisions, Congress Sought to Foster a Decentralized Economy

In 1950, after more than two years of discussion and debate, and by overwhelming margins in both the House and Senate, Congress passed the Celler-Kefauver Antimerger Act. The act amended the 1914 Clayton Act's merger provisions "by broadening its scope so as to cover the entire range of corporate amalgamations" and "chang[ing] the test of illegality" so as to outlaw a much wider array of mergers.[3] To this end, Congress banned any acquisition when "the effect of such acquisition may be substantially to lessen competition… in any line of commerce."[4]

With this language, Congress opted against the legal standard that courts apply to mergers under the Sherman Antitrust Act, a law enacted in 1890 that bars only those mergers that have a likelihood of creating a monopoly.[5] Instead, Congress chose to ban mergers that have a reasonable potential to reduce "the vigor of competition."[6] As a Senate report explained: "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."[7]

By outlawing a much broader range of mergers, Congress sought to both "limit future increases in the level of economic concentration"[8] and create the conditions that would allow markets to deconcentrate.[9] As the Department of Justice's 1968 Merger Guidelines note, the Celler-Kefauver Antimerger Act has several "interrelated purposes," including "preserving significant possibilities for eventual deconcentration in a concentrated market."[10] Reviewing the law's impact in 1978, the House Judiciary Committee concluded that "it prevented merger-induced increases in market concentration in many industries," which "open[ed] opportunities for deconcentration to occur."[11] The study highlighted shoe manufacturing and dairy processing as examples of industries that had become less concentrated as a result of the law and its enforcement.[12]

As the legislative history shows, Congress was motivated by a deep conviction that the structure of the economy has profound implications for American life and democracy.[13] While the Congressional record speaks to the many economic benefits of competition, a more dominant theme is the crucial importance of fragmented market structures to the cultivation and preservation of democracy.[14] Congress believed a decentralized economy facilitates strong, self-governing communities and ensures that the liberty of Americans cannot be circumscribed by the exercise of private power.[15] As the scholar Derek Bok points out, a notable feature of the Congressional debates leading to the law's passage is "the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency." While Congress spoke of competition as its goal, Bok notes that "competition appeared to possess a strong socio-political connotation."[16]

Indeed, the legislative history shows Congress understood "competition" to mean decentralized market structures in which power is widely distributed.[17] Throughout the debate, proponents of the bill emphasized the importance of local economic independence.[18] "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business," the U.S. Supreme Court has explained.[19] By vesting a significant degree of economic decision-making at the local level, Congress sought to nourish "local initiative and civic responsibility," and thereby cultivate the development of an independent citizenry with the capacity for self-government.[20]

Dairy processing and shoe manufacturing were among the industries that had become less concentrated as a result of the 1950 law and its enforcement.

Congress believed a decentralized economy facilitates strong, self-governing communities and ensures that the liberty of Americans cannot be circumscribed by the exercise of private power.

Congress feared that, absent intervention, mergers would concentrate decision-making in the hands of an ever smaller number of corporations, allowing the few to exert control over the many and leaving communities at the mercy of distant, unaccountable authority.[21] "Through monopolistic mergers the people are losing power to direct their own economic welfare," noted Senator Estes Kefauver, a lead sponsor of the bill. "Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years. The control of American business is steadily being transferred… from local communities to a few large cities in which central managers decide the policies and the fate of the far-flung enterprises they control. Millions of people depend helplessly on their judgment."[22]

Lawmakers saw this loss of local economic agency and community self-determination as fundamentally undemocratic. "The evil of that course is quite apparent," said Senator Kefauver. "When [people] lose the power to direct their economic welfare they also lose the means to direct their political future."[23] More concerning still, lawmakers feared that, if a handful of corporate giants came to dominate industry, it would inevitably "breed antidemocratic political pressures."[24] Proponents of the legislation argued that such centralized control tended to spur the reactionary rise of fascism or communism.[25] "Some of the key passages of [the] legislative history reveal strong congressional concern with the political implications of mergers," observes law professor Robert Pitofsky. He adds that these considerations had been entirely sidelined by antitrust enforcers in an era of "augmented influence by economists."[26]

Congress intended enforcers to stop concentration at its earliest stage, well before any accumulation of market power had occurred.

Congress believed that large numbers of small, independent businesses were an essential feature of the competitive, decentralized markets it sought to foster. A central purpose of the amendments, as the Senate Judiciary Committee report noted at the time, was to "aid in preserving small business as an important competitive factor in the American economy."[27] Small business was referenced frequently by proponents of the legislation.[28] During a hearing on the bill, Rep. Emanuel Celler read sections of the Democratic and Republican platforms, both of which championed using antitrust policy to limit concentration and thereby foster a competitive economy of small businesses and independent commerce.[29] President Harry Truman also highlighted small business in his brief signing statement: "I have repeatedly recommended the enactment of this legislation to the Congress, as a major element in the program of this administration to prevent the growth of monopoly and greater concentration of economic power and to create conditions favorable to small and independent business."[30]

"Through monopolistic mergers the people are losing power to direct their own economic welfare," noted Senator Estes Kefauver, who successfully pushed to strengthen the country's anti-merger law.

Congress saw the presence of a large number of small businesses in a market as essential not only to creating the decentralized market structures conducive to democracy, but also to fueling the vigorous commercial rivalry that spurs businesses to seek to innovate, better serve customers, attract the best workers, and so on.[31] The idea that "competition is likely to be greatest when there are many sellers, none of which has any significant market share," the Supreme Court has observed, "was undoubtedly a premise of congressional reasoning about the antimerger statute."[32] Congress sought to ensure that starting a business was an opportunity open to average Americans, and that independent businesses had a fair chance to compete.

Importantly, Congress sought to head-off rising consolidation in an industry long before it threatened competition. A "keystone" of the law, the U.S. Supreme Court has noted, "was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."[33] Congress intended enforcers to stop concentration at its earliest stage, well before any accumulation of market power had occurred. It recognized that rising concentration is hard to reverse once it has momentum; that one merger is likely to trigger others, among both competitors and suppliers.[34] Congress thus saw "the process of concentration in American business as a dynamic force" and through the Clayton Act's antimerger provisions, gave enforcers "the power to brake this force at its outset and before it gathered momentum."[35]

PART TWO

The Antitrust Agencies' Current Merger Guidelines Deviate Radically from the Law and the Aims of Congress

While Congress sought to foster competition as a means of advancing a range of economic goals and political values, today's Merger Guidelines, which were last revised by the agencies in 2010, abandon these principles and reorient policy around a single objective: greater efficiency.[36] Rather than seeking to stop further concentration, as Congress directed, the current guidelines adopt a broadly favorable view of mergers, expressing that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies."[37]

This policy deviates radically from the statutory text and aims of the Clayton Act and its substantial 1950 amendment. While Congress outlawed mergers that may lessen competition, on the grounds that competitive markets are the best way to achieve a broad range of political and economic goals — including safeguarding consumers — today's guidelines allow efficiency to trump competition. Even when mergers would

result in "highly concentrated markets" dominated by a few giant firms, the guidelines direct that they should not be challenged if there's "evidence showing that the merger is unlikely to enhance market power," which the guidelines and recent enforcement practice define almost exclusively as harm to output or consumer prices in the short-term.[38]

Enforcement policy hasn't always diverged from the law. In the decades after the passage of the 1950 Celler-Kefauver Antimerger Act, the Justice Department adopted an "aggressive structure-based policy" of enforcement.[39] The DOJ's first merger guidelines, issued in 1968 to provide clarity to businesses and the public,[40] mirrored Congress' intent to foster diverse, decentralized industries. The guidelines emphasized the importance of market structure, setting as the goal of enforcement "to preserve and promote market structures conducive to competition."[41] In keeping with the statute, the guidelines directed enforcers to err on the side of challenging mergers[42] and called for heading off concentration in advance by "prevent[ing] changes in market structure that are likely to lead *over the course of time* to significant anticompetitive consequences."[43]

While Congress outlawed mergers that may lessen competition, on the grounds that competitive markets are the best way to achieve a broad range of political and economic goals, today's guidelines allow efficiency to trump competition.

The dramatic shift in enforcement policy came in 1982, when the Reagan Administration issued new guidelines that veered sharply from both the law and the previous guidelines. The new guidelines reflected the ideas of the Chicago School, a group of highly influential economic and legal thinkers led by Robert Bork, Richard Posner, and others.[44] These scholars rejected the established economic and political aims of antitrust. They viewed markets as self-correcting and consolidation as beneficial on the assumption that it increased efficiency.[45] Accordingly, the new guidelines declared that "mergers generally play an important role in a free enterprise economy" and "even in

The 1982 guidelines, which deviated radically from the laws enacted by Congress, reflected the ideas of Robert Bork, who viewed markets as self-correcting and consolidation as beneficial.

concentrated markets, it is desirable to allow firms some scope for merger activity in order to achieve economies of scale."[46] They substantially relaxed the thresholds that triggered scrutiny of a merger and raised the bar that enforcers would need to clear to challenge one.[47]

Then-Attorney General William French Smith said that the 1982 guidelines were an "enormous advance" because they recognized that "most merger activity does not threaten competition, but actually improves our economy's efficiency and thus benefits all consumers."[48]

The Chicago School's belief that efficiency should be the lodestar of antitrust was such a departure from established law and policy that even the 1982 guidelines, as bold as they were, put guardrails around its role.[49] They directed enforcers to consider efficiency arguments only in "extraordinary cases" where there were "substantial cost savings" proven by "clear and convincing evidence." Meanwhile the Federal Trade Commission's 1982 guidelines rejected efficiencies as a defense in merger cases altogether.[50] (The FTC and DOJ first issued joint guidelines in 1992.)

In the decades since, the agencies have issued four revisions to the guidelines and "each successive iteration has been more hospitable" to efficiency arguments.[51] The 1984 guidelines made efficiency a central consideration in

reviewing mergers.[52] They also sharply limited the circumstances in which the agencies would challenge vertical mergers, on the grounds that such integrations yielded efficiencies and rarely posed completive threats. Challenges to vertical mergers have been rare ever since.[53]

The next issuance of the guidelines, published in 1992, omitted the requirement that efficiencies be proven "by clear and convincing evidence." The 1997 guidelines, issued under the Clinton Administration, went further still. They "elaborated on the mechanism by which efficiencies could increase the competitiveness of firms, and it expanded the list of efficiency benefits to include 'improved quality, enhanced service, or new products' in addition to lower prices."[54]

In the decades since, the agencies have issued four revisions to the guidelines and "each successive iteration has been more hospitable" to efficiency arguments.

The current guidelines, issued in 2010, in many respects "continued their evolution toward a narrow policy" and integrated efficiency even more fully into aspects of merger analysis.[55] Particularly striking, the 2010 revisions significantly raised the market concentration thresholds at which the agencies consider a market to be "highly concentrated" and thus mergers within it presumed to be problematic. In making this change, the Justice Department explained that it was simply aligning its formal guidelines with what had already been happening in practice for some time.[56] Indeed, as Professor John Kwoka has shown, at least since the 1990s, the agencies have not been challenging many of the mergers that should have drawn a presumption of illegality under the guidelines.[57]

Antitrust scholars representing a variety of economic traditions have made clear that the modern guidelines' sympathy for efficiencies as a panacea for anticompetitive mergers runs counter to Congressional intent. As American University law professor Herman Schwartz wrote in 1985, "This preoccupation with economic efficiency ignores Congressional intent and judicial precedent. The legislative history of the antitrust laws contains almost no mention of efficiency, production, or price. Rather, there is an insistent Jeffersonian concern for the small entrepreneur — for social, not economic reasons."[58]

Herbert Hovenkamp, an antitrust luminary who generally supports the Chicago School's "consumer welfare" standard, concurs: "The legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency."[59] And Chief Justice Warren writing the Supreme Court's opinion in *Brown Shoe* made Congressional intent clear: "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets . . . . [and] resolved these competing considerations in favor of decentralization."[60]

A key way the current guidelines promote, rather prevent, consolidation is by emboldening a "rule-of-reason" framework. Rather than establishing bright-line standards that prohibit mergers over a certain size or market share, the rule-of-reason approach considers a merger to be problematic only if enforcers can prove that it will lead to higher consumer prices in the future. This has led the agencies to rely on complex crystal-ball predictions about future prices. Recent scholarship has shown that these predications are often wrong: most major mergers not blocked by enforcers have in fact led to higher prices.

Under the current guidelines, mergers that will shutter factories and offices, leading to thousands of lost jobs, are generally treated as efficiency-enhancing. This runs directly against Congress's intent to distribute economic capacity widely.

Mergers have allowed a few powerful meatpackers to dominate meat processing, threatening farmers and our food supply.

And in instances where enforcers do challenge mergers, economists hired by the merging firms present equally complex models to challenge the agencies' price projections. This has resulted in weak cases, the outcomes of which hinge on which projection the judge thinks might be accurate.[61]

What's more, the current guidelines stretch the parameters of what counts as competition, so that even companies that don't actually compete in an industry but might in the future — so-called "rapid entrants" — are considered relevant competitors when evaluating a merger. This helps mergers that unduly concentrate markets win agency approval.[62]

The permissive nature of the current guidelines means that many of the values and goals embraced by Congress when passing and amending the Clayton Act have been sidelined and ignored. This includes preserving small businesses and market diversity as crucial to the health of the economy and democracy, and preventing the transfer of wealth from ordinary Americans to a concentrated elite.

Under the current framework, depriving Americans of their livelihoods often counts as evidence in favor of a merger. Mergers that will close factories or offices, for example, or enable the merged firm to cut payments to producers, are generally treated as efficiency-enhancing by the guidelines. This runs directly against Congress's intent to distribute economic capacity widely. As the guidelines note, enforcers should favorably consider "efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production."[63] Enforcement guided by such a policy harms workers, small businesses, and communities in which the merging companies operate.

Again, the current guidance's departure from Congressional intent and judicial precedent cannot be overstated. As the Supreme Court declared in *Philadelphia National Bank*: "We are clear . . . that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."

PART THREE

Current Merger Policy has Led to Extreme Concentration Across the Economy and Precipitated the Very Harms Congress Intended to Prevent

Forty years after the enforcement agencies turned merger policy on its head — abandoning Congress's directive to halt concentration and adopting instead the Chicago School's view that growing consolidation is indicative of efficiencies and therefore ought to be embraced[64] — we are facing the perilous consequences. Wealth and income inequality have soared. The gap between Black and white income has persisted and even widened. Gaping disparities have opened up between different parts of the country, with second-tier cities and many rural regions facing dim economic prospects.[65] Distrust of community and government institutions has soared.[66] Democracy is fraying.

As we detail in this section, these debilitating trends have all been linked to the increase in corporate concentration and thus are products, at least in part, of current

merger policy. Under the Chicago approach, a small number of corporations have been allowed to assume an extraordinary degree of economic and political control. The foundational ingredients of democracy — individual freedom, a rough equality of condition among citizens, and the self-determination of local communities — have all suffered as result.

A small number of corporations have been allowed to assume an extraordinary degree of economic and political control. The foundational ingredients of democracy — individual freedom, a rough equality of condition among citizens, and the self-determination of local communities — have all suffered as result.

Bork ridiculed the political aims of antitrust as "a jumble of half-digested notions and mythologies."[67] But today these supposed myths are manifest; U.S. democracy is contending with the very threats that Congress intended the antitrust laws to safeguard against.

At the same time, the almost single-minded pursuit of efficiency in antitrust policy has sapped the American economy of its strength and resilience. As markets have consolidated, dominant corporations have stripped many industries of their productive capacity. They've shuttered facilities, consolidated production, cut jobs and wages, and curtailed research and investment. This has left many sectors precarious and vulnerable, and contributed to the recent breakdown in our supply chains. Absent true competition among a wide diversity of firms, one of the chief benefits of markets — their ability to adjust and adapt to shifting conditions — has been lost.

In this section, we examine three impacts of current merger policy in more detail: 1) the decline of independent businesses and resulting loss of economic diversity and resilience, 2) the unjust transfer of wealth from workers, producers, and communities to powerful firms, and 3) the erosion of community self-determination and democracy.

Eliminating independent businesses, economic diversity, and resilience

As merger policy became progressively more permissive over the last forty years, the U.S. experienced wave after wave of mergers. Many markets now exhibit two related but distinct structural characteristics. One is that they are dominated by a few very large corporations. This has been documented across a wide variety of sectors, including airlines, book publishing, grocery retailing, meat packing, banking, beer, hospitals, and eyewear, to name just a few. The other is that small independent businesses are a significantly diminished and declining presence. Between 1982 and 2017, the share of U.S. business revenue going to firms with fewer than 100 employees plunged, falling from 40 percent to 23 percent.[68] In some sectors, we now risk a tipping point, because the number of suppliers that provide key inputs to independent businesses has dwindled, in some cases to just one or two firms.[69]

These trends should alarm policymakers. Small businesses are an essential component of healthy, competitive markets. They provide distinct benefits to consumers and distinct functions within their industries that are unmatched by their larger rivals.[70] The evidence for this can be found in many sectors, but economists and regulators, blinded by today's reigning assumptions about scale efficiencies, have often overlooked it.

Small, local banks outperform big banks, for example. They offer lower fees and better interest rates to consumers and devote a much larger share of their assets to providing productive loans, including supplying the majority of small business lending.[71] Independent pharmacies offer lower prescription prices, superior health care, and better service, compared to CVS, Walmart, and the other big chains that dominate the market.[72] Eight of the ten fastest internet service providers (ISPs) in the nation are small, local providers.[73]

More evidence can be found in the retail sector, where independent retailers excel at enabling new and diverse products to find a market. Local bookstores, for example, play a major role in introducing and marketing new titles, even though they account for less than 15 percent of book sales overall. The pandemic provided a disturbing test of the implications of losing these businesses: As bookstores

were idled and Amazon grew even more dominant, the range of books Americans bought sharply contracted, with more sales going to a small number of established authors and celebrities.[74] While books are an especially consequential product, much the same dynamic is at work in other categories. Inventive new toys, for example, originate mostly from small toy manufacturers, which depend heavily on independent toy stores to introduce their products to consumers.[75]

Bank mergers have given power to Wall Street while shuttering community banks across the country.

Notably, independent businesses achieve these distinct market benefits, not in spite of, but by virtue of being small.[76] Smallness confers several advantages. For one, it gives businesses access to local information that allows them to better meet the particular needs of their local markets and fulfill niche opportunities. It also enables them to more effectively interface with other small entities in the supply chain; the success of small food producers, for example, hinges on the viability of small grocers. Moreover, independent ownership means small businesses, in many cases, are run by people who are passionate about the particular services or goods they offer, which spurs innovation and engenders a commitment to quality, benefiting consumers. Finally, the diversity of small businesses fosters new ideas. Industries populated by small businesses generate new products and processes at a faster clip than those consisting of a few large companies.[77]

Importantly, locally owned businesses have particular significance in communities that have been marginalized economically, including Black and brown communities and rural communities. Independent grocers and pharmacies, for example, disproportionately serve rural areas and communities of color, which have been redlined by the dominant chains.[78] As these independent businesses have been shuttered by market power abuse, a growing number of communities have been left without grocery stores and pharmacies altogether.[79]

As these examples illustrate, small businesses are a vital element of healthy, competitive markets. And yet conventional antitrust policy, including merger enforcement, has discounted their value and fostered concentrated market structures that endanger their survival. By rarely blocking vertical tie-ups, for example, enforcers have allowed corporate integrations that are rife with problematic conflicts of interest. Independent pharmacies are struggling largely because of the ability of vertically integrated competitors, such as CVS, to control their reimbursement rates.[80] Craft brewers revolutionized the beer industry, yet many are unable to grow beyond a "micro" size because of consolidation among distributors, which has given AB InBev and Molson more scope to control distribution through contracts and foreclose access to store shelves for small brewers.[81]

Locally owned businesses have particular significance in communities that have been marginalized economically, including Black and brown communities and rural communities.

Today, most small businesses are operating in markets in which their powerful competitors can block their market access, raise their costs, steer outcomes, and even exert a kind of "regulatory" control over them, as Amazon does in setting the terms of e-commerce and CVS does in setting insurance terms. Instead of competing on the merits, large corporations can take market share by exploiting their size to strategically price below cost or extract unjust discounts from suppliers. The antitrust agencies have not policed these

types of illegal tactics for decades,[82] while their permissive stance on mergers has given rise to massive companies that have ample capacity to deploy them.

Under the influence of Chicago School ideology, policymakers and enforcers have been slow to recognize the implications of these misguided policies. Concentration is sapping our economy of its productivity and resilience. The evidence is increasingly stark. Since 2013, more than 100 rural communities have lost their hospitals, often to mergers, forcing residents in these communities to travel a median distance of 25 miles to obtain care.[83] The number of counties that lack a local bank has soared, from 21 percent to 34 percent.[84] The shutdown of several meat-packing plants in 2020 significantly disrupted the nation's meat supply.[85]

This last example of meatpacking is a good illustration of the two distinct structural problems in our markets: Not only is meatpacking concentrated in a handful of plants, but the small slaughterhouses dotted around the country that ramped up production to meet the moment in 2020 were simply too few to make any real difference. This pattern has played out in many ways in the last two years. While there are multiple factors causing supply chain disruptions, the economy's persistent inability to adapt and find workarounds to these challenges has been a startling sign of its brittleness. Our markets are no longer sufficiently competitive, diversified, and decentralized to adapt and adjust as conditions change.

Transferring wealth to the few

Many of the so-called "efficiencies" that have resulted from mergers are in fact little more than wealth transfers enabled by market power and a lack of competition. Dominant corporations have used acquisitions to liquidate productive capacity, eliminate jobs, suppress producer prices, push down wages, and transfer the gains to a few. This transfer of wealth from workers, suppliers, and communities to dominant firms has enriched corporate executives and Wall Street investors, while leaving many Americans and the places they live suffering.

Mergers have outsized effects on workers. Mergers deemed good for efficiency and approved by enforcers often lead to significant job losses, as those purported efficiencies frequently entail workforce reductions, plant closures, and other reductions in formerly separate and independent processes.[86] Researchers have found that corporate concentration, driven by mergers, reduced overall U.S. employment by 13 percent and the labor share of output by 22 percent.[87]

What's more, many labor markets are more highly concentrated than product markets, contributing to wage stagnation and inequality, yet the antitrust authorities have rarely challenged mergers due to their potential to concentrate industries in ways that harm wages and workers.[88] Economists have found that a major reason incomes for most Americans haven't risen in decades is that there are too few companies competing for their labor.[89] Without competition, large corporations have outsized power to hold down wages.

Mergers deemed good for efficiency and approved by enforcers often lead to significant job losses.

This phenomenon is particularly pronounced in rural labor markets. For example, as antitrust scholars Suresh Naidu, Eric Posner and Glen Weyl found, mergers have left the meatpacking industry highly concentrated. "Because many food processing establishments are in remote, rural areas where labor markets are concentrated, the effect of mergers in this industry on wages could be significant," they concluded. Overall, unchecked corporate mergers have left far too many people dependent on side hustles and gig jobs to put food on the table.

Mergers that lead to workforce reductions are more likely to harm workers of color, because people of color are more likely to be laid off after a merger, with Black and Hispanic workers the most likely to be laid off as part of any workforce reduction. One study of financial industry mergers, for example, found that "employee race significantly affected layoff probabilities."[90]

Corporate consolidation through mergers has also led to largely Black and Brown workforces being exploited, underpaid and, in some circumstances, put in serious physical danger on the job. Around 70 percent of line

workers in meatpacking facilities are Hispanic or Black. More than one-half of those workers are immigrants.[91] Due to dozens of unchecked mergers in the industry, livestock packing and processing have become highly concentrated. Because processing plants are dominated by just a few companies, they are often sited in rural and remote places where the large meatpackers "can artificially suppress pay to cattle producers, hog and poultry farmers, and processing plant workers below the value that their inputs provide to the industry."[92]

When mergers strip corporate headquarters out of smaller cities, or shutter factories in small towns, it creates a geographic wealth transfer in which just a few superstar cities, mainly on the coasts, account for an outsized share of the nation's wealth and prosperity.

Aside from labor, corporate mergers also give a few powerful companies the power to squeeze producers and suppliers, and extract concessions from those that rely on the powerful merged companies to buy their goods. Again, the highly concentrated beef packing industry is a prime example; the industry, consolidated through mergers, has vastly increased its profits, while the share of the consumer dollar going to ranchers and farmers has declined, from nearly 70 percent in the 1970s to less than 40 percent in 2020.[93]

A series of mergers between peanut shellers has left just two companies shelling 80 percent of all peanuts in America; the low prices they are able to pay farmers is only sustainable because of extensive taxpayer subsidies.[94] Another academic study shows that increasing buyer power concentration since the 1970s has pushed down wages at smaller, independent suppliers who have few options but to accept lower prices.[95]

Consolidation has concentrated income in a handful of major cities and metro areas. It's led to the loss of local keystones of economic activity, including factories, retail locations, and corporate headquarters.[96] Mid-sized, regional cities have been stripped of their main employers, the control over their economies, and the loss of regional identity that, in total, helps to create and foster civic pride.[97] When mergers strip corporate headquarters out of smaller cities, or shutter factories in small towns, it creates a geographic wealth transfer in which just a few superstar cities, mainly on the coasts, account for an outsized share of the nation's wealth and prosperity.[98]

The effect of regional inequality has been even more pronounced in rural areas. Between 2014 and 2018, more than 43 percent of rural counties experienced a net decline in jobs, compared to just 16 percent of non-rural counties.[99]

In contrast, decentralized markets disperse wealth both regionally and between workers, suppliers, and producers. Small business is a pathway to the middle class; research has shown that small businesses lead to higher growth in employment and lower levels of poverty.[100] Local economies where many smaller employers compete for labor lift workers' wages.[101] Small businesses buy goods and services from other local businesses, creating interlinked networks of exchange and mutual support.[102]

Destabilizing communities and democracy

As we detailed in Part I, a central motivation for Congress in passing the Celler-Kefauver Antimerger Act was a fear that economic concentration would deprive communities of their

Many rural counties have experienced job losses and other consequences as a result of corporate consolidation.

ability to direct their own affairs, subject them to distant and unaccountable power, and ultimately threaten democracy. Today there is ample evidence that Congress's fears were justified.

Scholars have found that democratic participation is suppressed in communities whose economies are dominated by large, absentee corporations. People who live in communities with highly concentrated economies are less likely to vote and have lower levels of participation in community organizations, policy reform efforts, and protest activities, compared to people in places with a dispersed economy of smaller businesses.[103]

This diminished civic engagement, in turn, erodes a community's "collective efficacy," or its ability to solve problems and propel its own self-development.[104] Absent this capacity, the well-being of the community and its residents declines.[105] Scholars have documented these effects across a variety of measures of individual and social welfare.

Four companies have used mergers to corner the waste disposal industry, where they use their power to site toxic landfills and incinerators in Black and Brown neighborhoods.

Public health, for example, has been linked to "the structure of the business sector," with counties that have a larger small business sector exhibiting lower rates of mortality and a lower prevalence of diabetes.[106] These patterns hold in both urban and rural areas: "We find that communities in agriculturally dependent counties with a civically engaged populace, in which a high percentage of persons work for themselves and operate small independent businesses, tend to have higher levels of welfare."[107]

When powerful interests control the political agenda, people lose trust in the democratic process, which leads to alienation and depresses their civic engagement.

Scholars have traced several intertwined mechanisms by which concentration diminishes local civic participation (and leads to declining community welfare). As large, distantly controlled corporations take over local economies, their interests come to dominate the local political agenda.[108] Defining which issues matter and setting the agenda "are crucial control mechanisms."[109] Unlike local business owners, who are part of the community and whose ability to succeed and prosper depends on it, absentee corporations generally view the places where they operate as little more than sites of production and revenue extraction, often easily abandoned for other locations. They pursue local policy outcomes that advance their own interests without regard to, and indeed, often at odds with, the needs and interests of the community.[110]

While local business owners derive their social status from their activity and reputation in the community, managers of branch facilities, big-box stores, and satellite offices derive their status from their place within the corporate hierarchy.[111] To the extent that they participate in local affairs, it's often with an eye toward advancing their careers within the corporation, and with an awareness that their time in the community is transitory, pending the next transfer or promotion.[112]

One striking example of absentee corporations advancing their own interests at the expense of the communities in which they operate are recent moves by Walmart and other large retailers to slash their local property tax payments. Across multiple states, these retailers have systematically challenged the valuations of thousands of their stores, relying on a novel and dubious "dark store" theory of value.[113] They've succeeded in sharply reducing their tax bills, often by half or more, leading to drastic cuts in funding for local schools, libraries, and other services.[114]

Walmart's extraordinary market dominance gives it the scale to engage in a systematic strategy like this, with the upfront costs of developing this legal tactic and deploying via litigation at state tax boards more than rewarded by the huge cumulative gains of succeeding across thousands of communities. Moreover, Walmart has nothing to lose by depriving these cities and towns of revenue. Local business owners, in contrast, not only lack the wherewithal to override the tax system. They also have a radically different cost-benefit calculation. Put simply, it's their own kids who will suffer in the event of school budget cuts.

Another mechanism by which dominant corporations harm community self-determination and democracy is by exploiting systemic racism to enlarge their market power. Consider the waste disposal industry. Forty years ago, this sector was comprised of about 10,000 small private and municipal landfills.[115] Today, after numerous mergers, just four companies, led by Waste Management Inc., control 75 percent of the nation's landfill capacity and a majority of the garbage hauling market.[116] These corporations consolidated control of the industry in part by systematically siting new waste incinerators and landfills in Black and brown neighborhoods, which lacked the political agency of white neighborhoods and therefore could not block these toxic facilities.[117] Across other sectors, monopolistic corporations have similarly exploited racism to augment their own power, in the process further entrenching racial inequality.[118]

In addition to the outsized power that dominant corporations wield over community affairs, there's a second, and arguably even more debilitating, injury to local democracy that flows from concentration. When powerful interests control the political agenda, people lose trust in the democratic process, which leads to alienation and depresses their civic engagement.[119] Residents perceive, correctly, that their interests are marginalized and that overcoming the sway that large economic actors have over local policy decisions would be difficult at best. They drop out of the political process "because corporate goals are prioritized over the solution of local problems and general local well-being."[120]

In contrast, decentralized market structures tend to promote democratic engagement at the local level. In communities where economic activity is broadly distributed across a diversity of businesses, including many small and local firms, power structures tend to be diffuse and pluralistic. When numerous interests are offering competing solutions to problems and different ideas about how the community might develop in the future, it increases trust in the democratic process and spurs greater involvement.[121] The interests of locally owned businesses are naturally more aligned with that of the community.[122] Their owners are motivated to solve local problems and engage in community development because doing so improves their own lives and the success of their businesses.

Merger policy has allowed dangerous accumulations of economic power, destabilizing communities and democracy — exactly the eventuality that Congress intended to avoid.

This capacity for collective self-governance is further enhanced by the fact that local businesses – from farmers markets to neighborhood stores, to local bars and cafes – have been shown to foster "greater levels of interaction and trust among community members."[123] These kinds of casual interactions, what sociologists refer to as "weak social ties," promote empathy across differences and cultivate a sense of shared responsibility and belonging, which in turn, enhance civic participation.[124]

Finally, when the capacity to produce and distribute goods and services is controlled locally, communities have the ability to marshal and redirect these resources in times of crisis or when needs and conditions warrant. The benefits of this were widely evident during the pandemic, as small manufacturers pivoted to making protective gear to supply local needs, restaurants turned to feeding healthcare workers, community banks developed "war rooms" to distribute relief money, and independent pharmacies fanned out to vaccinate long-term care residents. In each of these cases, small businesses acted with a speed and nimbleness, and a responsiveness to the particular needs of their communities, unmatched by the large corporations that have come to dominate their industries.[125]

It would be hard to overstate how much taking part in the shared exercise of self-government at the community level matters to the viability of U.S. democracy. Having a hand in the decisions that shape your community builds trust in the process of democracy, the skills to take part in it, and the commitment to preserving it. As Alexis de Tocqueville observed, "municipal institutions constitute the strength of free nations… [they] are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it."[126]

The concentration of corporate power has substantially weakened the authority, responsibility, and capacity of communities to govern their own affairs and solve problems.

Over the last few decades, the concentration of corporate power has substantially weakened the authority, responsibility, and capacity of communities to govern their own affairs and solve problems. This has undermined the basic building blocks of democracy and sowed widespread unease and discontent. Today, rising alarm about corporate influence over the federal government has helped propel a movement to reinvigorate antitrust policy.[127] But so far, little attention has been paid to the effects of concentration on community self-determination.

Such issues were, at one time, alive in antitrust law and enforcement. As discussed in Part I, local control figures prominently in the legislative history of the 1950 amendments to the Clayton Act. It was understood by the agencies and the courts as an important goal of antitrust policy and merger enforcement in the decades following.[128]

In 1973, as Chicago School thinking was gaining traction, Supreme Court Justice William O. Douglas warned of the "serious consequences" of losing sight of the fact that the Clayton Act's antimerger provisions were enacted to safeguard the self-determination of communities and, with it, democracy.[129] At the time, sentiment on the Court had begun to shift in favor of relying on a narrow economic analysis to evaluate mergers.[130] In a case involving the acquisition of a New England brewery by a multi-regional beer company, Douglas wrote at length about the implications of a spate of recent mergers on the nation's local fabric: "Control of American business is being transferred from local communities to distant cities, where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship."[131]

A few years later, in 1980, the Federal Trade Commission's Bureau of Economics sponsored a series of research papers and a conference aimed at deepening its analysis of four objectives of antitrust policy: the distribution of income, local community welfare, the political power of corporations, and worker satisfaction. Professor John Siegfried, engaged by the FTC to organize the conference, noted in his introductory remarks, that these issues were of "considerable significance" to current policy and public debate, highlighting in particular public worries that large conglomerate mergers threatened to "put too much clout in the hand of a few corporate decision makers" and "leave community leaders increasingly powerless."[132]

Two years after the FTC's conference, the antitrust agencies dismissed these concerns and side-stepped Congress. In issuing the 1982 guidelines, the Justice Department overrode the social and political goals that Congress embedded in the antitrust laws. In so doing, the agency ignored the essential role that antimonopoly policy plays in the structure and viability of American democracy. By providing a check on private power, antimonopoly policy is every bit as important as the checks on the three branches of government and the federalist structure of distributing authority between national and local governments. Forty years later, the magnitude of this mistake is widely apparent. Merger policy has allowed dangerous accumulations of economic power, destabilizing communities and democracy — exactly the eventuality that Congress intended to avoid.

PART FOUR

Ten Principles for New Antimerger Guidelines

In enacting the Celler-Kefauver Antimerger Act, Congress sought to halt growing concentration out of a conviction that a decentralized economy was essential to fostering strong communities and ensuring that the liberty of Americans could not be circumscribed by private power. Today, some forty years after antitrust enforcers abandoned these principles, there is ample evidence that Congress's concerns about the dangers of concentration were well-founded.

To fix our broken markets and revive liberty and democracy, the forthcoming 2022 Merger Guidelines should embody the following principles and provisions.

1. The success of new guidelines should be measured by the degree to which markets become less concentrated over time.

As detailed in Part 1, in enacting the 1950 antimerger amendments to the Clayton Act, Congress sought not only to stop further increases in concentration. It also intended that, by blocking mergers, the antitrust agencies would facilitate more opportunities for new and competing businesses and "open the way for deconcentration of highly concentrated industries."

In light of the extreme and debilitating levels of concentration in many industries, the agencies and the public should measure the long-term success of the new merger guidelines (and antitrust enforcement broadly) by the degree to which concentrated markets become more competitive and decentralized over time.

2. Create bright-line rules that categorically block mergers that exceed certain thresholds.

New guidelines should establish what are known as "structural presumptions of illegality" — clear, bright-line thresholds above which mergers are automatically blocked. Mergers in concentrated markets and those involving very large corporations are among those that should be presumed illegal.

As discussed in Part 2, enforcers currently evaluate proposed mergers based on dubious predictions about their likely effect on a single, narrow outcome (prices). Instead, merger enforcement should be guided by the structure of the market, including how concentrated it is and how open it is to new entrants.

As the Department of Justice noted in the 1968 guidelines "the conduct of the individual firms in a market tends to be controlled by the structure of that market, i.e., by those market conditions which are fairly permanent or subject only to slow change."[133] In other words, corporations that attain market power through their size or position in an industry are highly likely to abuse that power. Therefore, they should be blocked from obtaining that power in the first place.

Although the 1968 guidelines wisely prescribed specific concentration levels above which mergers would be presumed anticompetitive and unlawful, the agencies today "routinely undertake full-blown analyses of even the largest mergers for their specific anticompetitive potential."[134] This "rule of reason" approach betrays enforcers' statutory duty and has allowed numerous mergers harmful to competition to go unchallenged.

By setting firm presumptions of illegality, the agencies will be able to efficiently identify and block mergers that clearly threaten competition.

By establishing structural presumptions of illegality — an idea that originated with the U.S. Supreme Court's 1963 ruling in *Philadelphia National Bank* — the agencies can avoid protracted analysis and simply ban a set of mergers that the evidence overwhelmingly indicates are harmful to competition. The 1968 guidelines largely take this approach and a growing number of experts have been calling for its resurrection.

As economist John Kwoka has concluded, challenging mergers above certain thresholds of scale and market concentration almost never leads to false positives and unwarranted agency action. Based on his analysis of mergers that reduce the number of major competitors in an industry to six or fewer, he concludes that "reliance on structural criteria for a strong presumption of an anticompetitive outcome would make few errors."[135]

We recommend that the agencies establish multiple thresholds, any of which would create a presumption of illegality. These should include:

- the absolute size of each company
- the market share of each company
- the number of major competitors in the market (e.g., no mergers when there are 6 or fewer major competitors)

A clear benefit of relying on bright-line structural limits is that doing so will end the need for the agencies to analyze claims of efficiencies before moving to block a merger. These claims are almost always false or misleading.[136] They are also resource-intensive to analyze. At a time when the agencies are confronted with record numbers of mergers and an already highly concentrated economy,[137] new guidelines should instruct enforcers to block mergers when there is no doubt that they will result in a significant increase in concentration and harm to competition.

Finally, it's crucial that the agencies enforce these presumptions. Although the current merger guidelines recommend concentration levels at which enforcers should consider blocking a merger, the agencies challenge only a small fraction of the mergers that meet this criteria.[138] Most of these challenges are "extreme cases of mergers to duopoly" and the agencies have largely "abandoned merger enforcement in… high-to-moderately high concentration markets."[139]

3. For mergers that fall shy of these thresholds, the agencies should evaluate them based on an analysis of market structure with the aim of fostering industries that are decentralized and host to a vibrant mix of competitors.

By setting firm presumptions of illegality as outlined above, the agencies will be able to efficiently identify and block mergers that clearly threaten competition. For mergers that do not trigger these thresholds, the new guidelines should direct enforcers to block those that:

Contribute to anticompetitive market structures – Rather than prioritizing a single, narrow outcome (efficiency) and relying on questionable predictions of future effects, enforcers should examine market structure to evaluate the state of competition and the likely effects of a merger on competition. We recommend that new guidelines focus scrutiny on mergers in markets that exhibit:

- **Too little market diversity,** meaning a diversity of competitors of different sizes and with varying market strategies, or a trend of declining diversity.

Enforcers should block mergers in sectors that show signs of a lack of healthy competition, including a dearth of small businesses and startups.

- **A dearth of small, independent businesses** or a trend of declining small business market share. As discussed in Part III, small businesses provide distinct and important functions and benefits within industries. With limited exceptions,[140] enforcers should view the presence of a healthy mix of small businesses as a sign of the competitive health of a market. Their absence or decline is a likely indicator of a dysfunctional market with undue concentration and/or market power abuse.

- **Few or no new entrants.** Competitive markets should exhibit ease of entry. As the FTC has noted, "The factors making for high entry barriers also make for domination of small competitors by large, and so tend to eliminate actual as well as potential competition.… "[141]

- **Conflicts of interest.** As a consequence of consolidation, particularly vertical integrations, many industries are now rife with inherent conflicts of interest that impede competition and enable monopolization. Mergers in these sectors deserve close scrutiny. For example, allowing a beer distributor that has a contractual relationship with a dominant beer maker to acquire an independent, unaffiliated distributor in another market could enlarge the dominance of the big brewer and foreclose access to shelves for small brewers.

- **A significant trend to consolidation.** Congress and the courts have recognized that corporations can consolidate control of an industry through a series of small acquisitions. With the Celler-Kefauver Antimerger Act, Congress intended for antitrust

enforcers to promote competition by stopping a trend to consolidation in its incipiency. This principle should be restored. The guidelines should impose additional scrutiny and standards on mergers in sectors where private equity firms or other companies have been rapidly rolling up smaller competitors.

Exhibit anticompetitive incentives and opportunity – Enforcers should closely scrutinize mergers that allow a company to eliminate a potential competitor, leverage dominance in one market to gain an edge in another market, entrench its dominant position (for example, by enhancing network effects), or otherwise realize an incentive or opportunity to harm competition.

Detecting these motivations requires a holistic look at business and market dynamics, particularly in light of pivotal changes in the economy, including the increasing role that data plays in the accumulation and deployment of market power, the emphasis that Wall Street has placed on preemptive expansion over profits,[142] and the "flywheels," or monopoly feedback loops, that can emerge in digital markets.[143]

Enforcers should consider whether a merger may eliminate pathways for a market to deconcentrate. This was once a factor in enforcement.

These realities require caution in relying too heavily on traditional modeling to evaluate mergers. Enforcers should rely more on analyzing industries, collecting business intelligence, and gleaning insights from market participants and industry experts.

Lead to a loss of opportunities for markets to deconcentrate – Enforcers should consider whether a merger may eliminate pathways for a market to deconcentrate. This was once a factor in enforcement. In the Scott Paper case, for example, the FTC challenged a series of acquisitions in which Scott took control of upstream production capacity that could have been used by a potential rival to enter the market and contest Scott's dominant market position. "In other words, the Commission reasoned that although Scott's market shares did not increase, but for the acquisitions they might have decreased."[144] Given America's significant market power problem, enforcers should guard avenues that could eventually restore the competitive health of an industry.

4. Direct antitrust enforcers to err on the side of challenging mergers.

A key failure of current merger enforcement policy is "its embedded preference for under-enforcement."[145] Because the Chicago School framework views consolidation as efficiency-generating and therefore beneficial, and assumes that any market power problems will be swiftly eliminated by new entrants, the current merger guidelines are strongly biased in favor of under-enforcement.

As discussed in Part I, this is out of step with the law. Congress barred mergers that "may" lessen competition. It emphasized halting increases in concentration before consolidation gained momentum or threatened competition. As the Supreme Court has noted, "its concern was with probabilities, not certainties."[146]

Today the case for erring on the side of blocking mergers is overwhelming. Many markets have become so highly concentrated that even mergers that modestly increase market power are likely to generate significant competitive harms. Durable oligopolies in many markets also cast doubt on the notion that markets naturally self-correct. Moreover, there's little downside risk of tipping the balance of enforcement in favor of action. Retrospective studies of dozens of mergers in recent decades have found that most have not delivered their promised price and efficiency benefits, and indeed, many have led to price increases.[147]

5. Eliminate efficiency as a determinative factor in enforcement.

As detailed in Part 2, the prioritization of efficiency as the overriding objective of merger policy defies the both text and intent of the law as written by Congress. It ignores Congress's commitment to safeguarding competition and liberty from concentrated private power. It also defies judicial precedent. As the Supreme Court noted in *Brown Shoe*: "Congress

appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."

The Chicago School's myopic focus on efficiency inherently favors consolidation and has led the enforcement agencies to allow highly problematic and illegal mergers to proceed. In a dark irony, this approach, ostensibly designed for the benefit of consumers, has often led to merged firms raising prices, as we detailed in previous sections of this report.

For these reasons, the new guidelines should eliminate efficiency as a determinative factor and defense in merger enforcement.

New guidelines should block mergers that allow big retailers to wield outsized power over suppliers, to the detriment of competing independent retailers.

6. Block mergers that allow big retailers and other dominant firms to amass "buyer power."

Antitrust law has long recognized the anticompetitive impact of the exercise of "buyer power" — when large retailers or other major buyers of goods coerce suppliers into charging them less, while imposing higher costs on their smaller competitors. Buyer power endangers the decentralized, diverse markets that Congress intended to promote in enacting the antitrust laws, including the Celler-Kefauver Antimerger Act.

Nevertheless, merger enforcement policy of the last few decades has largely ignored buyer power, in keeping with the consumer-welfare framework, which views mergers through the narrow lens of prices. Yet recent scholarship and real-world evidence suggests that mergers that create buyer power can thwart competition more readily than those that consolidate the seller-side, including by facilitating persistent collusion, price discrimination, exclusionary contracts, and other patently anticompetitive behavior.[148]

By failing to target buyer power, the antitrust agencies have biased policy in favor of large corporations, which can use their superior financial might to extract rents from suppliers and indirectly impose higher costs on small firms. As noted in Part 3, this also depresses workers' wages in the affected supply chains.

Importantly, dominant buyers can exercise buyer power at comparatively low levels of concentration. As antitrust scholar Peter Carstensen observes: "Buyers with relatively modest market shares can — and often do — have substantial power."[149] He goes on to note that "a retail firm with a 20% or 15% share of the national market in such a class of products is likely to have substantial power over its suppliers because of the threat that the supplier could lose one-sixth or one-fifth or more of its outlets."

We recommend the guidelines express clear presumptions against mergers that create buyer power at even lower thresholds than mergers between sellers.

Therefore, we recommend the guidelines express clear presumptions against mergers that create buyer power at even lower thresholds than mergers between sellers.

Moreover, the guidelines should instruct the agencies to challenge mergers in which the merged firm would have power to dictate wages to workers. As noted previously, most labor markets are highly concentrated, and mergers have the potential to drive down wages and working conditions within the company and industry wide.

This can have outsized effects on poor workers, people of color, and other vulnerable communities. As the Treasury Department recently reported, market power in labor markets manifests at relatively low levels of overall market concentration because of workers' lack of information, inability to easily change jobs, and more.[150] Therefore, the guidelines should instruct the agencies to challenge mergers that increase labor market power in most, if not all, instances regardless of levels of overall market concentration.

Insofar as these harms are independent of the agencies' antitrust analysis of mergers among sellers, they should be considered just as serious as the anticipated harms of a horizontal seller merger, if not more so, given the ability of a dominant firm with buyer power to harm multiple levels of the supply chain.

7. Scrutinize vertical mergers as closely as horizontal mergers.

New guidelines should recognize that vertical mergers — when a company buys a firm that operates at another level in the supply chain, such as a supplier or a customer — can and do harm competition through various means of foreclosure, and that the agencies should treat such mergers with as much skepticism and concern as horizontal mergers. Any new guidance on vertical merger enforcement should include a presumption that vertical mergers in concentrated markets harm competition.

There is no doubt that Congress intended to include vertical and conglomerate merger enforcement when amending the Clayton Act in 1950: "[I]n the proposed bill, the test of the effect on competition between the acquiring and acquired firm has been eliminated…to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition or tending to create a monopoly."[151]

Since the publication of the since-withdrawn 1984 Non-Horizontal Merger Guidelines, the antitrust agencies have treated the vast majority of vertical mergers as procompetitive or benign, and have declined to challenge all but a scant few.[152] This enforcement activity has closely aligned with Chicago School theories of political economy around vertical and conglomerate mergers, including the influential writings of Robert Bork, that supported vertical integration as "efficient" in both scale and scope under the consumer welfare standard.[153]

However, those guidelines and the philosophy that underpins them repeatedly ignores or dismisses evidence that vertical mergers lead to precisely the kind of real-world harms to the economy, the competitive process and to independent businesses that Congress intended to avoid when amending the Clayton Act.

In particular, there is overwhelming evidence that many vertical mergers foreclose upstream or downstream rivals, either by restricting key inputs they need to compete, or by raising their costs in ways that drive business to the merged firm — exactly the opposite of the argument made by Bork and others.[154] Vertical foreclosure can be particularly harmful to independent businesses that require access both to inputs and to customers on fair and equal terms in order to compete.

In the decades following the 1950 antimerger amendments, the FTC's enforcement policies recognized the ability of vertical mergers to foreclose competition, particularly for independent businesses. For example, a wave of vertical mergers in the cement industry in the 1960s led the FTC to

New guidelines should prevent vertical mergers in the health care sector, creating a fairer market for independent pharmacies, which research tells us provide lower prices and better quality health care.

issue specific vertical merger guidelines for the industry. The commission "believed that the vertical merger movement in the industry threatened competition because it promised to result in a significant degree of foreclosure in some markets. This, in turn, would place some manufacturers at a competitive disadvantage and would also raise entry barriers in cement manufacturing."

A Congressional study found that the Commission's guidelines and enforcement efforts "did halt the trend toward increased vertical integration through merger in the cement industry" and "likely played a part in the decline in concentration among cement manufacturers."[155]

Vertical merger enforcement has been largely non-existent over the past four decades in part because the merger guidelines governing vertical mergers have prescribed non-enforcement in nearly all cases. As a result, large, integrated firms have been allowed to complete vertical mergers that foreclosed independent rivals and harmed communities and the economy.

For example, in 2010, the Justice Department permitted Live Nation to merge with Ticketmaster by accepting behavioral conditions in order to settle its lawsuit enjoining the merger. "With the merger, additional entry barriers are emerging," the Department wrote in the complaint. "The merged firm's promotion and artist management businesses provide an additional challenge that small ticketing companies will now have to overcome."

The so-called "remedies" imposed by antitrust enforcers to fix bad mergers — including the Safeway/Albertson's deal — have failed so often that new guidelines should strongly disfavor these fixes and instead direct enforcers to block problematic mergers outright.

Advocacy groups and independent businesses voiced deep concerns about the likely effects the Live Nation/ Ticketmaster merger would have on their ability to compete. Post-merger, the government found that Live Nation had violated its settlement agreement with the government by leveraging its control of top touring artists to force independent live music venues into using Ticketmaster for concert ticketing. The violation was so egregious, the government could, and likely should have brought a Section 2 monopolization lawsuit against the company. Instead, the government simply amended the consent decree – a measure that could fail as well, putting independent venues, small ticketing companies, and concertgoers to suffer under the Live Nation monopoly.

8. Adopt a "no remedies" approach to problematic mergers.

So-called merger "remedies," which allow otherwise anticompetitive mergers to proceed, have failed so often, and so completely, that they should be strongly disfavored in the new merger guidelines. Instead, the federal antitrust agencies should return to their statutory mandate of either permitting or blocking mergers outright based on the mergers' likelihood to concentrate markets and harm competition.

These remedies have included both structural provisions, such as requiring a company to divest certain assets or locations, and behavioral rules that constrain certain types of corporate behavior post-merger.

In the case of behavioral remedies, a large body of research suggests that these are difficult to administer and enforce, and often do little to avoid harms to competition.[156] Such remedies turn antitrust law enforcers into company regulators – a job which they have neither the expertise or resources to do.[157] As noted earlier, the behavioral conditions put in place in an attempt to remedy the competitive harm of the largely-vertical Live Nation/Ticketmaster merger not only failed to preserve competition, but led directly to monopolistic abuses that hurt independent businesses and concert goers, and required additional DOJ enforcement action. Had the merger simply been blocked outright, no such monopoly abuses would have occurred. The same can be said for several other recent mergers in which behavioral

conditions were imposed, including Comcast/NBC Universal, and Google/ITA; the Comcast/NBCU remedy was so deeply flawed, a U.S. Senator suggested the deal be unwound.[158]

Moreover, as former Assistant Attorney General Makan Delrahim noted, behavioral remedies "are merely temporary fixes for an ongoing problem. Once the term of the consent decree expires…the conditions disappear but the merger and any on-going anticompetitive effects remain."[159]

Structural remedies, typically entailing divestitures, have likewise failed so often that they too should not be available as an alternative to simply blocking a merger outright. Divestitures fail for a number of reasons, including the often vast information asymmetry between the agencies and the merging parties about the potential for the proposed divestiture to adequately replace the competition lost in the merger.

As professor and former Department of Justice official Joseph Farrell, along with other antitrust scholars, have correctly observed, the merging parties have an incentive to ensure the divestiture does not succeed and replace the reduced output that would increase their profits: "If [the merging parties] would do this by shutting down some of their capacity post-merger, then much the same result can be obtained by selling this capacity to a buyer in a crippled form."[160]

We urge that the new merger guidelines strongly disfavor remedies of any kind except in narrow circumstances, and instead instruct the agencies to either approve or disapprove of mergers on their competitive merits.

Structural remedies imposed in mergers between Safeway and Albertson's, Dollar Thrifty and Hertz, and T-Mobile and Sprint, among others, all failed, leading to significant harms to competition and local communities.[161] In the case of Safeway/Albertson's, the third-party buyer declared bankruptcy and sued Albertson's for allegedly undermining its ability to operate the divested supermarkets successfully – a sordid affair that could have been avoided had the merger been banned altogether.[162]

The long-term success of new guidelines should be measured by the degree to which concentrated markets become less concentrated over time.

As economist Hal Singer notes in writing about the failed T-Mobile/Sprint divestiture and remedy, "regulator-constructed merger remedies generally fail to preserve or restore competition in affected markets. The inadequacy of behavioral remedies is well understood. What was not so clear (until now) is that divestiture remedies often fail as well."[163]

The new merger guidelines should strongly disfavor remedies of any kind except in narrow circumstances, and instead instruct the agencies to either approve or disapprove of mergers on their competitive merits.

9. Issue industry-specific guidelines for the tech sector.

We recommend that the agencies issue guidelines specific to mergers in the tech sector. Acquisitions by the dominant tech firms should be closely scrutinized and presumed problematic.

Specific guidelines are warranted in part because conventional approaches to evaluating mergers and understanding markets are particularly ill-suited to identifying anticompetitive tech mergers. Because of their integration across multiple business lines, the tech companies can use acquisitions to entrench or enhance their power in markets other than the one that appears to be relevant.

Amazon's acquisition of Whole Foods was seen as a minor deal in the context of grocery retailing, for example. But Amazon used the merger to further cement its dominance in online retail by, among other things, integrating Whole Foods with its Prime membership program, a key strategy for locking in consumers and monopolizing e-commerce.

The tech giants have also used multiple small acquisitions to establish dominant positions in entirely new markets. Amazon's acquisitions of Evi Technologies (2013), Biba Systems (2016), Blink (2017), Ring (2018), and Eero (2019) together enabled Amazon to buy its way to dominate the emergent digital home industry, giving it control over still another pivotal digital arena and further expanding its monopoly control over the digital ecosystem. That some of these mergers, and many other transformative tech sector acquisitions, fell below the HSR notification threshold provides strong justification for separate guidelines that scrutinize all tech mergers that trigger notification.

Acquisitions by the dominant tech firms should be closely scrutinized and presumed problematic.

The tech giants' status as infrastructure providers for other companies and the role that data plays in their market domination strategies are additional features that contribute to the need for dedicated scrutiny of their mergers and acquisitions, and heightened presumptions about their likely illegality. Through AWS, for example, Amazon has access to data on the usage of third-party applications and services that give it insights about promising upstart firms.[164] Facebook, Google, and others have access to similar troves of data about the smaller firms that rely on their infrastructure to reach the market.

Because of the essential infrastructure that they control and their access to sensitive, often proprietary data, the tech giants have an unparalleled ability to identify advantageous acquisition targets and use these deals solidify their dominance. As such, these mergers warrant heightened agency scrutiny.

10. Increase public transparency and engagement.

To increase transparency and accountability, new guidelines should allow for public comment on significant mergers and require that the agencies issue periodic reports and statements that give the public a view into the agencies' decision-making.

Currently, the agencies solicit public comment on mergers only when they're proposing a consent decree (an agreement with the merging parties). And they typically provide little or no insight to the public about their enforcement decisions. In 2013, for example, the DOJ abruptly reversed course on the merger of US Airways and American Airlines; it had initially sued to block the merger, but then, a few months later, approved it.[165] Yet, the agency provided no information to Americans about why it changed its mind.

Scholars have linked this lack of public engagement to the atrophying of antitrust policy. As the work of the agencies slipped into the bureaucratic shadows, it became the domain of a small cadre of technocrats and economists. As a consequence, antitrust came to suffer from what the scholars Harry First and Spencer Weber Waller have described as a debilitating "democracy deficit," and this "imbalance between democratic control and technocratic control has put antitrust on a thin diet of efficiency, one that has weakened antitrust's ability to control corporate power...."[166]

In addition to bringing antitrust enforcement back into public view as a matter of democratic policymaking, requiring a comment period for significant mergers would also aid the agencies and improve merger enforcement by allowing market participants and others to provide relevant information and insights.

By adopting these principles and approaches, the 2022 Merger Guidelines can put an end to harmful mergers, promote a decentralized economy, safeguard American liberty, and fulfill the aims of the antitrust laws enacted by Congress.

Notes

1. Richard Posner and George J. Stigler, "A Richard Posner and George Stigler Memo: 'Throttling Back on Antitrust: A Practical Proposal for Deregulation'," *ProMarket*, April 28, 2022.
2. Hillary Greene, "Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse," *William & Mary Law Review*, 2006-2007.
3. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 1963.
4. 15 U.S.C. § 18 (emphasis added).
5. Brown Shoe Co. v. United States, 370 U.S. 294, 320, 1962, ("Congress rejected, as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7.")
6. Senate Report No. 81-1775, at 6, 1950, ("A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."); House Report No. 81-1191, at 8, I949, (Stating that the bill is intended to stop mergers when there "may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, 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, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.")
7. Senate Report No. 81-1775, at 3, 1950, (emphasis added).
8. Senate Report No. 81-1775, at 3, 1950, ("The purpose of the proposed bill ... is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions.")
9. "The Celler-Kefauver Act: Sixteen Years of Enforcement," Staff Report to the Committee on the Judiciary, U.S. House of Representatives, at 14 and 26, October 16, 1967, ("The legislative history makes it clear that the authors of the act hoped not only that it would prevent further increases in concentration, but that it would open the way for deconcentration of highly concentrated industries."); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 1963, ("[i]f concentration is already great, the importance of preventing even slight increases in concentration, and so preserving the possibility of eventual deconcentration, is correspondingly great.").
10. U.S. Department of Justice, 1968 Merger Guidelines, 1968.
11. "The Celler-Kefauver Act: The First 27 Years," Committee on the Judiciary, U.S. House of Representatives, at 21, December 1978.
12. Ibid.
13. "Amending Sections 7 and 11 of the Clayton Act: Hearing on H.R. 988," Before Subcommittee No. 3 of the H. Comm. on the Judiciary, 81st Cong. 12, 1949, (Senator Estes Kefauver: "I feel, gentlemen, that if our democracy is going to survive in this country we must keep competition, and we must see to it that the basic materials and resources of the country are available to any little fellow who wants to go into business."); Cristofer Esty Lord, "Entrenchment Challenges to Conglomerate Mergers," Wash. Univ.L. Rev., January 1982, ("Congress feared that an increase in concentration was producing radical changes in the structure of American industry by eliminating small business and local control."); Derek C. Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," Harvard Law Review, p. 236-237, December 1960, ("Underlying the legislative deliberations was the conviction that small business and the dispersion of economic power are salutary and should be encouraged by the new section 7. This premise clearly suggests reliance upon a structural theory of competition which stresses the advantage of large numbers of small-sized firms.")
14. Brown Shoe Co. v. United States, 370 U.S. 294, 320, 1962, ("Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.");Richard M. Brunell, "The Social Costs of Mergers: Restoring Local Control as a Factor in Merger Policy," 85 N.C. L. Rev. 149, 2006, ("Congress sought to avoid lessened competition and further increases in economic concentration not merely — or even predominantly — because of the adverse 'economic' effects of concentration, but also because of its 'social' or 'political' consequences.")
15. Wesley A. Cann, Jr., "Section 7 of the Clayton Act and the Pursuit of Economic 'Objectivity': Is There Any Role for Social and Political Values in Merger Policy?," 60 Notre Dame L. Rev. 273, 1985, ("Throughout the legislative history of the amendment, Congress spoke of the social and political effects that would result from an unbridled accumulation of economic and political power within our country.")
16. Derek C. Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," Harvard Law Review, p. 236-237, December 1960.
17. Herbert Hovenkamp, "Antitrust Policy After Chicago," 84 Mich. L. Rev., 1985, ("'Competition' within the meaning of the statute does not refer to a state of affairs in which prices are driven to marginal cost and firms are encouraged to pursue all economies in production and distribution. Rather it refers to a regime in which small businesses have a chance to compete against larger, more efficient rivals. There is no question that Congress had precisely that in mind.")
18. Wesley A. Cann, Jr., "Section 7 of the Clayton Act and the Pursuit of Economic 'Objectivity': Is There Any Role for Social and Political Values in Merger Policy?," 60 Notre Dame L. Rev. 273, 1985, ("Congress expressed concern for small businesses and for the local communities in which those businesses had played such an important role. It feared the consequences of absentee management, the loss of local independence, and the concentration of decision-making power in the hands of a few.")
19. Op. Cit., "Brown Shoe Co. v. United States."
20. Robert Pitofsky, "The Political Content of Antitrust," 127 Univ. Penn. L. Rev., 1979, ("Virtually all proponents of the bill who spoke asserted that the merger trend must be blocked because ... absentee ownership by large corporations would diminish local initiative and civic responsibility."); Derek C. Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," Harvard Law Review, December 1960, ("There were arguments that concentration narrowed the opportunity to have one's own business, depressed local initiative and civic responsibility, and diminished the scope of entrepreneurship by forcing small businesses to become ever more subject to the dictates of large concerns.")
21. 96 Congressional Record 16, 450, 1950, (Senator Estes Kefauver: "Shall we permit the economy of the country to gravitate into the hands of a few corporations… with… the destiny of the people determined by the decisions of persons whom they never see, or even know of? Or on the other hand are we going to preserve small business, local operations, and free enterprise?")
22. Ibid.
23. "Amending Sections 7 and 11 of the Clayton Act: Hearing on H.R. 988," Before Subcommittee No. 3 of the H. Comm. on the Judiciary, 81st Cong. 12, 1949.
24. Op Cit., "The Political Content of Antitrust."
25. Daniel A. Crane, "Antitrust and Democracy: A Case Study from German Fascism," Law & Economics Working Papers, April 17, 2018, ("[F]loor statements by the bill's two primary sponsors — and New York Senator Emanuel Celler and Tennessee Senator Estes Kefauver — reveal a preoccupation with the political consequences of concentrated economic power, particularly in the correlation between industrial cartelization and monopoly and the rise of fascism in pre-War Germany, and totalitarianism more broadly... Celler and Kefauver's floor speeches reflected a broader concern of the U.S. Congress that industrial concentration facilitated the incubation of totalitarianism and threatened democracy."); Wesley A. Cann, Jr., "Section 7 of the Clayton Act and the Pursuit of Economic 'Objectivity': Is There Any Role for Social and Political Values in Merger Policy?," 60 Notre Dame L. Rev. 273, 1985, ("Congress acted to avoid what it saw as the otherwise inevitable public response — the creation of a politically-collective state."); Robert Pitofsky, "The Political Content of Antitrust," 127 Univ. Penn. L. Rev. (1979).
26. Op. Cit., "The Political Content of Antitrust."
27. Senate Report No. 81-1775, at 3, 1950.
28. 95 Congressional Record 11,486, 1949, (Representative Emanuel Celler introducing the bill: "Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is fast disappearing, and second, is being made dependent upon monster concentration."); 94 Congressional Record A4639, 1948, (Rep. Estes Kefauver: "The history of legislation previously adopted to prevent monopoly, the great increase in recent years of competition-destroying mergers, the damage to small business, the blighting of opportunity for our young people — all cry out for the enactment of legislation to stop the rising tide of monopoly.")

Notes Continued

29. "Amending Sections 7 and 11 of the Clayton Act: Hearing on H.R. 988," Before Subcommittee No. 3 of the H. Comm. on the Judiciary, 81st Cong. 12, 1949, (Celler quoting the 1948 Democratic Party platform: "We recognize the importance of small business in a sound American economy. It must be protected against unfair discrimination and monopoly... We advocate the strengthening of existing antitrust laws by closing the gaps which experience has shown have been used to promote the concentration of economic power." And the 1948 Republican Party platform: "Small business, the bulwark of American enterprise, must be encouraged through aggressive antimonopoly action.")
30. Statement by the President Upon Signing Bill Amending the Clayton Act, December 29, 1950.
31. United States v. Aluminum Co. of America, 148 F.2d 416, 1945, ("Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.")
32. Op. Cit., "United States v. Philadelphia Nat'l Bank."
33. Op. Cit., "Brown Shoe Co. v. United States."
34. Recent history yields numerous examples of this snowball effect, from groceries, to publishing, to car rental.
35. Op. Cit., "Brown Shoe Co. v. United States."
36. Lina M. Khan, "Amazon's Antitrust Paradox," Yale Law Journal, 2017, ("Although Bork used 'consumer welfare' to mean 'allocative efficiency,' courts and antitrust authorities have largely measured it through effects on consumer prices.")
37. U.S. Department of Justice, "2010 Horizontal Merger Guidelines."
38. Ibid, ("A merger enhances market power if it is likely 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. Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct. Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers.")
39. John Kwoka, "Reviving Merger Control - A Comprehensive Plan for Reforming Policy and Practice," Northeastern University, October 9, 2018, ("Merger control in the United States is guided by a statutory prohibition on those consolidations whose effect "may be substantially to lessen competition, or to tend to create a monopoly." The original interpretation of the statute by the courts and the Justice Department led to an aggressive structure-based policy, one that found competitive threats even in mergers of fairly modest size.")
40. Op. Cit., "1968 Merger Guidelines," ("The purpose of these guidelines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act.")
41. Ibid at 1, (The guidelines continue: "Market structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, i.e., by those market conditions which are fairly permanent or subject only to slow change.")
42. Ibid at 4, (For example, when discussing mergers in which the geographic market definition is unclear, "the Department believes it to be ordinarily most consistent with the purposes of Section 7 to challenge any merger which appears to be illegal in any reasonable geographic market, even though in another reasonable market it would not appear to be illegal.")
43. Ibid at 8, emphasis added.
44. See generally, William James Adams, "Should Merger Policy Be Changed? An Antitrust Perspective," Conference proceedings from the Federal Reserve Bank of Boston, 1987, (finding that "Over the past 15 years, a revolution has occurred in U.S. merger policy. Antitrust attacks on non-horizontal mergers have all but disappeared. Regulation of horizontal mergers now starts from the presumption that 'the vast majority of horizontal mergers pose no market power problems and should simply be approved rapidly'…Reversal of the conventional wisdom on mergers can be traced to acceptance of Robert Bork's views on the subject.")
45. Eleanor Fox, "The 1982 Merger Guidelines: When Economists Are Kings?" *California Law Review*, March 1983, ("The 1982 Merger Guidelines…represent a new positivism; a reduction of legal principles to a simple, unitary, quasi-scientific, outcome-oriented economic model that, in a generalized sense, has been offered as the model for solving all antitrust problems. By embodying only one substantive goal - allocative efficiency - the model offers the appearance of clarity, predictability, and reduced government intervention.")
46. Op. Cit., "The 1982 Merger Guidelines."
47. Janusz A. Ordover and Robert D. Willig, "The 1982 Department of Justice Merger Guidelines: An Economic Assessment," California Law Review, March 1983, ("[the 1982 Merger Guidelines] increase the market share levels of the merging firms at which a merger will presumptively go unchallenged; significantly raise the benchmark levels for classifying markets as concentrated and highly concentrated; and markedly restrict the universe of vertical mergers that are likely to be challenged.")
48. Statement of Attorney General William French Smith upon the release of the Justice Department's 1984 Merger Guidelines, June 14, 1984.
49. Thomas B. Leary, "Efficiencies and Antitrust: A Story of Ongoing Evolution," Prepared Remarks before ABA Section of Antitrust Law, 2002 Fall Forum, November 8, 2002.
50. Ibid.
51. Ibid.
52. Ibid.
53. Op. Cit., "Amazon's Antitrust Paradox," ("Although the guidelines acknowledged that vertical mergers could sometimes give rise to competitive concerns, in practice the change constituted a de facto approval of vertical deals.")
54. Op. Cit., "Efficiencies and Antitrust."
55. Op. Cit., "Reviving Merger Control."
56. Christine Varney, "International Cooperation: Preparing for The Future," Remarks as Prepared for the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium," (Sep. 21, 2010) ("The revised Guidelines that we issued last month provide transparency into the agencies' current enforcement analysis in mergers… The revised Guidelines also describe a number of economic considerations that have been central to merger investigations for many years.")
57. Op. Cit., "Reviving Merger Control."
58. Herman Schwartz, "Antitrust's Looser Guidelines; New Rules Breed Wasteful Mergers," *The New York Times*, May 19, 1985.
59. Herbert Hovenkamp, "Antitrust Policy After Chicago," *Michigan Law Review*, November 1985, (Writing about other antitrust scholars who have reviewed and written about the legislative history of the antitrust laws, Hovenkamp continues: "No one, it appears, has even attempted to argue that Congress had "efficiency" in mind when it passed the Robinson-Pat man Act in 1936, or the Celler-Kefauver amendments to Section 7 of the Clayton Act in 1950.")
60. Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 1962.
61. John E. Kwoka, "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," *Antitrust Law Journal*, No. 3, 2013, (finding that, "a very large fraction of carefully studied mergers shows that those mergers resulted in higher prices, even when a remedy was imposed.")
62. U.S. Department of Justice, "Horizontal Merger Guidelines," August 19, 2010.
63. Ibid.
64. Robert H. Bork and Ward S. Bowman, Jr., "The Crisis in Antitrust," Columbia L. Rev., 1965, ("The difficulty with stopping a trend toward a more concentrated condition at a very early stage is that the existence of the trend is prima facie evidence that greater concentration is socially desirable. The trend indicates that there are emerging efficiencies or economies of scale — whether due to engineering and production developments or to new control and management techniques — which make larger size more efficient.")
65. For an in-depth look at geographic disparity, see Alec MacGillis, Fulfillment: Winning and Losing in One Click America, March 16, 2021.
66. Lee Rainie, Scott Keeter, and Andrew Perrin, "Trust and Distrust in America," Pew Research Center, July 22, 2019, ("Two-thirds of adults think other Americans have little or no confidence in the federal government. Majorities believe the public's confidence in the U.S. government and in each other is shrinking, and most believe a shortage of trust in government and in other citizens makes it harder to solve some of the nation's key problems."); Ruth Igielnik, "70% of Americans say U.S. economic system unfairly favors the powerful," Pew Research Center, January 9, 2020.
67. Robert Bork, The Antitrust Paradox: A Policy at War with Itself, 1978.
68. U.S. Census Bureau, "1982 Economic Census" and "2017 Economic Census."
69. See for example: Judith Rosen, "The Book Wholesaling World is Consolidating Too," Publishers Weekly, April 19, 2022.

Notes Continued

70. Stacy Mitchell, "The View from the Shop – Antitrust and the Decline of America's Independent Businesses," *The Antitrust Bulletin*, November 17, 2016.
71. Stacy Mitchell and Susan R. Holmberg, "Fighting Monopoly Power: Banking," Institute for Local Self-Reliance, July 2020.
72. Zach Freed, "Fighting Monopoly Power: Pharmacy," Institute for Local Self-Reliance, July 2020.
73. Eric Griffith, "The Fastest ISPs of 2020," *PC Magazine*, June 12, 2020.
74. Alexandra Alter and Elizabeth A. Harris, "What Snoop Dogg's Success Says About the Book Industry," *The New York Times*, April 18, 2021.
75. Stacy Mitchell and Olivia LaVecchia, "Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities," Institute for Local Self Reliance, pp. 26-28, November 2016, (Citing several toymakers who credited their successful product launches to independent toy stores and reported difficulty launching new products successfully on Amazon.)
76. For a deeper examination of these dynamics, see Stacy Mitchell, "The View from the Shop–Antitrust and the Decline of America's Independent Businesses," *The Antitrust Bulletin*, November 17, 2016.
77. Wilfred Dolfsma & Gerben van der Velde, "Industry Innovativeness, Firm Size, and Entrepreneurship: Schumpeter Mark III?" Journal of Evolutionary Economics, 2014.
78. Stacy Mitchell and Charlie Thaxton, "A Rebirth of Indie Pharmacies Could Cure Rural Ills," *The American Conservative*, November 5, 2019; Jerry Shannon, "Dollar Stores, Retailer Redlining, and the Metropolitan Geographies of Precarious Consumption," Annals of the American Association of Geographers, 2021.
79. Kim Bellware, "A Wave of Closures Has Left Some Neighborhoods in a 'Pharmacy Desert,'" *Chicago Magazine,* October 26, 2017; Abiodun Salako, Fred Ullrich, and Keith J. Mueller, "Independently Owned Pharmacy Closures in Rural America, 2003-2018," Rural Policy Brief, July 2018; Marie A. Chisholm-Burns, Christina A. Spivey, Justin Gatwood, Adam Wiss, Kenneth Hohmeier, Steven R. Erickson, "Evaluation of Racial and Socioeconomic Disparities in Medication Pricing and Pharmacy Access and Services," *American Journal of Health System-Pharmacy*, May 2018.
80. Zach Freed, "Fighting Monopoly Power: Pharmacy," Institute for Local Self-Reliance, July 2020.
81. Diane Bartz, "Exclusive: U.S. Probes Allegations AB InBev Seeking to Curb Craft Beer Distribution," *Reuters*, October 12, 2015; Tripp Mickle, "Craft Brewers Take Issue with AB InBev Distribution Plan," *Wall St. J.*, December 7, 2015.
82. Op. Cit., "Amazon's Antitrust Paradox," (Noting that "Although Amazon established its dominance in this market through aggressive price cutting and selling steeply at a loss, its actions have not triggered predatory pricing claims.")
83. "Rural Hospital Closures: Affected Residents Had Reduced Access to Health Care Services," U.S. Government Accountability Office, January 21, 2021.
84. Author's analysis of data from the Federal Deposit Insurance Corporation.
85. Ron Knox, "Monopolies in Meat: Endangering Workers, Farmers, and Consumers," The American Prospect, May 4, 2020.
86. "The Human Side of Mergers: Those Laid Off and Those Left Aboard," Knowledge at Wharton, March 30, 2005, ("The investment community focuses on costs. They generally always like the idea that you can cut workers" and save money when mergers and acquisitions are announced, says Peter Cappelli, director of Wharton's Center for Human Resources.)
87. Suresh Naidu, Eric A. Posner and Eric Glen Weyl, "Antitrust Remedies for Labor Market Power," *Harvard Law Review*, December 10, 2018.
88. Ioana Marinescu and Herbert Hovenkamp, Anticompetitive Mergers in Labor Markets," Faculty Scholarship at Penn Law, 2019, ("Concentration in labor markets is very likely as high or higher than in many of the product markets in which firms sell. As a result, the antitrust law against anticompetitive mergers affecting employment markets is certainly underenforced, very likely by a significant amount.")
89. Jose Azar, Ioana Elena Marinescu, Marshall Steinbaum, and Bledi Taska, "Concentration in US Labor Markets: Evidence from Online Vacancy Data," 2018; Naidu, Posner and Weyl, "Antitrust Remedies."
90. Marta M. Elvira and Christopher D. Zatzick, "Who's Displaced First? The Role of Race in Layoff Decisions," *Industrial Relations*, April 2002.
91. Shawn Fremstad, Hye Jin Rho and Hayley Brown, "Meatpacking Workers Are a Diverse Group Who Need Better Protections," Center for Economic and Policy Research, April 29, 2020.
92. Hiba Hafiz and Nathan Miller, "Big Ag's monopsony problem: How market dominance harms U.S. workers and consumers," Washington Center for Equitable Growth, February 18, 2021.
93. Mary Hennigan, "A consolidated market leaves ranchers wondering what's next," Midwest Center for Investigative Reporting, July 21, 2021.
94. Ron Knox, "The Peanut Industry Has a Monopoly Problem," *Civil Eats*, January 15, 2021.
95. Nathan Wilmers, "Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014," *American Sociological Review*, March 27, 2018, (Finding that, "since the 1970s, the rising share of employment relations structured by dominant buyers has eroded middle-income workers: buyer power has contributed to wage stagnation.")
96. The examples of harm to local economies and loss of local control due to mergers are too numerous to list. However, see generally Richard M. Brunell, "The Social Costs of Mergers: Restoring Local Control as a Factor in Merger Policy," 85 N.C. L. Rev. 149, 2006.
97. Baltimore is a good example; by 2012, the city had lost all of its Fortune 500 company headquarters, mainly to mergers. See Jean Marbella and Jamie Smith Hopkins, "Lost 'Fortune'," *The Baltimore Sun*, May 1, 2011; See also Alec MacGillis, Fulfillment: Winning and Losing in One Click America, March 16, 2021.
98. Emily Badger, "In Superstar Cities, the Rich Get Richer - and They Get Amazon," The New York Times, November 8, 2018; "Regional Inequality and Monopoly," The Open Markets Institute (Finding that, "Just three states – California, Massachusetts, and New York – now receive 78 percent of all venture capital investments.")
99. "Redefining Rural: Towards a Better Understanding of Geography, Demography, and Economy in America's Rural Places," Economic Innovation Group, March 9, 2021.
100. Anil Rupasingha, "Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-being?" Federal Reserve Bank of Atlanta, August 2013, ("I find that the percent of employment provided by resident, or locally-owned, business establishments has a significant positive effect on county income and employment growth and a significant and negative effect on change in poverty in the all counties and nonmetro counties samples.")
101. Ibid at 21.
102. Garrett Martin and Amar Patel, "Going Local: Quantifying the Economic Impacts of Buying from Locally Owned Businesses in Portland, Maine," Maine Center for Economic Policy, December 2011; Civic Economics, "Local Works: Examining the Impact of Local Business on the West Michigan Economy," September 2008.
103. Troy Blanchard and Todd L. Matthews, "The Configuration of Local Economic Power and Civic Participation in the Global Economy," *Social Forces*, Vol. 84, No. 4, pp. 2241-2257, June 2006, (Finding that "economic concentration has a significant negative influence on [participation in] electoral politics," measured by "the degree to which individuals participate in the voting process, follow current events through newspaper readership, possess knowledge of politics, maintain an interest in current events and know the names of their senators," and on "participation in protest activities," defined as activities such as petition signing, demonstrations, and local reform campaigns, as well as membership in labor unions, civil rights organizations, and other public interest groups.); Charles M. Tolbert, Michael D. Irwin, Thomas A. Lyson, and Alfred R. Nucci, "Civic Community in Small-Town America: How Civic Welfare Is Influenced by Local Capitalism and Civic Engagement," *Rural Sociology*, 67(1), pp. 90–113, 2002.
104. Troy Blanchard and Todd L. Matthews, supra note 100, at 151-153; Robert N. Stern and Howard Aldrich, "Effect of Absentee Firm Control on Local Community Welfare: A Survey," in "The Economics of Firm Size, Market Structure, and Social Performance," (John J. Siegfried ed., 1980) ("Dependence on absentee-owned employers creates community vulnerability… as well as learned incapacity for community self-help.")
105. Thomas A. Lyson, "Big Business and Community Welfare: Revisiting a Classic Study by C. Wright Mills and Melville Ulmer," *The American Journal of Economics and Sociology*, Vol. 65, No. 5, November 2006, pp. 1001-1024, ("Communities dominated by one or more very large national or multinational firms are vulnerable to greater inequality, lower levels of welfare, and increased rates of social disruption than localities where the economy is more diversified and organized around smaller economic enterprises.")
106. Troy C. Blanchard, Charles Tolbert, and Carson Mencken, "The health and wealth of US counties: how the small business environment impacts alternative measures of development," Cambridge J. of Regions, Econ. and Society pp. 149–162, 2012.
107. Thomas A. Lyson, Robert J. Torres, and Rick Welsh, "Scale of Agricultural Production, Civic Engagement, and Community Welfare," *Social Forces*, pp. 311-327, September 2001.
108. Stern and Aldrich, *supra* note 101, (Noting that the "ascendence of absentee

Notes Continued

managers in local politics is well-documented…The managers of nonlocal corporations with outside professional and economic interests came to dominate local politics by defining the critical local community issues.")

109. Ibid.
110. Brunell, *supra* note 12, (Noting that large absentee firms that operate in multiple locations are less dependent on the community and less likely than locally owned businesses "to be subject to the local community's social norms that otherwise influence managerial discretionary behavior."); David W. Barnes, "Nonefficiency Goals in the Antitrust Law of Mergers," 30 *Wm. & Mary L. Rev.* 787, 1989, ("The fact that outside interests control corporate decision-making implicitly means that local economic effects are given less weight… [in] business decisions."); Blanchard and Matthews, *supra* note 100. ("When a small number of firms account for a large share of total employment within the local labor force, these firms wield a great deal of economic power in local community decision making…")
111. Stacy Mitchell, Big-Box Swindle, *Beacon Press*, 2006, ("Local merchants derive much of their social standing from their accomplishments within the community; they win recognition and status from such things as taking the lead in addressing a local problem, organizing a fund-raiser for a local cause, or restoring a landmark downtown building.").
112. Stern and Aldrich, *supra* note 101, ("The significance of domination by those with outside interest lies not only in shifting policy outputs, but also in the decline of a locally based leadership. Transient managers are poorly integrated into community social systems and have difficulty responding to problems unrelated to corporate interests… [They are] more concerned about their careers in the larger corporation than with the quality of community life.")
113. Olivia LaVecchia, "For Cities, Big-Box Stores Are Becoming Even More of a Terrible Deal," Institute for Local Self-Reliance, June 16, 2015.
114. Comlanvi Sitou Akibode and Mark Skidmore, "The Impact of Michigan's "Dark Store" Method of Property Taxation and Potential Solutions," Michigan State University, 2020.
115. Neil Seldman, "Monopoly and the U.S. Waste Knot," Institute for Local Self-Reliance, December 2018.
116. Ibid.
117. Neil Seldman and David Morris, "Waste," in "Fighting Monopoly Power: How States and Cities Can Beat Back Corporate Control and Build Thriving Communities," July 2020.
118. The dominant dollar store chains offer another example of this racialized strategy at work. See Stacy Mitchell and Marie Donahue, "Report: Dollar Stores Are Targeting Struggling Urban Neighborhoods and Small Towns. One Community Is Showing How to Fight Back.," Institute for Local Self-Reliance, December 2018; Marie Donahue and Hannah Bonestroo, "Maps Show Alarming Pattern of Dollar Stores' Spread in U.S. Cities," February 20, 2019.
119. Blanchard and Matthews, *supra* note 100, ("[L]ocal residents became alienated from local decision making and problem-solving activities because decision making was guided by select leadership circles acting on behalf of the large employers.")
120. Ibid.
121. Op. Cit., "Big-Box Swindle."
122. Op. Cit., "Big-Box Swindle," pp. 77-78, ("Local owners are bother financially and personally vested in their communities…. These community roots and personal connections influence business decisions…"); Brunell, *supra* note 37; Allison K. Hughes, "Corporate Impact on the Community: A Study of Charitable Contribution Patterns for Corporations with Local, Non-Local Domestic and Foreign Headquarters in Three U.S. Cities," Harvard Business School, 1994, (The study analyzed the community involvement of 180 companies in Boston, Cleveland, and Miami found that "[l]ocally headquartered companies do most for the community on every measure," including having "the most active involvement by their leaders in prominent local civic and cultural organizations.")
123. Blanchard, Tolbert, and Mencken, *supra* note 100. See also Ray Oldenburg, The Great Good Place, Da Capo Press, 1999; Jane Jacobs, The Death and Life of Great American Cities, Random House, 1961; Stacy Mitchell, "Big-Box Swindle."
124. Op. Cit., "Big-Box Swindle."
125. Stern and Aldrich, *supra* note 102, ("Absentee ownership creates community vulnerability by… robbing the community of the skills needed to cope with economic crises. Further, local institutions lose their ability to respond to local needs.")
126. Alexis de Tocqueville, Democracy in America, G. Dearborn & Co., 1838.
127. See: Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age, Columbia Global Reports, 2018.
128. See Part I and related notes.
129. United States v. Falstaff Brewing Corp., 410 U.S. 526, 1973.
130. Lawrence Sullivan, "Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships," in "The Economics of Firm Size, Market Structure, and Social Performance," (John J. Siegfried ed., 1980) (proceedings of a conference sponsored by the Bureau of Economics of the Federal Trade Commission).
131. United States v. Falstaff Brewing Corp., 410 U.S. 526, 1973.
132. John J. Siegfried, "Introduction," in "The Economics of Firm Size, Market Structure, and Social Performance," (John J. Siegfried ed., 1980) (proceedings of a conference sponsored by the Bureau of Economics of the Federal Trade Commission).
133. U.S. Department of Justice, 1968 Merger Guidelines, 1968.
134. Kwoka, *supra* note 37.
135. Ibid at 28
136. Evidence that merger do not lead to gains in productivity is abundant; see generally, Bruce Blonigen and Justin Pierce, "Evidence for the Effects of Mergers on Market Power and Efficiency," Federal Reserve Board, (Finding "that M&As significantly increase markups on average, but have no statistically significant average effect on productivity.") In other cases, so-called efficiencies are merely unjust wealth transfers enabled by outsized market power, as detailed in Part 3 of this comment.
137. Ron Knox, "Why Congress Must End America's Merger Free-For-All," *The American Prospect*, October 27, 2021.
138. Kwoka, *supra* note 37.
139. Ibid.
140. There are a few industries, such as aluminum production, that necessitate a large scale of production. But these are rare. In most sectors, small businesses are viable and, indeed, contribute distinct benefits and functions.
141. Federal Trade Commission, "Procter & Gamble Co.," Federal Trade Commission Decisions: Findings, Opinions, and Orders, Vol. 63, 1963.
142. Op. Cit., "Amazon's Antitrust Paradox," ("[T]he economics of platform markets incentivize the pursuit of growth over profits, a strategy that investors have rewarded. Under these conditions predatory pricing becomes highly rational—even as existing doctrine treats it as irrational.")
143. Stacy Mitchell, "Amazon's Toll Road," Institute for Local Self-Reliance, 2021, ("Bezos often uses the term "flywheel" to describe the growth machine he's created…This is a metaphor for monopolization. It perfectly describes the feedback loop created by using below-cost pricing to lock-in consumers, and then using that control over the market to price-gouge sellers. Each fuels the other…")
144. R. M. H., "Preserving the Possibilities of Deconcentration. The Scott Paper Case," Vir. L. Review, Vol. 50, No. 5, pp. 907-932, June 1964, (The author further notes that "the fettering of oligopoly and the jealous preservation of economic forces antagonistic to its growth or continuation was considered the object of section 7 enforcement.")
145. Lina M. Khan, "The Ideological Roots of America's Market Power Problem," Vol 127, *Yale Law Journal*, June 4, 2018.
146. Op. Cit., "Brown Shoe Co. v. United States."
147. John Kwoka, "Competitive Edge: Structural presumption in U.S. merger control policy would strengthen modern antitrust enforcement," Washington Center for Equitable Growth, December 19,2018; Peter Carstensen and Robert Lande, "The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors," *Wis. L. Rev.*, 784, 2018, (Citing Judge Richard Posner, who noted that mergers that result in significant efficiencies are rare: "I wish someone would give me some examples of mergers that have improved efficiency. There must be some.")
148. Examples of such anticompetitive buyer power can be found in retail markets, in agriculture, and elsewhere. Peter C. Carstensen, "Buyer Power and Merger Analysis - The Need for Different Metrics," statement prepared for the Workshop on Merger Enforcement held by the Antitrust Division and the Federal Trade Commission, February 17, 2004; "Buyer Power and Economic Discrimination in the Grocery Aisle: Kitchen Table Issues for American Consumers," The National Grocers Association, March 2021, ("In the grocery sector, demands from power buyers impose disadvantageous terms, conditions, and prices on independent grocers. This economic discrimination reduces the smaller rivals' competitiveness through higher costs or reduced product supply or quality, and directly harms competition, consumers, and the economy."); Paul Ziobro and Serena Ng, "Wal-Mart Ratchets

Notes Continued

Up Pressure on Suppliers to Cut Prices," *Wall Street Journal*, March 31, 2015; Annie Gasparro, Sarah Nassauer and Heather Haddon, "Big Food Faces Pressure from Retailers Demanding Discounts," *Wall Street Journal*, August 31, 2017.

149. Peter C. Carstensen, "Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue," Univ. of Penn. J. of Business Law, April 2012.

150. "The State of Labor Market Competition," U.S. Department of the Treasury, March 7, 2022, ("These conditions can enable firms to exert market power, and consequently offer lower wages and worse working conditions, even in labor markets that are not highly concentrated.")

151. Report of the House Committee on the Judiciary regarding amending the Clayton Act, 81st Congress, August 4, 1949.

152. Steven C. Salop and Daniel P. Culley, "Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners," J. Antitrust Enforcement 1, 2015.

153. Herbert Hovenkamp, "Robert Bork and Vertical Integration: Leverage, Foreclosure and Efficiency," *The Antitrust Law J.*, No. 3, 2014, (Finding that Bork "wrote extensively about vertical integration, and defended it as nearly always procompetitive.")

154. Johannes Boehm and Jan Sonntag, "Vertical Integration and Foreclosure: Evidence from Production Data Network," CEPR Discussion Paper No. DP15463, (Using a novel relational dataset of vertically connected firms, the authors "interpret our results as supporting the view that vertical mergers have, on average in the population of firms and relationships that we study, anticompetitive effects," and that those effects include foreclosure, raising rivals' costs, and self-foreclosure.)

155. Willard F. Mueller, "The Celler-Kefauver Act: The First 27 Years," prepared for the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, U.S. House of Representatives, December 1978.

156. See generally, John Kwoka, "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," (finding that "the remedies imposed—divestiture and conduct or conditions remedies—are not generally adequate to the task of preserving competition. Price increases persist in the face of these remedies, and more so in cases where non-structural conduct or conditions remedies are employed.")

157. John Kwoka and Diana Moss, "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," American Antitrust Institute, December 2012, ("Behavioral remedies require ongoing oversight, monitoring, and compliance enforcement on the part of the government and a parallel compliance organization within the merged company. Both may involve nontrivial costs." p. 23)

158. Ibid at 14; Office of Senator Richard Blumenthal, "Blumenthal Calls for Renewed Investigation of Comcast-NBCU Acquisition Ahead of Expiring Merger Conditions," December 13, 2017.

159. Remarks by Assistant Attorney General Makan Delrahim to the Federal Telecommunication Institute's Conference in Mexico City, November 7, 2018.

160. Joseph Farrell, "Negotiation and Merger Remedy: Some Problems," Competition Policy Center Working Paper, August 21, 2003.

161. Brent Kendall, "Haggen Struggles After Trying To Digest Albertsons Stores," *The Wall Street Journal*, October 9, 2015; Brent Kendall and Jacqueline Palank, "How The FTC's Hertz Antitrust Fix Went Flat," *The Wall Street Journal*, December 8, 2013; Melody Wang and Fiona Scott Morton, "The Real Dish On the T-Moble/Sprint Merger: A Disastrous Deal From The Start," *ProMarket*, April 23, 2021.

162. Haggen LLC vs Albertson's LLC et al, U.S. District Court for the District of Delaware, September 1, 2015.

163. Hal Singer, "Beefing Up Merger Enforcement by Banning Merger Remedies," *ProMarket*, August 5, 2021.

164. Alistair Barr, "Amazon finds startup investments in the 'cloud'," Reuters, November 9, 2011, (Quoting Jeremy Levine of Bessemer Venture Partners: "Amazon actually has a bunch of unique data sources to drive advantages in start-up investing.")

165. Justin Elliot, "The American Way," *ProPublica*, October 11, 2016.

166. Harry First and Spencer Weber Waller, "Antitrust's Democracy Deficit," *Fordham Law Review*, 2013; see also Stacy Mitchell, "The Rise and Fall of the Word 'Monopoly' in American Life," *The Atlantic,* June 20, 2017.