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Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages

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ABSTRACT

In enacting the antitrust laws, Congress sought to prevent big businesses from maintaining and augmenting their power through collusion, mergers, and exclusionary and predatory practices and also aimed to preserve the ability of workers to act in concert. At times, the antitrust laws have benefited ordinary Americans. Antitrust achievements include the restructuring of the oil industry in 1911, the creation of competitive market structures in the mid-twentieth century, and the termination of AT&T's telecommunications monopoly in 1984.

Yet, the history of antitrust in the United States is not one of uninterrupted successes. Over two forty-year periods, the executive branch and federal courts, in enforcing and interpreting the antitrust laws, have failed to advance Congress's vision and indeed inverted congressional intent. During the original and current Gilded Ages, the antitrust laws were and are used to protect the power of large-scale business and also to limit the autonomy of workers to organize and demand higher wages and better working conditions. Through this anti-labor application, the federal government has employed antitrust to aid big business, rather than restrain its power.

Despite this history of accommodating capital and policing labor, the antitrust laws can still be reinterpreted and redeemed. Congressional, executive, and judicial action can remake these laws to control the power of large corporations and also protect the freedom of all workers to organize for higher wages and better working conditions. A renewal of antitrust, in accordance with the expressed purposes of Congress, would help remedy the inequities of the New Gilded Age and create a more just society.

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INTRODUCTION

> *[A]s legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, [and] agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side.*—Senator George Hoar[1]

> *[H]istory shows that the victories won under [the Sherman Act] have been the suits against labor organizations, while great trusts and monopolies have grown and flourished.*—Representative M. Clyde Kelly[2]

The federal antitrust laws—the Sherman,[3] Clayton,[4] and Federal Trade Commission Acts[5]—have a complicated history. The enforcement of these laws has produced some landmark successes and delivered important benefits to the public. Federal antitrust enforcement restructured the oil refining industry in 1911,[6] helped create decentralized market structures in the mid-twentieth century,[7] and ended AT&T's stranglehold over the telecommunications industry in 1984.[8] Yet, at other times, the federal antitrust agencies and courts, in enforcing and interpreting the antitrust laws, failed to advance Congress's vision and indeed inverted its intent. During the first forty years following the Sherman Act's passage, and again over the past four decades, these laws were and have been generally applied and interpreted to structure markets to privilege monopolistic and oligopolistic businesses and to curtail the liberty of workers.[9]

1. 21 CONG. REC. 2728 (1890).
2. 51 CONG. REC. 9087 (1914).
3. Sherman Act, 15 U.S.C. §§ 1–7 (2012).
4. Clayton Act, 15 U.S.C. §§ 12–27 (2012).
5. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).
6. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
7. William G. Shepherd, *Causes of Increased Competition in the U.S. Economy, 1939–1980*, 64 REV. ECON. & STAT. 613, 626 (1982).
8. United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226–34 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).
9. Contrary to libertarian and neoclassical accounts of a "free market" economy, state action is a precondition for markets and determines who has power and wealth in a society, most fundamentally, through the enforcement of property rights and contracts. Those with a large holding of property, or, say, a monopoly on an essential form of property, wield a great deal of coercive power over others. Those with little or no property have little or no coercive power. The question is not whether the state acts or does not act, but to whose benefit it acts. Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 305–07 (1973). The Supreme Court has in the past recognized the fact that state action

In enacting the principal antitrust laws, Congress aimed to check the power of large-scale capital and protect concerted labor action from federal interference. The framers of the antitrust laws understood corporate power broadly. Congress passed the antitrust laws to protect consumers and producers from powerful corporate sellers and buyers, maintain markets open to all comers, and defend the American political system against corporate capture.[10] At the same time, they did not want these new laws to be employed against collectives of workers. The legislative histories of both the Sherman and the Clayton Acts indicate that Congress intended these statutes to control the power of capital, not labor.[11] Indeed, a common view in Congress was that the antitrust laws and labor unions would serve complementary functions and together limit the power of monopolies and trusts.[12]

During the decades following the passage of the Sherman Act, overlapping with the original Gilded Age,[13] the government failed to control the

controls the scope of property rights and enables contract law. In a 1971 decision holding that welfare recipients were entitled to due process before loss of benefits, the Court noted that welfare benefits could be considered a form of property and that "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970). Earlier, in finding the enforcement of racially restrictive covenants in housing to be in violation of the Fourteenth Amendment, the Court wrote,

> These are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

10. John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 304–05 (1988); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 314–15 (1991).

11. Louis B. Boudin, *The Sherman Act and Labor Disputes: I*, 39 COLUM. L. REV. 1283, 1287 n.14 (1939).

12. For instance, one member of Congress called for "counter combinations among the people" to challenge the power of large corporations. 21 CONG. REC. 2565 (1890) (statement of Sen. Stewart).

13. The Gilded Age is conventionally thought to have ended around the turn of the twentieth century with the rise of the Populist and Progressive movements. The historical evidence suggests, however, that the New Deal era lasting from the 1930s through the 1970s was a "long exception" or an "interregnum between Gilded Ages." Jefferson Cowie & Nick Salvatore, *The Long Exception: Rethinking the Place of the New Deal in American History*, 74 INT'L LABOR & WORKING-CLASS HIST. 3, 5 (2008); Paul Krugman, *Introducing This Blog*, N.Y. TIMES: THE CONSCIENCE OF A LIBERAL (Sept. 18, 2007, 11:45 PM), https://krugman.blogs.nytimes.com/2007/09/18/introducing-this-blog/; *see also* Sarah Jones, *Lessons from the Gilded Age*, NEW REPUBLIC (June 13, 2018), https://newrepublic.com/article/149005/lessons-gilded-age ("America is in a new Gilded Age, or so the headlines say. 'It's Beginning to Look a Lot Like the Gilded Age,' *Bloomberg* warned in February, noting that the late nineteenth century 'was a time of exploding economic inequality, stagnant living standards, growing concern about monopolies, devastating financial crises . . . brazen political corruption, frequent pronouncements that the American republic was doomed, and seemingly unending turmoil over race and national identity.'" (alterations in original) (quoting Justin Fox, *It's Beginning to Look a Lot Like the Gilded Age*, BLOOMBERG (Feb. 7, 2018), https://www.bloomberg.com/opinion/articles/2018-02-07/it-s-beginning-to-look-a-lot-like-the-gilded-age)).

growth of monopolies and oligopolies and instead used the antitrust laws to limit the activities of labor unions. Although the United States Supreme Court established strict rules against price fixing,[14] it limited the ability of the government to challenge corporate mergers.[15] This combination of a prohibition on price fixing and a tolerance of consolidation contributed to the first wave of mergers in American history.[16] Instead of helping move the United States toward a less concentrated industrial structure, the antitrust laws accelerated the rise of monopolies and oligopolies. Although the administrations of Theodore Roosevelt, William Howard Taft, and Woodrow Wilson launched a vigorous anti-monopoly campaign, these efforts, at most, undid only a part of the consolidation that resulted from the merger mania between 1897 and 1904. During this same time, even as the Supreme Court permitted economy-wide consolidation, it applied the antitrust laws to restrict the activities of labor unions.[17] The Department of Justice ("DOJ") and the federal courts used the antitrust laws to discipline workers and to limit the ability of unions to apply pressure against hostile employers through secondary boycotts and strikes.[18] In the words of economic historian Richard White, the Sherman Act was "aimed at capital but hit labor."[19]

Breaking with the mid-twentieth century approach to antitrust, the federal courts and antitrust enforcers, since the late 1970s, have once again interpreted—indeed reinterpreted—antitrust law to expand the autonomy of big capital and restrict the freedom of workers. The executive branch and judiciary have minimized concerns about the power of corporations. They have replaced congressional (and once-judicially validated) economic and political objectives with an "efficiency" or "consumer welfare"[20] goal. In the area of mergers, the Court has taken a generally hands-off approach, meaning that

14. United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

15. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

16. "The years following the *Knight* decision [one of the first significant cases tried under the Sherman Act] witnessed the greatest consolidation movement in the nation's history, and most states proved economically impotent against the new, giant corporations operating in national and even world markets." NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904, at 166 (1985).

17. Loewe v. Lawlor, 208 U.S. 274 (1908).

18. *See infra* Section II.B.

19. RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA 384 (2011).

20. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978))); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010) ("Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers."). Although the distinction between consumer welfare and economic efficiency is not important to the thesis of this Article, a review of the case law shows that consumer welfare is the goal of contemporary law. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008).

the federal antitrust agencies have become the principal policymakers and used their power to handicap their *own* ability to stop mergers. [21] Except for horizontal mergers in highly concentrated markets that threaten to leave a market with four or fewer players, the DOJ and the Federal Trade Commission ("FTC") today generally do not stop or even remedy most horizontal mergers.[22] This lax approach to mergers has yielded multiple waves of consolidation across the economy and contributed to a highly concentrated industrial structure. Along with the agencies' permissive approach to mergers, the Supreme Court has narrowed the scope of anti-monopoly law and restricted the ability of plaintiffs to challenge predatory pricing[23] and refusals to deal.[24] The federal antitrust agencies have done little to resist this doctrinal retrenchment and have not brought a significant anti-monopoly case arguably since the lawsuit against Microsoft in 1998.[25]

This general deference toward large businesses has been paired with vigilance toward collective action by labor. The federal antitrust agencies, especially the FTC, repeatedly challenged union-like organization by workers and professionals. The FTC also consistently called on states to scale back occupational licensing rules that can help consumers and workers. With this pro-capital, anti-labor orientation, the antitrust laws in the new Gilded Age resemble antitrust in the original Gilded Age.[26] Laws intended to challenge the privileges of monopoly and preserve space for workers to organize are once again being used to preserve the existing power structure and undermine attempts by labor to strike a more equitable bargain with capital.[27]

Through congressional, executive, and judicial action, the antitrust laws can be reinterpreted to honor their original legislative intent and to create a more just and equitable society. This reinterpretation and revival of antitrust law would neither be easy nor be immediate. It would require new legislation and a radical change in personnel both at the federal antitrust agencies and on the federal bench and the erasure of decades of accumulated pro-monop-

21. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 4 ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.").

22. John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 855 (2017).

23. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

24. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

25. Press Release, Dep't of Justice, Justice Department Files Antitrust Suit against Microsoft for Unlawfully Monopolizing Computer Software Markets (May 18, 1998), https://www.justice.gov/archive/atr/public/press_releases/1998/1764.htm.

26. *See infra* Part IV.

27. Frank Pasquale, *When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy*, CPI ANTITRUST CHRON., May 2017, at 4–5.

oly and pro-oligopoly precedent. Yet, the conservative coup against the historical understanding of the antitrust laws beginning in the 1970s[28] reveals the malleability of these statutes. At a minimum, the antitrust agencies and courts should reorient the antitrust laws to advance the congressional intent expressed in the Sherman, Clayton, and FTC Acts. The Congresses that passed these statutes sought to limit the power of large-scale capital over consumers and producers, competitors, and citizens and, at the same time, were near-unanimous in stating that these laws should not interfere with the joint action of workers. The federal antitrust agencies and the courts should rediscover these legislative histories. In this current era of deep economic and political inequality, the policy objectives expressed by Congress in 1890 and 1914 remain as important as ever to ordinary Americans. Persisting with the current antitrust paradigm would only uphold an unjust and increasingly unpopular status quo.

Part I will lay out the legislative vision for the antitrust laws, showing that the framers of these statutes sought to control the power of large businesses[29] and to protect the freedom of workers and their right of collective action.[30] Part II will turn to administration and interpretation of the antitrust law from 1890 to the 1930s and examine how the executive branch and courts defanged the new laws against big business and weaponized it against workers during this period.[31] Part III will review antitrust over the past four decades—the Second Gilded Age—and describe the troubling pro-business,[32] anti-worker application and interpretation of the antitrust statutes over this period.[33] Part IV will explain how antitrust law can still be remade in accordance with the original congressional vision and become a powerful instrument to create a more equitable society.[34]

I. THE ANTI-MONOPOLY, PRO-WORKER VISION UNDERLYING U.S. ANTITRUST LAW

The Congresses that enacted the antitrust laws had an expansive vision to curtail the power of concentrated capital in American society. These laws were passed against the backdrop of growing public fears about large corporations, which emerged in the new national market in the decades after the

28. The decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), was key in this transformation and retrenchment of antitrust law. *Id.*; *see also* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1152 (1981).

29. *See infra* Section I.A.

30. *See infra* Section I.B.

31. *See infra* Sections II.A–B.

32. *See infra* Section III.A.

33. *See infra* Section III.B.

34. *See infra* Sections IV.A–B.

Civil War.[35] Americans recognized the totalizing power of these corporate titans. They believed these new giants threatened ordinary Americans' interests in their capacity as consumers, workers, farmers, entrepreneurs, and citizens.[36]

The legislative histories of the antitrust laws can and should inform their interpretation. Despite the late Justice Scalia's strident advocacy against the use of legislative history in statutory interpretation, courts, including the Supreme Court, continue to consult legislative history when interpreting ambiguously phrased statutes.[37] Even under Justice Scalia's philosophy of selectively looking to the historical record for guidance,[38] open-ended statutes such as the Sherman Act—more akin to broad constitutional provisions than to a detailed and precisely drafted federal statute[39]—arguably should be interpreted in light of congressional purposes.

A review of the legislative histories of the three principal antitrust statutes reveals a broad understanding of corporate power. Congress in the late nineteenth and early twentieth centuries recognized that this power manifested itself in several ways. The members of Congress who drafted the antitrust laws had a rich understanding of the power of monopoly and oligopoly and believed that such businesses exercised authority akin to private governments.[40] Ohio Senator John Sherman described the trusts and monopolies as

35. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 283–84 (1989).

36. *See also* WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 246–47, 334 (1991); HANS B. THORELLI, FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 138–49 (1955); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1226–28 (1987). *See generally* LAWRENCE GOODWYN, THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA (1978).

37. David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1739–40 (2010).

38. Justice Scalia's use of the debating and drafting record was not consistent. He consulted and championed the use of these records in constitutional interpretation but denounced their use in statutory interpretation. William N. Eskridge Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1306–07 (1998).

39. The key substantive provisions of the three main antitrust statutes are phrased in sweeping terms. The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" and "monopoliz[ation] or attempt[s] to monopolize." 15 U.S.C. §§ 1–2 (2012). The FTC Act outlaws "[u]nfair methods of competition." *Id*. § 45. The Clayton Act prohibits mergers and acquisitions whose effects "may be substantially to lessen competition, or to tend to create a monopoly." *Id.* § 18. The Supreme Court once described the antitrust laws as "the Magna Carta of free enterprise." United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); *see also* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

40. K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 72 (2016).

exercising a "kingly prerogative, inconsistent with our form of government."[41] More than fixating on a particular material effect of big business,[42] many leading members of Congress spoke out against these new corporate behemoths because they could, and did, exercise unaccountable power over Americans.[43] Although prices were generally falling in the United States in the late nineteenth and early twentieth centuries, members of Congress denounced the *power* of corporations to raise prices above competitive levels and capture wealth from the consuming public.[44] And for these Congresses, higher consumer prices were an important—but *not* the only—manifestation of monopoly and oligopoly power in the American political economy. The drafters of the antitrust laws held that dominant and other powerful corporations threatened the freedom and viability of competitors and the preservation of democratic institutions.

As Congress sought to curtail the power of large businesses, it aimed to preserve freedom of action for workers and their representative organizations. Workers, unions, and their congressional supporters were concerned that the antitrust laws would be used against collective action by labor. The legislative history of the Sherman Act suggests a congressional desire to exempt labor from the new law's ambit. After a series of court decisions hostile to workers, Congress enacted an express exemption for labor in the Clayton Act. This exemption states that "labor of a human being is not a commodity or article of commerce."[45] The legislative history of the Sherman Act indicates that many members of Congress viewed labor organizing not as a target of antitrust enforcement but as a complement to antitrust enforcement—both essential to controlling the power of big businesses.

A. Curtail the Power of Concentrated Capital

In passing the three principal antitrust statutes, the respective Congresses expressed deep concerns about the power of concentrated capital. The legislative histories of the Sherman, Clayton, and FTC Acts reveal an expansive understanding of corporate power. The members of the Con-

41. 21 CONG. REC. 2457 (1890).

42. Notably, the economics profession was either indifferent toward or opposed to the passage of an antitrust law. THORELLI, *supra* note 36, at 120–21.

43. Senator Edmunds stated that, notwithstanding the possible material benefits of some trusts, these concentrations of power would "come to be tyrannies, grinding tyrannies, that have sometimes in other countries produced riots, just riots in the moral sense." 21 CONG. REC. 2726 (1890). One member of Congress in the debates preceding the enactment of the Clayton Act captured this power succinctly. While he conceded that the trusts could be operated for the public benefit, he characterized this view as naïve because unchecked private power "affords too great a temptation to frail humanity." 51 CONG. REC. 9186 (1914) (statement of Rep. Helvering).

44. Robert H Lande, *Wealth Transfers as the Original and Primary Concern: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 101 (1982).

45. 15 U.S.C. § 17 (2012).

gresses that debated, drafted, and passed the antitrust statutes were not concerned with just one aspect of corporate power. Representatives and senators warned of the power of corporations to control American society in myriad ways. The congressmen feared private autocracy threatened the interests of Americans as consumers, farmers, workers, business proprietors, and citizens.[46] The antitrust statutes were Congress's efforts to protect ordinary Americans from the power of the new corporate giants that defined the political economy of the United States.

1. Protect Consumers, Producers, and Consumers from the Power of Large Corporations

As Robert Lande shows in painstaking detail, the members of Congress that drafted the three primary antitrust statutes condemned monopolies and trusts for capturing wealth from American consumers, farmers, and other producers.[47] The corporate giants of the day used their power to raise prices to consumers and depress prices paid to farmers and workers, impoverishing ordinary Americans. In the debate leading up to the passage of the Sherman Act, Senator James George denounced the higher prices from monopoly as "extortion which makes the people poor."[48] The private taxes collected by monopolies and cartels were a moral outrage akin to robbery,[49] not an academic concern about "deadweight loss[es]" for economists to contemplate in seclusion.[50]

Large corporations' power to depress prices to producers, especially farmers, was another recurring theme. Representative Heard, for instance, stated that the corporate titans of the day have "stolen untold millions from the people."[51] Congressman Taylor recognized that the trusts exercised great power as both sellers and buyers and condemned the beef trust for "rob[bing] the farmer on the one hand and the consumer on the other."[52] For Congressman Bland, the beef trust was a principal enemy of the farmer. He asserted that "there is no trust in this country that today is robbing the farmers of the great West and Northwest of more millions of their hard-earned money than this so-called Big Four beef trust of Chicago."[53] This congressional interest in the impact of trusts on farmers is not surprising. Farmers, acting collectively through organizations such as the Farmers' Alliance, were among the

46. *See, e.g.*, Flynn, *supra* note 10, at 304–05; Peritz, *supra* note 10, at, 314–15.

47. Lande, *supra* note 44, at 82–142.

48. 21 CONG. REC. 1768 (1890).

49. *Id.* at 2614 (statement of Rep. Coke).

50. Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 373 (1993).

51. 21 CONG. REC. 4101 (1890).

52. *Id.* at 4098.

53. *Id.* at 4099.

leading supporters of anti-monopoly legislation in the late nineteenth century.[54]

In the debates in 1914 in the run-up to the passage of the FTC and Clayton Acts, the theme of corporate theft from consumers and producers was once again at the forefront. The principal Senate sponsor of the FTC Act expressed concern about "unreasonable and extortionate prices."[55] Another Senator stated that monopolies and trusts "mulct the people out of hundreds of millions of dollars each year"[56] and characterized monopoly and oligopoly pricing as robbery.[57] One Congressman sought to "secure the people from unjust tribute levied by monopolistic corporations."[58] In the debates preceding the enactment of the Clayton Act, Senators Cummins and Thompson spoke of "protecting the people against the rapacity and the avarice of monopoly"[59] and the "extortion practiced by the trust,"[60] respectively. Representative Morgan endorsed the creation of the FTC because it would limit corporate "power to arbitrarily control prices and thus exact unjust profits from the people."[61]

Just as they were concerned with protecting consumers and producers from the power of the trusts, the Congresses that enacted the antitrust statutes were committed to protecting small businesses and other competitors from the power of large-scale capital. Senator Sherman declared, "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances."[62] He deemed this right to be "industrial liberty" and the foundation of equality in American society.[63] Senator George held that, without congressional action, capitalist power would "at some not very distant day . . . crush out all small men, all small capitalists, all small enterprises."[64] He rhetorically asked: "Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men . . . ?"[65] Representative Mason went further than most of his colleagues and argued that preserving opportunities for small businesses should receive precedence

54. CRONON, *supra* note 36, at 343; Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242, 256 (1992).

55. *Federal Trade Commission: Hearing on S.B. 2941 Before the S. Comm. on Interstate Commerce*, 62d Cong. 25 (1914) (statement of Sen. Newan, S. Comm. on Interstate Commerce).

56. 51 CONG. REC. 13223 (1914).

57. *Id.*

58. *Id.* at 8854.

59. *Id.* at 14256.

60. *Id.* at 14223.

61. *Id.* at 9265.

62. 21 CONG. REC. 2457 (1890).

63. *Id.*

64. *Id.* at 2598.

65. *Id.*

over consumer interests.[66] He believed the theoretical efficiencies of large-scale enterprise could come at too high a price:

> Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent a barrel it would not right the wrong done to the people of this country by the "trusts" which have destroyed legitimate competition and driven honest men from legitimate business enterprises.[67]

When they debated the FTC and Clayton Act nearly a quarter-century later, members of Congress once again took an interest in the protection of competitive opportunities for small enterprises. For Senator Reed, an objective of the FTC Act was to "keep the highways of opportunity unobstructed . . . so that all may have a fair chance to gain a livelihood and to embark in business."[68] A Senate colleague aimed to preserve open and equal market opportunities for all participants.[69] Senator Lane described the existential threat of large enterprises to small businesses, stating that without comprehensive federal legislation "every small and honorable dealer may be put to intentional and infinite annoyance or driven out of business by his larger or more crafty rival."[70] Senator Cummins, albeit expressing somewhat contradictory sentiments, wanted to preserve the domain of "individual initiative" against "the power of the corporation."[71] Policing unfair practices in the marketplace was another important theme. Congressman Stevens spoke for the need to protect "healthful competition"[72] from threatening business practices. Sounding a similar note, Senator Newlands condemned market practices "against public morals" that inflicted harm on competitors.[73] Another Senator held that "oppression or advantage obtained by deception or questionable means is the distinguishing characteristic of 'unfair competition.'"[74]

The debates culminating in the passage of the Clayton Act also featured the preservation of opportunities for all comers. The protection of small business from overweening private power was an expressed goal. Representative Nelson lamented the disappearance of small business in a wave of consolidation.[75] A House colleague condemned large enterprises' quest for "industrial domination."[76] In endorsing the 1950 amendments to the Clayton Act (also

66. Lande, *supra* note 44, at 102.
67. 21 CONG. REC. 4100 (1890).
68. 51 CONG. REC. 13231 (1914).
69. *Id.* at 14791–92 (statement of Sen. Burton).
70. *Id.* at 13223.
71. *Id.* at 12742.
72. *Id.* at 14937.
73. *Id.* at 11112.
74. Lande, *supra* note 44, at 110 n.171 (quoting 51 CONG. REC. 12248 (1914)).
75. 51 CONG. REC. 9167 (1914).
76. *Id.* at 9086.

known as the Celler-Kefauver Antimerger Act),[77] Congressman Bennett stated that it would "preserve the chances of the average man to make a place for himself in business."[78]

2. Preventing Capitalist Takeover of Political Institutions

While coercion in the marketplace was an animating theme in the legislative debates, the Congresses that passed the antitrust laws viewed concentrated corporate power as a threat to the American political system itself. Private capture and even displacement of government is an important theme in the legislative debates leading up to the passage of the landmark antitrust statutes. The representatives and senators debating and drafting the bills signaled the threat of private dictatorship. They spoke of the threat to democratic institutions in American society and even warned of corporate autocracy.

Corporate control of political decisions was an important theme in the debate over the Sherman Act. The specter of corporate capture of the state loomed large. Senator Hoar deemed the monopolies of the late nineteenth century to be "a menace to republican institutions themselves."[79] In light of the power of these new corporate behemoths to control state governments, a Senate colleague called for a strong federal check on this private power.[80] Senator Sherman went even further and described the possibility of monopolies and trusts assuming control of key public decisions and displacing government. He did not mince words on the connection between private power and dictatorship. He explicitly stated, "If we would not submit to an emperor[,] we should not submit to an autocrat of trade."[81] Identifying the capital of private autocracy, he asked his Senate colleagues to "consider . . . whether, on the whole, it is safe in this country to leave the production of property, the transportation of our whole country, to depend upon the will of a few men sitting at their council board in the city of New York."[82] A colleague echoed the profound threat to the public of a few individuals making decisions that affected the entire nation.[83]

77. Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (2012)).

78. 95 CONG. REC. 11506 (1949) (remarks of Rep. Bennett).

79. 21 CONG. REC. 3146 (1890).

80. *See id.* at 2460 ("These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.").

81. *Id.* at 2457.

82. *Id.* at 2570.

83. *Id.* at 2598 (statement of Sen. George).

As with the debates over the Sherman Act, the theme of private assumption of governmental powers was central in the debates over the FTC and Clayton Acts. Echoing Senator Sherman's comments from a quarter-century earlier, Senator Cummins warned that material benefits of large-scale enterprise would come at too great a price "if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind."[84] In endorsing the FTC Act, Congressman Stevens stated that the growth of trusts and monopolies had created among Americans "a very just apprehension that this wealth, and power growing out of it, may be not only used to the detriment but also may be a potential source of injury and oppression."[85] Deeming the Sherman Act to be a failure, Senator Newlands contended that corporate giants were so embedded in the American political economy that few dared to challenge their prerogatives.[86] Senator Kenyon posed the choice before his colleagues starkly as between government taming private monopoly or private monopoly taking over the government.[87]

The congressional discussion over the Clayton Act also revealed grave worries about private usurpation of government authority and featured especially evocative and rich rhetoric. Representative Kelly spoke of monopoly as "the invisible government which has controlled the visible Government in this Nation for many years."[88] The Congressman additionally denounced the monopolies' capture of government and their conversion of democratic institutions into servants of big capital:

> Great combinations of capital for many years have flaunted their power in the face of the citizenship, they have forced their corrupt way into politics and government, they have dictated the making of laws or scorned the laws they did not like, they have prevented the free and just administration of law. In doing this they have become a menace to free institutions, and must be dealt with in patriotic spirit, without fear or favor.[89]

Representative Nelson even offered a conservative case for the Clayton Act's anti-merger provision, presenting the choice as one between decentralized markets or eventual public ownership of corporations. If the trend toward monopoly continued, Nelson stated the people would select "public ownership of trusts for the benefit of all" over "the private ownership of the trusts for the privilege of the few."[90] For Nelson, this would be "the final

84. 51 CONG. REC. 12742 (1914).

85. *Id.* at 8850.

86. S. REP. NO. 62-1326, at 19 (1914) ("[W]e find that the trusts are more powerful to-day than when the antitrust act was passed, and that evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.").

87. 51 CONG. REC. 13158 (1914).

88. *Id.* at 9087.

89. *Id.* at 9086.

90. *Id.* at 9167.

triumph of socialism in this country."[91] For Senator Borah, capitalist control of the state would trigger a powerful reaction and culminate in political and social chaos. Without a new antitrust law to fill major gaps in the Sherman Act and to impose real checks on the power of monopolies and trusts, he painted a Hobbesian future in which unlimited business power would "divide our people into classes, breed discontent and hatred, and in the end riot, bloodshed, and French revolutions."[92]

When the Clayton Act was amended in 1950,[93] representatives and senators stressed the connection between concentrated industrial structures and the rise of totalitarianism.[94] They believed that decentralization was critical to protecting democracy in the United States and toward that end strengthened the Clayton Act's anti-merger provision.[95] Several members of Congress argued that economic autocracy and political autocracy were intimately intertwined.[96] Congressman Celler drew a causal chain from the rise of the trusts in Germany to Hitler's ascension to power and ultimately to World War II.[97]

B. Protect Workers' Ability to Undertake Collective Action

The Congresses that debated the Sherman and Clayton Acts sought to preserve freedom for workers and farmers to engage in collective action. In enacting the antitrust laws, the legislative focus was on limiting the power of big business, not interfering with the freedom of workers to organize to raise wages and improve their working conditions. The members of Congress who drafted the Sherman and Clayton Acts took pains to ensure these new laws would police capital and accommodate labor. For many members of Congress, the new federal antitrust laws and labor organizing were two methods

91. *Id.*

92. *Id.* at 15955.

93. *See supra* note 77 and accompanying text.

94. Lande, *supra* note 44, at 137–38.

95. *See, e.g.*, 96 CONG. REC. 16452 (1950) (remarks of Sen. Kefauver) ("I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.").

96. *Id.* at 16446 (remarks of Sen. O'Mahoney); *id.* at 16503–04 (remarks of Sen. Aiken).

97. 95 CONG. REC. 11486 (1949).

by which to protect millions of ordinary Americans against the power of concentrated capital.[98] In the words of one Senator, "counter combinations among the people" were necessary to control the trusts.[99]

In the lead-up to the passage of the Sherman Act, several members of Congress feared that the new law would be applied against organizations that represented workers and farmers. The first draft of the bill that would become the Sherman Act prohibited "all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles."[100] Labor unions (and agricultural cooperatives) employed collective action to raise workers' wages and farmers' incomes and thereby could sometimes raise prices for consumers.[101] Under Senator Sherman's original bill, the federal government and other plaintiffs could challenge collectives of workers.[102]

98. For example, Senator Teller in the debate over the Sherman Act wanted to control trusts and also preserve for "the laborers of the country the opportunity to combine either for the purpose of putting up the price of their labor or securing to themselves a better position in the world." 21 CONG. REC. 2561 (1890). Senator Hoar said,

> [A]s legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side.

Id. at 2728. He contrasted combinations of works with combinations of capital that "extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed." *Id.* Senator Edmunds, who did not support an exemption for labor, nonetheless said,

> [I]f capital and plants and manufacturing industries organize to regulate and so to repress and diminish, if you please, below what it ought to be, the price of all the labor everywhere that is engaged in that kind of business, labor must organize to defend itself on the other side.

Id. at 2727. For more context, see Louis B. Boudin, *The Sherman Act and Labor Disputes: I*, 39 COLUM. L. REV. 1283, 1287 n.14 (1939).

99. 21 CONG. REC. 2565 (statement of Sen. Stewart). This idea is what John Kenneth Galbraith later described as "countervailing power" against existing concentrations of power in the economy. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 110–14 (1952).

100. 21 CONG. REC. at 2455.

101. During the debates preceding the passage of the Sherman Act,

> Senator Edmunds expressed the view that if a law was to be passed condemning all agreements or combinations which tended to raise the price of commodities, neither labor nor farmer organizations ought to be excluded, since the raising of wages and the raising of prices of farm products by agreement or combination tended as much to raise the prices of commodities as did similar agreements or combinations of any other class.

Boudin, *supra* note 98, at 1289.

102. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 250 (1956).

Although Senator Sherman insisted that his bill would not affect the activities of labor unions,[103] many of his colleagues were not assuaged by his assurances. They feared that absent an exemption the bill would apply to labor organizations. The senators who spoke on this issue overwhelmingly opposed applying the antitrust laws to labor collectives.[104] Senator Hoar distinguished between collectives of labor and collectives of capital (corporations, including trusts and monopolies). He deemed the former to be "lawful, wise, and profitable, [and] absolutely essential to the existence of the commonwealth itself," and the latter as instruments of "purposes of individual greed."[105] Senator Edmunds, the one member who opposed the exemption, argued that the bill would deconcentrate markets and establish parity between capital and labor.[106] In Senator Edmunds' future world of equality between labor and capital, unions would be unnecessary.[107] In light of the widely held concern that labor would be targeted, Senator Sherman introduced an exemption for farm and labor organizations to address his colleagues' concerns.[108]

When reviewing the bill with the farm and labor exemption and other amendments, the Senate Judiciary Committee adopted another bill entirely. This new bill made no mention of higher consumer prices and instead prohibited restraints of trade.[109] It also did not include any express exemption for labor unions and agricultural cooperatives.[110] Yet, the critics of Senator Sherman's earlier bill did not voice any concerns that this bill could be interpreted to restrict the collective actions of workers.[111] These champions of labor, including Senator Hoar, supported the new bill and helped shepherd it through the Senate and enact the Sherman Act.[112]

103. Senator Sherman stated that "combinations of workingmen to promote their interest, promote their welfare, and increase their pay . . . are not affected in the slightest degree, nor can they be included in the words or intent of the bill." 21 CONG. REC. 2562 (1890).

104. Boudin, *supra* note 98, at 1287 n.14.

105. 21 CONG. REC. 2728 (1890).

106. Boudin, *supra* note 98, at 1287 n.14.

107. *See id.* ("In the course of the debate every senator who spoke on the subject, with the exception of Senator Edmunds, expressed himself as opposed to the application of the proposed law to labor unions or farmers' organizations, and expressed the belief that the entire Senate concurred in that view. Senator Edmunds was the only one to dissent, apparently being of the belief that if the proposed law would succeed in preventing the organization of trusts, labor organizations would become unnecessary.").

108. 21 CONG. REC. 2611–12 (1890); *see also* Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 155–56 (1988).

109. *See* Greenslade, *supra* note 108, at 160 ("[T]he Judiciary Committee's bill focused on conduct that restrained trade.").

110. Boudin, *supra* note 98, at 1287 n.14.

111. *Id.*

112. Greenslade, *supra* note 108, at 158–59.

While evidently not the view of some scholars,[113] the most logical interpretation of the Sherman Act's legislative history is that Congress did *not* intend the law to reach the activities of labor unions and agricultural cooperatives.[114] Senator Sherman's initial bill focused on joint activities between "citizens or corporations" that raised prices to consumers.[115] This language provoked strong reactions from senators who wanted to protect labor and farmer organizations from antitrust attack.[116] Once the bill's language was revised and made no reference to consumer prices, however, the pro-labor senators no longer raised the threats to labor unions.[117] Barring some unanticipated and unrecorded change in their attitude toward unions, at least one of these senators would have presumably demanded an exemption for labor unions, as they had for the earlier bill, if they feared an antitrust threat to unions. Instead, they supported the new bill without further amendment.[118] Many years later, Samuel Gompers, the President of the American Federation of Labor and admittedly not a neutral source, stated, "We know the Sherman law was intended by Congress to punish illegal trusts and not the labor unions, for we had various conferences with members of Congress while the Sherman Act was pending, and remember clearly that such a determination was stated again and again."[119]

In 1914, Congress unambiguously voiced its views on the application of antitrust to labor unions by establishing an express exemption in the Clayton Act. Reacting to judicial application of the Sherman Act to the activities of labor unions,[120] Congress sought to undo this court interpretation and restore workers' full freedom to engage in collective action. Section 6 of the Clayton Act is phrased in broad terms, declaring that "[t]he labor of a human being is not a commodity or article of commerce."[121] After a protracted struggle to pressure Congress to overturn the judiciary's anti-labor interpretation of the Sherman Act,[122] organized labor and its supporters in Congress believed they had won a great victory, hailing the Clayton Act's exemption for labor as its Magna Carta.[123] The statute's plain meaning does not legalize

113. Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919, 951 (1988).

114. Greenslade, *supra* note 108, at 160; THORELLI, *supra* note 36, at 231–32.

115. 21 CONG REC. 2455 (1890).

116. Boudin, *supra* note 98, at 1287 n.14.

117. *Id.*

118. Greenslade, *supra* note 108, at 158–59.

119. EDWARD BERMAN, LABOR AND THE SHERMAN ACT 5 (1930) (quoting Samuel Gompers, *The Hatters' Case. The Sherman Law—Amend It or End It.*, 17 AM. FEDERATIONIST 197, 202 (1910)).

120. Louis B. Boudin, *Organized Labor and the Clayton Act: Part I*, 29 VA. L. REV. 272, 273–74 (1942); *see infra* Section II.B.

121. 15 U.S.C. § 17 (2012).

122. *See infra* Part II.B.

123. Boudin, *supra* note 120, at 306–09.

all union activity but does withdraw all union activity, including secondary actions, from the purview of the antitrust laws.[124]

The legislative history of the Clayton Act is full of denunciations of the federal courts for applying the Sherman Act to the activities of labor unions. This judicial interpretation of the Sherman Act was considered a perversion of the statute. Representative Madden declared that the Senate that passed the Sherman Act "clearly and unequivocally stated that its provisions would not cover" labor unions.[125] Senator Ashurst held that the courts, by resorting to "strained and harsh constructions," overrode the intent of the framers of the Sherman Act to protect labor unions.[126] Stressing that the Sherman Act was intended to control the power of large corporate enterprise, Senator Williams declared:

> A statute which was passed avowedly and without question to check the operation of the tyranny of the combined money power of the country as being a menace to free institutions was construed by the Federal judiciary so as to operate against the freedom and liberty of men engaged in hiring their labor.[127]

Tracing the arc of American history in the nineteenth century, Congressman Buchanan condemned the Supreme Court for holding that labor is a "commodity or an article of commerce" in this country and undoing not only what Congress had intended but also what the Civil War had conclusively resolved.[128]

II. ANTITRUST DURING THE FIRST GILDED AGE: 1890–1930S

Despite Congress's intent to police capital and accommodate labor through the Sherman Act, the executive branch and the courts inverted this legislative purpose. In the 1890s, the first decade of the Sherman Act, the Supreme Court made two critical choices: The proscription of price fixing and the acceptance of consolidation contributed to an unprecedented merger wave. These two decisions transformed the structure of American industry between 1896 and 1904. This tolerance of mergers was accompanied by executive and judicial hostility toward collective action by workers. Most of the early Sherman Act prosecutions targeted labor rather than business. The Supreme Court interpreted the Sherman Act to proscribe secondary boycotts and strikes by workers and continued to follow this interpretation even after

124. Louis B. Boudin, *Organized Labor and the Clayton Act: Part II*, 29 VA. L. REV. 395, 410 (1943); *see also* Joseph Kovener, *The Legislative History of Section 6 of the Clayton Act*, 47 COLUM. L. REV. 749 (1947).

125. 51 CONG. REC. 9087 (1914).

126. *Id.* at 13663.

127. *Id.* at 14588.

128. *Id.* at 16337.

Congress established an antitrust exemption for labor unions. Multiple presidential administrations and federal courts warped a law intended to tame the power of capital, converting it to tame the power of labor and create a more pliant workforce to the benefit of capital.

A. A Failure to Check the Growth of Trusts

In a series of decisions, the early judicial interpretation of the antitrust laws produced a major dichotomy. First, the Court held in the 1895 decision *United States v. E.C. Knight Co.*[129] that Congress did not have the constitutional authority to restrict mergers in manufacturing and mining and so the Sherman Act could not be used to challenge mergers in these sectors.[130] In establishing a distinction between interstate commerce (which Congress could regulate) and production (which Congress could not regulate),[131] the Court crippled the ability of the government to stop or undo anticompetitive mergers using the Sherman Act.[132] Second, the Supreme Court, in a trio of decisions between 1897 and 1899, adopted a strict ban on overt price fixing between competitors.[133] The Court refused to entertain defenses to horizontal price fixing or consider the "reasonableness" of the collusive prices.[134] It established a per se ban on the practice that persists to this day.[135]

These judicial interpretations of the Sherman Act encouraged businesses to grow and achieve monopoly and oligopoly through mergers.[136]

129. 156 U.S. 1 (1895).

130. *Id.* at 17. The Court stated that citizens should look to state governments for protection from corporate consolidation. *Id.* at 16–17.

131. *See id.* at 13 ("The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.").

132. Samuel R. Reid, *Antitrust and the "Merger-Wave" Phenomenon: A Failure of Public Policy*, 3 ANTITRUST L. & ECON. REV. 25, 28–29 (1969).

133. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899).

134. *Trans-Mo. Freight Ass'n*, 166 U.S. at 331–32.

135. *Joint Traffic Ass'n*, 171 U.S. at 577. During the depths of the Great Depression, the Supreme Court softened the ban on horizontal price fixing for distressed industries. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). The Court restored the per se ban on horizontal collusion in 1940. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

136. Naomi Lamoreaux explained:

> The Court [in *E.C. Knight*] returned responsibility for oversight of large corporations to the states, but events were not to permit matters to rest there. The years following the *Knight* decision witnessed the greatest consolidation movement in the nation's history,

Corporations that previously sought to stabilize market prices through collusion abandoned this strategy. Under the judiciary's reading of the Sherman Act, competitors that organized pools (a common price-fixing arrangement that did not involve the integration of business operations) would violate the Sherman Act.[137] The *E.C. Knight* decision, however, granted businesses broad freedom to merge with competitors.[138] Instead of price fixing, many firms tried to achieve market stabilization through mergers with, and acquisitions of, rivals.[139] At least outside of sectors that directly involved interstate commerce as the concept was then interpreted by the courts (such as railroads), businesses could merge with some confidence that these consolidations would be beyond the reach of the Sherman Act.[140] The Court blocked one channel (price fixing) by which businesses could obtain market power but opened the flood gates on another channel (mergers) by which businesses could achieve a similar end. Indeed, mergers, by bringing different businesses under common control, are a more potent method of raising and stabilizing prices than collusive arrangements, which can be susceptible to cheating by participants.[141]

In a cruel irony to the congressional framers and public supporters of the Sherman Act, the first fifteen years of this new law intended to curb the power of trusts and monopolies witnessed the emergence of concentrated markets across the economy. In the late 1890s and early 1900s, the United States saw its first major merger wave, with hundreds of firms merging with their rivals.[142] In 1899 alone, 1208 mergers occurred in the manufacturing

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> and most states proved economically impotent against the new, giant corporations operating in national and even world markets.

LAMOREAUX, *supra* note 16, at 166.

137. WHITE, *supra* note 19, at 175.

138. William Letwin, *The First Decade of the Sherman Act: Judicial Interpretation*, 68 YALE L.J. 900, 917 (1959); *see also* George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J. L. & ECON. 77, 86–87 (1985) ("*E.C. Knight* made merger legal, at least in the minds of many lawyers . . . .").

139. Bittlingmayer, *supra* note 138, at 116–17; *see, e.g.*, 2 SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 7 (1958) ("Three months after Judge Taft's decree enjoining the pool, the four Tennessee and Alabama companies consolidated to form the American Pipe and Foundry Company. Nine months later, in March 1899, the merger was extended, under the name United States Cast Iron Pipe and Foundry Company, to take in the two remaining defendants and five firms in the northeastern states, thus including 75 percent of the entire industry."(footnote omitted)).

140. Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from* Knight *to* Swift, 39 U.C. DAVIS L. REV. 85, 99 (2005).

141. LAMOREAUX, *supra* note 16, at 87, 100; Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 321 n.182 (1989).

142. WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 144 (2d ed. 2004).

and mining sectors.[143] Just two years earlier, in 1897, only sixty-nine mergers had occurred in these two fields.[144] Writing in 1901, two prominent economists, with a touch of hyperbole, described the nature of the change in the political economic landscape of the country: "If the carboniferous age had returned and the earth had repeopled itself with dinosaurs, the change made in animal life would have scarcely seemed greater than that which has been made in the business world by these monster-like corporations."[145]

Congress's attempt to control mergers through the Clayton Act in 1914 proved unsuccessful. The new law had a major limitation.[146] It prohibited acquisitions of corporate stock that could be anticompetitive but permitted asset acquisitions with similar effects.[147] On top of this legislative "asset loophole," the Supreme Court added a judicial gloss that further handicapped the government's power to enforce anti-merger law. In *FTC v. Western Meat Co.*,[148] the Court held the government could not undo a stock acquisition after the acquiring company had assumed ownership of the acquiree's physical assets.[149] This neutered anti-merger law predictably failed to control the corporate consolidation movement. In the 1920s, the number of mergers in manufacturing and mining annually never fell below 200 and hit a high of 1245, exceeding the earlier annual high of 1208 in 1899.[150] And in many years between 1914 and 1950, the federal antitrust agencies, including the newly created FTC, did not bring suit to stop a single merger.[151]

143. Reid, *supra* note 132, at 27.

144. *Id.*

145. JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 15 (1912). One scholar has argued that different treatment of collusive arrangements in the United States and United Kingdom—prohibition in the former, tolerance in the latter—explains the greater persistence of smaller firms and decentralized industrial structures in the United Kingdom. *See generally* TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880–1990 (1992); Tony Freyer, *The Sherman Antitrust Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain, 1880–1920*, 74 IOWA L. REV. 991 (1989).

146. Section 7 of the Clayton Act, which governs mergers, originally read:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

Clayton Act, ch. 323, § 7, 38 Stat. 731–32 (1914) (current version at 15 U.S.C. § 18 (2012)). Congress amended the Clayton Act to cover asset acquisitions and all types of mergers. Act of December 29, 1950, ch. 1184, § 7, 64 Stat. 1125 (1980).

147. *See* Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652–53 (1961) (discussing the "assets loophole" in the original Clayton Act).

148. 272 U.S. 554 (1926).

149. *Id.* at 563.

150. Reid, *supra* note 132, at 27.

151. *Id.*

This early era, however, did see some major victories on the monopoly front. Given the creation of monopolies in a number of key industries, the public clamored for government action.[152] The administrations of Theodore Roosevelt and especially of William Howard Taft and of Woodrow Wilson initiated a number of major monopolization suits.[153] Targets of these cases included American Tobacco, International Harvester, Standard Oil, Swift, and U.S. Steel.[154] In *Standard Oil Co. v. United States*[155] and *United States v. American Tobacco*,[156] the Supreme Court ordered the breakup of the monopolist in oil refining and the oligopolists in tobacco into smaller entities.[157] This anti-monopoly campaign continued through 1920 when legal and political changes brought it to an end. The Supreme Court held in *United States v. United States Steel Co.*,[158] that the steel giant's growth through a series of acquisitions did not violate the Sherman Act in the absence of particular acts that excluded rivals.[159] And with the election of conservative Republican President Warren Harding in 1920, the government showed little interest in anti-monopoly and antitrust enforcement in general.[160]

Notwithstanding the significant government monopolization victories between 1904 and 1920, the merger wave had an enduring impact on the industrial structure of the United States. A number of today's corporate giants emerged during this period. General Electric was the product of eight firms with a combined market share of ninety percent, Du Pont of sixty-four firms with approximately seventy percent of the market, and U.S. Steel of 180 firms with sixty-five to eighty percent market share.[161] The economist Jesse Markham, in a measured 1950 study, found that the effects of the turn of the century merger wave were still clear decades later.[162] He concluded that the merger wave between 1896 and 1904 "left an imprint on the structure of the

152. *See generally* George Bittlingmayer, *Antitrust and Business Activity: The First Quarter Century*, 70 BUS. HIST. REV. 363 (1996).

153. William S. Comanor & Frederic M. Scherer, *Rewriting History: The Early Sherman Act Monopolization Cases*, 2 INT'L J. ECON. BUS. 263, 264 (1995).

154. John J. Flynn, *Monopolization Under the Sherman Act: The Third Wave and Beyond*, 26 ANTITRUST BULL. 1, 4 (1981).

155. 221 U.S. 1 (1911).

156. 221 U.S. 106 (1911).

157. Peter C. Carstensen, *Remedies for Monopolization from* Standard Oil *to* Microsoft *and* Intel*: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815, 824 (2011). For a critical take on the effectiveness of these structural remedies, see Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1, 2 (1951).

158. 251 U.S. 417 (1920).

159. *Id.* at 451; Flynn, *supra* note 154, at 7–8.

160. William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1122 (1989).

161. ADAMS & BROCK, *supra* note 142, at 23.

162. Jesse W. Markham, *Survey of the Evidence and Findings on Mergers*, *in* BUSINESS CONCENTRATION AND PRICE POLICY 141, 180 (1955).

American economy that fifty years have not yet erased."[163] Ralph Nelson went further and wrote that the merger wave at the turn of the twentieth century "laid the foundation for the industrial structure that has characterized most of American industry in the twentieth century."[164]

B. Frustration of Collective Action by Workers

Despite the pro-labor statements in the legislative history of the Sherman Act, the DOJ and the courts interpreted the new antitrust law to reach and limit collective action by workers. Almost as soon as the Sherman Act became the law of the land, it was used against workers. Over the first four decades of the new antitrust statute, the Supreme Court used the Sherman Act to deprive workers of two powerful organizing tools: the secondary boycott and strike.[165] Through these secondary actions, labor could apply pressure on anti-union employers and organize an entire industry.[166] Unless an entire industry was organized, union employers would face higher labor costs and remain at a competitive disadvantage vis-à-vis non-union rivals.[167] Even after Congress enacted the statutory labor exemption in the Clayton Act, the Court continued to apply the Sherman Act against secondary action.

The anti-labor potential of the Sherman Act became clear in its early years. Between 1890 and 1897, a majority of successful prosecutions targeted labor rather than capital.[168] In the second case brought under the Sherman Act, the government targeted the workers who participated in the general strike in New Orleans in 1892, which originated in a dispute between longshoremen and their employers.[169] The government characterized the strike as a "gigantic and widespread combination of the members of a multitude of

163. *Id.*

164. RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY 5 (1959).

165. If the workers at Manufacturer A go on strike due to discontent over wages, the strike is deemed a primary strike. If the workers at Retailer B, a firm that purchases goods from Manufacturer A, go on strike to pressure Retailer B not to do business with Manufacturer A, the strike is a secondary strike. If the consumers of Retailer B refuse to purchase goods from Retailer B to increase pressure on Retailer B not to carry the products of Manufacturer A, this action is a secondary boycott. *See* Robert M. Schwartz, *Secondary Targets Can Be Union's Primary Focus*, LABOR NOTES (June 20, 2012), http://www.labornotes.org/2012/06/secondary-targets-can-be-unions-primary-focus?language=en.

166. DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 71–72 (1995).

167. *Id.* at 196.

168. Hovenkamp, *supra* note 113, at 950. As Herbert Hovenkamp notes though, "These numbers may overstate the antilabor bias of early Sherman Act prosecutions because ten of the twelve labor conspiracy cases arose from the great Pullman sleeping coach strike led by Eugene Debs, which crippled the American railroad network in 1894." *Id.* For a review of Sherman Act prosecutions in the 1890s, see generally William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464 (1959).

169. United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994, 995 (C.C.E.D. La. 1893); Boudin, *supra* note 98, at 1293.

separate organizations for the purpose of restraining the commerce among the several states and with foreign countries."[170] The District Court for the Eastern District of Louisiana held that the Sherman Act applied to "combinations of labor, as well as of capital."[171] Although the strike had ended by the time the court heard the case, it granted the government's request for injunctive relief and enjoined similar labor action in the future.[172]

The most famous use of the Sherman Act against labor in the early years was against the nationwide railroad strikes stemming from the labor dispute between the Pullman Company, a monopoly in the manufacture of sleeping cars, and its employees.[173] Workers at the Pullman company town in Illinois, where the eponymous luxury sleeping cars were manufactured, went on strike over a reduction in their wages.[174] Rail workers across the country staged a secondary strike, with the aim of pressuring their employers to stop hauling Pullman cars.[175] Even as many state and local officials across the country adopted a laissez-faire posture and declined to interfere in the dispute between workers and railroads unless violence occurred, the DOJ, headed by a corporate attorney who had counseled railroads, intervened on the side of capital.[176] The government brought an action against the workers, using the Sherman and Interstate Commerce Acts, to end the Pullman strike.[177] The Supreme Court ruled in favor of the government and against the striking workers and union leaders, relying on the general commerce clause powers of the federal government rather than the Sherman Act, to reach its holding.[178]

The Supreme Court made its first major pronouncement on the Sherman Act and labor in 1908.[179] In *Loewe v. Lawlor*,[180] the Court decided whether the Sherman Act prohibited secondary boycotts undertaken as part of a campaign to organize workers at a hat manufacturer in Connecticut.[181] The Court, quoting a common law treatise on trade unions, stated that "every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction."[182]

170. *Workingmen's Amalgamated Council of New Orleans*, 54 F. at 995.
171. *Id.* at 996.
172. *Id.* at 1000.
173. THORELLI, *supra* note 36, at 394.
174. WHITE, *supra* note 19, at 418–19, 430.
175. *Id.* at 430.
176. *Id.* at 417–18, 441.
177. United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894); Letwin, *supra* note 168, at 481–85.
178. *In re* Debs, 158 U.S. 564, 599–600 (1895).
179. Hovenkamp, *supra* note 113, at 951.
180. 208 U.S. 274 (1908).
181. *Id.* at 283–85.
182. *Id.* at 295–96.

After reviewing the legislative history of the Sherman Act, the Court concluded that attempts to exempt labor and farmer organizations from the bill had failed, and thereby labor activities that affected interstate commerce were subject to the Sherman Act.[183] Because the union-instigated secondary boycotts and strikes had "restrain[ed] and destroy[ed] interstate trade and commerce"[184] of the manufacturer, the Court held that the union and its members could be held liable under the Sherman Act.[185] Affirming this ruling in *Gompers v. Buck Stove & Range Co.*,[186] the Court wrote: "[T]he principle announced by the court [in *Loewe*] was general. It covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor . . . ."[187]

Even after Congress enacted an express exemption for labor in the Clayton Act,[188] the Supreme Court continued to apply the Sherman Act to restrain the freedom of labor organizations. The Court in *Duplex Printing Press Co. v. Deering*[189] construed the Clayton Act's labor exemption narrowly. According to the majority, the Clayton Act restricted the federal judiciary's equity power only over the employees directly involved in a labor dispute,[190] not over secondary boycotts and strikes. The Court stated that Congress sought to give legal protection to "particular industrial controversies, not a general class war."[191] For the Court, the secondary action entailed "a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees."[192] Prosecutions of labor activities also continued apace and actually increased after Congress enacted the exemption for labor. Nearly eighty percent of the antitrust cases against labor between 1890 and 1929 were brought *after* the passage of the Clayton Act and its labor exemption in 1914.[193]

Although strikes could impede interstate commerce, the Court held in *United Leather Workers International Union v. Herkert & Meisel Trunk*

183. *Id.* at 301–02.
184. *Id.* at 308.
185. *Id.* at 308–09.
186. 221 U.S. 418 (1911).
187. *Id.* at 438.
188. 15 U.S.C. § 17 (2012).
189. 254 U.S. 443 (1921).
190. *Id.* at 470.
191. *Id.* at 472.
192. *Id.* at 474. The Court affirmed this principle in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 48 (1927).
193. Allen G. Siegel et al., *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?*, 13 DUQ. L. REV. 411, 427 n.59 (1975).

Co.[194] that this is "an indirect and remote obstruction to that commerce."[195] The Court concluded that Congress did not intend the Sherman Act to reach primary labor disputes that incidentally restrained interstate commerce.[196] A few years earlier, the Court had indeed stated that unions were essential for the welfare of workers in a capitalist society.[197]

Nonetheless, some courts even outlawed primary strikes and picketing under the Sherman Act. In the wake of *Herkert & Meisel*, the District Court for the Eastern District of Pennsylvania in *Alco-Zander Co. v. Amalgamated Clothing Workers of America*[198] prohibited primary strikes under the Sherman Act, drawing on common law precedent that prohibited third parties from inducing workers to leave their jobs.[199] The judge found that the strikes in nonunionized textile mills in Philadelphia were intended to help principally unionized mills in New York City, and that aiding workers in Philadelphia was "at best a secondary and remote" motive.[200] On this basis, the judge concluded the strike was an improper restraint of commerce and illegal under the Sherman Act.[201] Under the rationale of the decision, workers arguably could not organize any new firm or region of the country: unionizing new workplaces would reduce or eliminate wage disparities across firms and thereby benefit already unionized workers and firms in an industry. At least two courts held that the Clayton Act's labor exemption provided no protection for labor unions and ruled that *any* collective labor activity that restrained interstate commerce violated the Sherman Act.[202]

The courts' anti-labor interpretation of the antitrust laws, contrary to the wishes of Congress, reflected a broader trend in the Gilded Age in which the judiciary overrode state and local decisions concerning the rights of workers.[203] The courts issued sweeping injunctions against labor activities and

194. 265 U.S. 457 (1924).

195. *Id.* at 471.

196. *Id.*

197. *See* Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) ("Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.").

198. 35 F.2d 203 (E.D. Pa. 1929).

199. *Id.* at 206.

200. *Id.* at 205.

201. *Id.* at 208.

202. *E.g.*, Quinlivan v. Dail-Overland Co., 274 F. 56, 65–66 (6th Cir. 1921); United States v. Ry. Employes' Dep't, 286 F. 228, 233 (N.D. Ill. 1923).

203. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 75, 101 (1991). Many elites had no qualms about using state violence to discipline labor. William

jailed union leaders and members for defying them, leading to the epithet "government by injunction."[204] The federal government did not adopt a laissez-faire approach to the contest between labor and capital but instead employed its coercive power to aid the interests of capital.[205] As Sven Beckert writes of New York's nineteenth century capitalist class:

> Loudly proclaiming the need for "less government," they simultaneously embraced greater state activism—ranging from the use of the military and policing power of the state to quell domestic dissent to the restriction of such fundamental rights as the freedom of movement, by successfully advocating the passage of antitramping legislation in New York State.[206]

State action against workers in the United States was exceptionally violent and succeeded in eroding the power of American labor.[207]

III. ANTITRUST IN THE NEW GILDED AGE: THE LATE 1970S TO THE PRESENT

In the latter part of the twentieth century and early twenty-first century, the executive and judicial choices to embrace consumer welfare antitrust have restored the antitrust law of the first Gilded Age to a troubling degree. Over the forty-year period from the New Deal in the late 1930s until the 1970s, the Court interpreted the antitrust laws to serve as a check on the power of capital. In the mid-twentieth century, the Supreme Court acknowledged the congressionally expressed values of competitively priced goods,[208]

Forbath quotes the views of then-Judge William Howard Taft. In a letter to his wife, Taft commented on the killing of striking Pullman workers, writing that "[Federal marshals and troops] have killed only six of the mob as yet. This is hardly enough to make an impression." *Id.* at 75; *see also* Matthew Dessem, *Happy Labor Day Weekend! In 1897: The* New York Times *Argued Police Should Open Fire on Striking Workers!*, SLATE (Sept. 2, 2017), http://www.slate.com/blogs/browbeat/2017/09/02/read_the_new_york_times_lattimore_massacre_editorial_from_1897.html.

204. FORBATH, *supra* note 203, at 59, 101–09.

205. For a history of the business-backed anti-union litigation campaign in the early twentieth century, see generally ERNST, *supra* note 166.

206. SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896, at 303–04 (2001).

207. *See id.* at 296–97 ("As America was 'becoming a mighty armed camp, with enormous armories,' military force played a major role in challenging the collective action of workers. During the 1890s, American strikers were killed at a rate of 2 per 100,000 and injured at a rate of 140 per 100,000, contrasting with France's rate of no killings and only 3 injuries per 100,000. Arrest rates diverged in a similarly dramatic fashion: It was ten times more likely that a striker would get arrested in Illinois than in France. The cumulative results of such an embrace of violence were dramatic: As Richard Oestreicher has pointed out, '[a]t the beginning of the era has of mass production, the American labor movement was among the strongest in the world.' By the 1920s, however, American unions had become considerably weaker than their counterparts abroad." (footnotes omitted)).

208. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940).

autonomy for small businesses,[209] and decentralization of economic power.[210] Recognizing that powerful private entities exercise quasi-governmental power, the Supreme Court imposed antitrust duties and restrictions on this corporate regulatory authority.[211] During this era, antitrust law placed significant limits on the prerogatives of big business, especially in the areas of mergers[212] and monopolistic conduct.[213] At the same time, antitrust law carved out a large space for workers to act collectively,[214] though this freedom granted to labor did not extend to workers outside of conventional employment arrangements.[215]

Since the late 1970s, the federal courts, the DOJ, and the FTC, informed by former Solicitor General Robert Bork's fallacious analysis of the legislative history of the Sherman Act,[216] have reoriented antitrust law away from broad political economy and toward narrow microeconomics.[217] They have renounced the congressional goals of the antitrust laws and held that the only appropriate objective is the promotion of economic efficiency or consumer welfare.[218] In implementing this model of antitrust, the federal antitrust agen-

209. *E.g.*, Simpson v. Union Oil Co., 377 U.S. 13, 20–21 (1964); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959).

210. *E.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

211. *E.g.*, Silver v. N.Y. Stock Exch., 373 U.S. 341, 366 (1963); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941).

212. *E.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963).

213. *E.g.*, Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); Am. Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

214. The Norris-LaGuardia Act deprives the federal court of equitable jurisdiction over nonviolent labor disputes. 29 U.S.C. § 52 (2012); *see, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 512 (1940) ("These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.'").

215. *See, e.g.*, Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145 (1942) (holding that organized fishermen were not entitled to antitrust immunity because "a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment'" (alterations in original)).

216. James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 278–81 (1991).

217. The retrenchment of antitrust law is part of a larger big business-led project, spanning much of the world, of overturning the social democratic capitalism of the post-World War II era. *See generally* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

218. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT BORK, THE ANTITRUST

cies and courts have adopted the desirability of corporate freedom as an article of faith, influenced by hypotheses developed and promoted by thinkers associated with the University of Chicago.[219] Built on "an oversimplified economics that often rests on unfounded or disproven assumptions,"[220] antitrust law today views most types of business conduct as positive or neutral. Outside of express price fixing and market allocation with rivals, businesses have expansive autonomy to control and dominate markets.

In contrast to the deference to accumulation and exercise of corporate power, antitrust proscribes collective action by workers who are classified as independent contractors, instead of employees, under federal law. In a period of high inequality[221] and precarity for millions of Americans,[222] which has been dubbed the "new Gilded Age,"[223] antitrust law increasingly resembles antitrust law in the original Gilded Age and reinforces—rather than remedies—structural inequalities in American society. Federal enforcers and the courts are once again using and interpreting antitrust law not to tame the power of capital, but to tame the power of workers for the benefit of capital. And as the fraction of workers not entitled to the antitrust exemption grows, antitrust enforcers can target an ever-larger segment of American labor.

PARADOX 66 (1978))); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 1 ("Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers."). Although the distinction between consumer welfare and economic efficiency is not important to the thesis of this article, a review of the case law shows that consumer welfare is the goal of contemporary law. Kirkwood & Lande, *supra* note 20, at 192.

219. For two influential articles articulating "Chicago School" hypotheses on business behavior, see Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) and Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

220. Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 939 (2014).

221. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Harvard University Press 2013).

222. *See* GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 35 (2011) ("In the United States, the Bureau of Labour Statistics estimated in mid-2009 that over 30 million people were in part-time jobs 'of necessity', more than twice as many as the number counted as unemployed, which made for an adjusted unemployment rate of 18.7 per cent. A vast proportion of those jobs will remain part-time and low paid even if the economy picks up."); *see also* BD. OF GOVERNORS OF FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2016, at 2 (2017) ("Forty-four percent of adults say they either could not cover an emergency expense costing $400, or would cover it by selling something or borrowing money, which has continued to improve from the 50 percent who were ill-prepared for this magnitude of expense when first asked in 2013.").

223. *See* Jefferson Cowie, *America May Never Have Another New Deal*, NEW REPUBLIC (Mar. 15, 2016), https://newrepublic.com/article/131401/america-may-never-another-new-deal ("The return of nineteenth-century-style plutocracy, crony capitalism, and shocking levels of inequality—disparities that continued even after the excitement of Obama's presidency—suggest a conscious, confident, and powerful ruling class that has largely separated itself from the concerns of the nation's working people.").

A. Acceptance of Monopoly and Oligopoly

The Supreme Court and the federal antitrust agencies have transformed antitrust and, in large measure, neutralized the ability of these laws to control corporate power. The Supreme Court has generally stood aside on the issue of mergers. Here, the federal antitrust agencies have become the principal policymakers and published merger guidelines that have become increasingly tolerant of corporate consolidation. In the name of advancing the ahistorical goal of consumer welfare,[224] the Supreme Court and lower courts have rewritten precedent on monopolization to favor large corporations. The agencies and courts still view horizontal price fixing and other forms of collusion between rivals with hostility and stress the need to police this "supreme evil of antitrust."[225] Yet even here the results are underwhelming. An examination of the anti-collusion program reveals a campaign that inadequately deters price fixing, often treats large corporate colluders with leniency, and devotes resources to secondary or otherwise trivial matters.

1. Mostly Quiet on Mergers and Monopolies

In the area of mergers, the federal antitrust agencies have, in large measure, displaced the courts as the principal makers of policy. The Supreme Court last heard and decided a merger challenge on the merits more than forty years ago[226] and has not formally overruled strict merger precedents from the 1960s.[227] The DOJ and FTC have published a series of guidelines on how they analyze horizontal mergers and when they are likely to challenge such mergers.[228] Over time, the agencies have become increasingly tolerant of corporate consolidation because of a belief that mergers can produce productive efficiencies that benefit consumers and society.[229] In the most recent

224. Among other deficiencies, the language of consumer welfare ignores how sellers were and still are entitled to antitrust protection from powerful buyers. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235–36 (1948); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007).

225. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

226. United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

227. *See, e.g.*, Polypore Int'l Inc. v. FTC, 686 F.3d 1208, 1216 (11th Cir. 2012) ("[W]e see no error resulting from the Commission's application of the *Philadelphia National* presumption to find that Polypore had illegally acquired Microporous, thus substantially lessening competition."). In *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Supreme Court ruled that a horizontal merger that creates an entity with a market share of thirty percent is presumptively illegal. *Id.* at 364. Some appellate courts, however, have held that the *Philadelphia National Bank* precedent no longer carries the weight it once did. *E.g.*, United States v. Baker Hughes, Inc., 908 F.2d 981, 990–91 (D.C. Cir. 1990).

228. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997); U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1982).

229. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus

guidelines issued in 2010, the agencies moved further away from presumptions of illegality for mergers in concentrated markets.[230] They embrace an analytical approach that calls for a showing of anticompetitive effects.[231] In other words, the agencies have progressively restricted their own ability to stop mergers. While not bound to adopt these guidelines, the courts have often given great weight to the agencies' analytical framework.[232]

In practice, the antitrust agencies today challenge only horizontal mergers in highly concentrated markets. The FTC's merger record is revealing. Fifteen or twenty years ago, the FTC frequently challenged mergers that reduced the number of competitors in a market from eight to seven or seven to six.[233] It, however, has rarely challenged these mergers in recent years, taking action only when a merger is poised to reduce the number of market participants to four or fewer.[234] And even when the FTC takes action against a merger, it often does not seek to challenge and stop the merger in court.[235] In an effort to remedy the predicted harms of horizontal mergers in concentrated markets, both the FTC and the DOJ often permit these consolidations to proceed on the condition that the merging parties agree to divest assets in the market in which they compete head-to-head or agree to behavioral duties and restrictions.[236] Remarkably, the agencies fail to enforce their own merger

enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."). *But see* Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 22750, 2016), https://www.nber.org/papers/w22750.pdf ("[W]e find little evidence for plant- or firm-level productivity effects from [merger and acquisition] activity on average, nor for other efficiency gains often cited as possible from [merger and acquisition] activity, including reallocation of activity across plants or scale efficiencies in non-productive units of the firm.").

230. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 4 ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.").

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

232. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001) (applying the *Horizontal Merger Guidelines* in a merger challenge). Hillary Greene has carefully documented and analyzed the influence of the Merger Guidelines on judicial decision-making. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 775 (2006).

233. Kwoka, *supra* note 22, at 855.

234. *Id.*

235. *E.g.*, Press Release, Fed. Trade Comm'n, FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger (Feb. 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc.

236. *See* ADAMS & BROCK, *supra* note 142, at 196–99 (criticizing the agencies' narrow analytical framework and "consultant" role in facilitating corporate consolidation).

guidelines, especially the concentration thresholds that should trigger presumptions of illegality.[237]

The agencies have taken a hands-off approach to vertical mergers since the Clinton administration.[238] On the rare occasions they are concerned with the competitive effects of a vertical consolidation, the DOJ and FTC generally do not seek to enjoin these deals in court.[239] In 2010 and 2011, the DOJ permitted three large vertical mergers that had serious anticompetitive potential to proceed on the condition that the new vertically integrated companies agree to behavioral duties and restrictions.[240] In one of these cases, the DOJ found that the merger had no offsetting consumer benefits and yet chose not to stop the consolidation in court.[241]

Along with the agencies' tolerance of corporate consolidation, the Supreme Court curtailed the reach of anti-monopoly law and granted expansive freedom to monopolies and other dominant businesses. The Court has repeatedly cited concerns about deterring "pro-competitive" behavior (defined as conduct that advances a particular conception of economic efficiency) in limiting the ability of the government and other plaintiffs to challenge monopolies.[242] The Supreme Court has neutered anti-monopoly doctrine in two areas in particular: predatory pricing and refusals to deal.

The Court practically eliminated predatory pricing as a cause of action and granted large corporations the power to acquire and maintain market dominance through temporary below-cost pricing. The Court initiated this

237. John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice* 19–28 (Oct. 9, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf.

238. Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1, 4 (2015). The Trump administration's attempt to stop AT&T's acquisition of Time Warner was the first time the government tried to block a vertical merger in court in nearly forty years. United States v. AT&T Inc., 310 F. Supp. 3d 161, 165 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019); Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979).

239. *See generally* Salop & Culley, *supra* note 238, app.

240. United States v. Comcast Corp., 808 F. Supp. 2d 145, 149–50 (D.D.C. 2011); United States v. Ticketmaster Entm't, Inc., No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626 (D.D.C. July 30, 2010).

241. Competitive Impact Statement at 29–30, *Comcast Corp.*, 808 F. Supp. 2d 145 (No. 1:11-cv-00106).

242. *See, e.g.*, Pac Bell. Tel. Co. v. Linkline Commuc'ns, Inc., 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.").

shift in a pair of decisions in the mid-1980s that cast doubt on whether predatory pricing occurs.[243] In one of these decisions, *Matsushita Electric Industries Co. v. Zenith Radio Corp.*,[244] the Court ignored the historical and empirical record on predation[245] and instead drew on simplistic theoretical literature, stating "that predatory pricing schemes are rarely tried, and even more rarely successful."[246] In addition to asserting that predatory pricing is not a real threat to competitive markets, the Court expressed a concern that the threat of predatory pricing lawsuits alone could discourage price discounting.[247]

Operating with these assumptions, the Court subsequently established a legal standard very favorable to actual and would-be predators. To establish predatory pricing, a plaintiff (government or private) must first show the defendant engaged in below-cost pricing and the defendant would likely recoup the upfront losses through higher prices in the future.[248] The second prong, recoupment, imposes especially high burdens on plaintiffs.[249] Under the recoupment requirement, plaintiffs have one of two options: either wait until the defendant has eliminated its rivals and preserved or acquired monopoly power or offer speculative stories on future recoupment to judges who have been directed to examine predatory pricing allegations with great skepticism.[250] In 2007, the Supreme Court, in a rare instance of looking at upstream effects, held that the restrictive two-part test announced in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[251] should apply to claims alleging predatory bidding practices in which monopsonies (single dominant buyers in a market) inflate purchase prices to weaken or eliminate rival buyers.[252]

243. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 119 n.15 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

244. 475 U.S. 574 (1986).

245. Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 715 (1982).

246. *Matsushita*, 475 U.S. at 589.

247. *Id.* at 594.

248. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

249. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1720 (2013).

250. *See id.* at 1760 ("The recoupment requirement creates false negatives, in part, because courts are not adept at predicting recoupment. Reliance on recoupment leads courts to incorrectly conclude that predation has not taken place. In the hands of judges unversed in the mechanics of competition and predation, recoupment presents an impossible-to-satisfy element in some courtrooms.").

251. 509 U.S. 209 (1993).

252. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325–26 (2007).

In addition to its general deficiencies, the *Brooke Group* test is especially ill-suited for business with buyer-side power. [253]

Much as they have freedom to engage in predatory pricing, dominant firms have broad discretion to preserve their market power by refusing to grant access to essential assets to rivals.[254] Over the past fifteen years, the Court has curtailed refusal-to-deal claims against monopolists. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[255] the Court held that the respondent's refusal-to-deal claim had to be resolved through the regulatory system, not antitrust litigation.[256] While arguably a narrow holding confined to industries subject to public utility regulation, the Court's decision limited the reach of an earlier decision that had upheld refusal-to-deal liability for a dominant firm.[257] The Court also adopted a Schumpeterian perspective[258] in which monopoly—and the prospect of monopoly—is the lifeblood of a capitalist system. It wrote that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."[259] This language flatly contradicts the legislative history of the Sherman Act. Congress condemned monopoly for its economic and political effects and, contrary to Justice Scalia's dictum, did not view it as the source of capitalism's salvation.[260]

Since *Trinko*, the Court appears to have only grown more hostile to refusal-to-deal allegations. In *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,[261] the Court applied the reasoning of *Trinko* to dismiss a price squeeze claim against a regulated internet service provider.[262] If anything,

253. Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1533 (2013) (observing that buyers can wield tremendous power over sellers at market shares well below the conventional monopoly share threshold).

254. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610–11 (1985) ("Although Ski Co.'s pattern of conduct may not have been as 'bold, relentless, and predatory' as the publisher's actions in *Lorain Journal*, the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. The sale of its 3-area, 6-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands. The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers. Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." (footnotes omitted) (quoting Lorain Journal Co. v. United States, 342 U.S. 143, 149 (1951))).

255. 540 U.S. 398 (2004).

256. *Id.* at 413–14.

257. *See id.* at 409 ("*Aspen Skiing* is at or near the outer boundary of § 2 liability.").

258. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 825 (1942).

259. *Trinko*, 540 U.S. at 407.

260. *See supra* Section I.A.

261. 555 U.S. 438 (2009).

262. *Id.* at 457.

the Court today may be even more hostile to refusal-to-deal claims than it was in 2007. As a judge on the United States Court of Appeals for the Tenth Circuit, Justice Neil Gorsuch, one of President Trump's two additions to the Court,[263] extended the logic of *Trinko* and held that refusal-to-deal claims would be recognized under only very exceptional circumstances.[264]

Along with the Court's retrenchment of monopoly law in two important areas, the federal antitrust agencies, in particular the DOJ, have scaled back their monopoly enforcement efforts. The DOJ has practically suspended anti-monopoly enforcement over the past twenty years, filing just one pure monopoly case since 2000[265] which settled.[266] The DOJ's most notable anti-monopoly action during the Obama years may have been non-action through the closing of a lengthy investigation into Monsanto's seed distribution practices[267] and the decision against bringing a monopolization claim against Amazon over its e-book pricing strategy.[268] As Chart 1 indicates, the DOJ's neglect of monopoly matters is not new, dating back to the early 1980s and being consistent across administrations except for a brief upsurge in investigations in the 1990s.

263. Julie Hirschfeld Davis, *Neil Gorsuch Is Sworn in as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/us/politics/neil-gorsuch-supreme-court.html?_r=0.

264. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1076 (10th Cir. 2013) (holding that a plaintiff seeking to establish a refusal-to-deal claim must show that a monopolist "sacrifice[d] short-term profits").

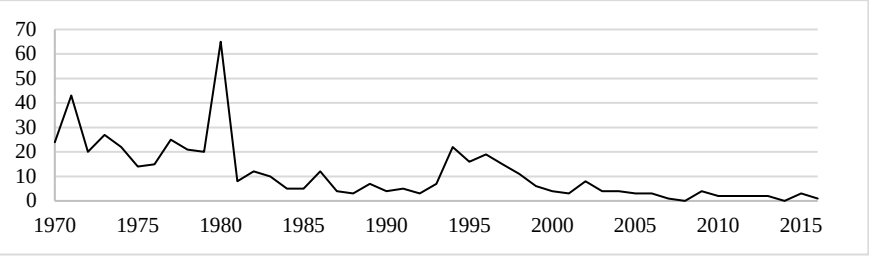
265. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION: WORKLOAD STATISTICS: FY 2008–2017, at 5 (2017), https://www.justice.gov/atr/file/788426/download [hereinafter U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS] ; U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION: WORKLOAD STATISTICS: FY 2000–2009, at 6 (2010), https://www.justice.gov/atr/public/281484.pdf [hereinafter U.S. DEP'T OF JUSTICE, 2000–2009 ANTITRUST WORKLOAD STATISTICS].

266. Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers (Feb. 25, 2011), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-texas-hospital-prohibiting-anticompetitive-contracts.

267. Ian Berry & David Kesmodel, *U.S. Closes Antitrust Investigation into Seed Industry, Monsanto*, WALL ST. J. (Nov. 16, 2012), https://www.wsj.com/articles/SB10001424127887324735104578123631878019070; Tom Philpott, *DOJ Mysteriously Quits Monsanto Antitrust Investigation*, MOTHER JONES (Dec. 1, 2012), http://www.motherjones.com/food/2012/12/dojs-monsantoseed-industry-investigation-ends-thud/.

268. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 756–62 (2017).

CHART 1: DOJ MONOPOLY INVESTIGATIONS INITIATED BY YEAR[269]



Over the past decade, the FTC has filed cases against monopolists, with a focus on parties that engaged in anticompetitive exclusive dealing[270] and abusive patent enforcement.[271] Yet, many of these cases have involved monopolists of lesser consequence.[272] And like the DOJ, the FTC's most newsworthy act on the monopolization front was arguably an act of omission. In early 2013, the FTC rejected the recommendation of its legal staff and closed its two-year investigation into Google's search practices with highly unusual "non-binding commitments" that did not include any enforceable conditions.[273]

Unfavorable precedent can explain only a part of the agencies' lethargy in the monopolization realm. Pro-defendant precedents such as *Brooke Group* and *Trinko* loom large. Yet, these cases do not represent the entire universe of anti-monopoly law. Monopoly precedent is not uniformly hostile to enforcers, in particular for exclusive dealing and loyalty rebate claims.

269. *Division Operations*, DEP'T OF JUSTICE, https://www.justice.gov/atr/division-operations (last visited Jan. 14, 2019).

270. *E.g.*, McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015); *In re* Intel Corp., No. 9341, 2010 F.T.C. LEXIS 82 (Oct. 29, 2010).

271. *E.g.*, *In re* Motorola Mobility LLC, No. C-4410, 2013 F.T.C. LEXIS 96 (July 23, 2013); *In re* Robert Bosch GmbH, No. C-4377, 2013 F.T.C. LEXIS 59 (Apr. 23, 2013).

272. *See, e.g.*, *In re* IDEXX Laboratories, Inc., No. C-4383, 2013 F.T.C. LEXIS 11, at *6 (Feb. 11, 2013) (settling allegations that manufacturer of pet diagnostic products improperly required exclusivity from distributors); *In re* Pool Corp., No. C-4345, 2012 F.T.C. LEXIS 8, at *8–9 (Jan. 10, 2012) (settling allegations that distributor of pool products used exclusive dealing with manufacturers to foreclose other distributors).

273. *In re* Google Inc., No. 111-0163, 2013 F.T.C. LEXIS 2, at *22–24 (Jan. 3, 2013). A memo drafted by the FTC's Bureau of Competition recommended that the Commission sue Google for anticompetitive practices including search bias and impeded advertisers from working with rival search engines. *See* Brody Mullins et al., *Inside the U.S. Antitrust Probe of Google*, WALL ST. J. (Mar. 19, 2015), www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274. Commissioner Rosch criticized his fellow commissioners for accepting a non-binding settlement. *Google*, 2013 F.T.C. LEXIS 2, at *22–23. For a critical take on the FTC's public explanation on why it chose not to sue Google, see generally Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, Occasional Paper Series, HARV. J.L. & TECH. (2013).

Plaintiffs have achieved victories in court on monopolization claims,[274] including in a predatory pricing claim a decade after *Brooke Group*.[275]

Instead of resisting the judicial retrenchment of anti-monopoly law, the federal antitrust agencies have on occasion supported expanding the autonomy of monopolists and other dominant firms. During the George W. Bush administration, the DOJ and FTC filed several amicus briefs that called on the courts to weaken anti-monopoly precedent.[276] For a time, the DOJ even served as Microsoft's international advocate, criticizing anti-monopoly actions against the software company by the European Union[277] and the Korean Fair Trade Commission.[278] In the final months of the second term of George W. Bush's presidency, the DOJ put out a report of Section 2 of the Sherman Act that called for further retrenchment of anti-monopoly law.[279] This report recommended relaxing existing Supreme Court anti-monopoly precedent, including in the areas of exclusive dealing[280] and predatory pricing[281] and called for de facto legality for unilateral refusals-to-deal.[282] A three-commissioner majority at the FTC declined to join the report and issued a scathing repudiation of it.[283] They described the report as "chiefly concerned with firms that enjoy monopoly or near-monopoly power, and prescrib[ing] a legal regime that places these firms' interests ahead of the interests of consumers."[284] To its credit, the Obama administration DOJ quickly withdrew this pro-monopoly report in 2009.[285] Despite this ostensible philosophical shift,

274. *E.g.*, *McWane*, 783 F.3d at 842; ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 303 (3d Cir. 2012); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 315 (3d Cir. 2007).

275. Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 953 (6th Cir. 2005).

276. *E.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009) (No. 07-512); Brief for United States & FTC Supporting Petitioner, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682).

277. Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, Thomas O' Barnett, Issues a Statement on European Microsoft Decision (Sept. 17, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/226070.pdf.

278. Press Release, U.S. Dep't of Justice, Statement of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision in Its Microsoft Case (Dec. 7, 2005), https://www.justice.gov/archive/atr/public/press_releases/2005/213562.pdf.

279. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), https://www.justice.gov/atr/public/reports/236681.pdf.

280. *Id.* at 140.

281. *Id.* at 73.

282. *Id.* at 129.

283. Press Release, Fed. Trade Comm'n, Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf.

284. *Id.* at 1.

285. Press Release, Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

the DOJ's actual monopoly enforcement record represented continuity from the Bush years.[286]

2. The Underwhelming Campaign Against Corporate Collusion

The Supreme Court and the federal agencies continue to treat (overt) collusion, which the Court has described as the "supreme evil of antitrust,"[287] as a serious antitrust offense. Price fixing and other forms of horizontal collusion remain per se illegal.[288] The antitrust agencies prioritize the prosecution of collusion.[289] The DOJ views the criminal prosecution of cartels and cartel participants as the core of its antitrust mission.[290] For cartel activity, the DOJ collected corporate fines of $985 million in 2015 and $450 million in 2016.[291] In those two years, the DOJ had twelve and twenty-two individuals, respectively, sentenced to prison.[292] The DOJ has sent a number of managers and executives to prison for their involvement in the auto parts[293]

286. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 5.

287. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). This is an empirically suspect assertion even from a consumer welfare perspective. Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 505–09.

288. Nynex Corp. v. Discon, Inc., 525 U.S. 128, 133–34 (1998). Even for collusion-like conduct though, the courts do not consistently apply the per se rule or even a strong presumption of illegality. *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 156 (2013) (holding that an agreement between branded and generic drug makers that resembles market allocation should be analyzed under the rule of reason); California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1139 (9th Cir. 2011) (concluding that a revenue sharing agreement between competing supermarkets should be evaluated under the rule of reason).

289. Consider the DOJ's workload numbers from 2016. The DOJ initiated twenty-three grand jury investigations and filed fifty-one criminal cases. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 4. Because only collusion is subject to criminal enforcement today, all these cases presumably involved collusion. In contrast, the DOJ filed fifteen merger challenges and zero monopoly complaints. *Id.* at 4–5. The numbers from 2007 during the George W. Bush administration reflect a similar breakdown, albeit with fewer merger challenges. *See generally* U.S. DEP'T OF JUSTICE, 2000–2009 ANTITRUST WORKLOAD STATISTICS, *supra* note 265.

290. *E.g.*, Bill Baer, Assistant Att'y Gen., Dep't of Justice Antitrust Div., Prosecuting Antitrust Crimes, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download; Thomas O. Barnett, Assistant Att'y Gen., Dep't of Justice Antitrust Div., Perspectives on Cartel Enforcement in the United States and Brazil, Address at the Universidade de São Paolo (Apr. 28, 2008), https://www.justice.gov/atr/file/519601/download.

291. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 11.

292. *Id.* at 12.

293. Nick Bunkley, *Japanese Auto Suppliers Are Fined, and Executives Agree to Prison, in a Price-Fixing Case*, N.Y. TIMES (Jan. 30, 2012), http://www.nytimes.com/2012/01/31/business/japanese-auto-suppliers-fined-in-us-price-fixing-case.html.

and liquid crystal display[294] cartels and indicted the late Aubrey McClendon, the CEO of Chesapeake Energy, over collusion in the acquisition of natural gas leases.[295]

Notwithstanding the rhetorical commitment and headline numbers, the anti-collusion enforcement program is still far from satisfactory.[296] When they target collusion, the agencies often impose inadequate penalties on offending corporations and individuals. The prison sentences are short compared to those for offenses inflicting much less harm on the public,[297] and the fines are often a small fraction of the offenders' annual revenues and profits.[298] John Connor and Robert Lande found that the overall cartel enforcement program, including both government prosecutions and private lawsuits, fails to adequately deter collusion.[299] Their research shows that private damages and public penalties are "only 9% to 21% as large as it should be to protect potential victims of cartelization optimally."[300] From the perspective of optimal deterrence, in the area of cartels, "[corporate] crime pays"[301] and

294. Press Release, Dep't of Justice, Au Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (Apr. 29, 2013), https://www.justice.gov/opa/pr/au-optronics-corporation-executive-sentenced-role-lcd-price-fixing-conspiracy.

295. Press Release, Dep't of Justice, Former CEO Indicted for Masterminding Conspiracy Not to Compete for Oil and Natural Gas Leases (Mar. 1, 2016), https://www.justice.gov/opa/pr/former-ceo-indicted-masterminding-conspiracy-not-compete-oil-and-natural-gas-leases.

296. A basic contradiction lies at the heart of public antitrust enforcement in the United States. The federal antitrust agencies have permitted markets to become much more concentrated. In highly concentrated markets, oligopolistic firms recognize their mutual interdependence and often collude tacitly to maximize collective profits over time. The antitrust laws cannot effectively police this type of tacit collusion or coordination. The antitrust agencies, through their feeble merger enforcement policy, have allowed markets to become much more vulnerable to collusion. While allowing the creation of market structures conducive to collusion, the agencies continue to emphasize prosecutions of explicit collusion between rivals. Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 161 (1993).

297. The average prison term for an individual antitrust violator sentenced in 2016 was under one year and never higher than 923 days (less than three years) in each year since 2007. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 12. These sentences are mild compared to the often-draconian sentences imposed on ordinary Americans, especially on poor people of color. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

298. Consider the successful prosecution of the lysine cartel that ran from 1992 to 1995. ADM, a principal conspirator, had net sales of $12.7 billion in 1995 alone. John M. Connor, *The Global Lysine Price-Fixing Conspiracy of 1992–1995*, 19 REV. AGRIC. ECON. 412, 413 (1997). ADM pled guilty and paid a $70 million fine to DOJ for its involvement, and all the participants paid a civil settlement of $66 million. John M. Connor, *"Our Customers Are Our Enemies": The Lysine Cartel of 1992–1995*, 18 REV. INDUS. ORG. 5, 14, 20 (2001). In short, ADM paid a small fraction of one year's revenues for its involvement in a multi-year criminal conspiracy.

299. John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 430 (2012).

300. *Id.* at 430.

301. *Id.* at 479.

"the 'cluster bombs' that constitute the current anti-cartel sanctions have been duds." [302]

The DOJ's cartel enforcement program has often taken a relatively lenient approach toward large corporations. Consider the DOJ's enforcement efforts against collusion in financial markets. In a series of cases targeting collusion in the municipal bond market and the setting of the London Interbank Offered Rate ("LIBOR"), the DOJ frequently entered into deferred or non-prosecution agreements with the banks instead of pursuing indictments.[303] Under these agreements, corporate defendants avoid prosecution typically on the condition that they pay a fine, improve internal compliance processes, and agree not to repeat the illegal acts in the future.[304] Highlighting the inadequate deterrence value of these agreements, the DOJ found in 2015 that two banks breached earlier deferred prosecution agreements and engaged in collusion.[305]

This leniency seems to extend to collusion by large actors in non-financial sectors. For instance, the DOJ declined to criminally prosecute several leading Silicon Valley executives for conspiring not to recruit each other's employees and thereby suppressing the wages of software engineers and other professionals in the tech sector.[306] The late Steve Jobs, the principal instigator of the conspiracy, threatened to instigate patent litigation and other

302. *Id.*

303. Press Release, U.S. Dep't of Justice, UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $160 Million to Federal and State Agencies (May 4, 2011), https://www.justice.gov/opa/pr/ubs-ag-admits-anticompetitive-conduct-former-employees-municipal-bond-investments-market-and; Press Release, U.S. Department of Justice, JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies (July 7, 2011), https://www.justice.gov/opa/pr/jpmorgan-chase-admits-anticompetitive-conduct-former-employees-municipal-bond-investments; Press Release, U.S. Dep't of Justice, Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation; Press Release, U.S. Dep't of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay $3225 Criminal Penalty (Oct. 29, 2013), https://www.justice.gov/opa/pr/rabobank-admits-wrongdoing-libor-investigation-agrees-pay-325-million-criminal-penalty.

304. PUB. CITIZEN, JUSTICE DEFERRED: THE USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS IN THE AGE OF "TOO BIG TO JAIL" 5 (2014), https://www.citizen.org/sites/default/files/justice-deferred-too-big-to-jail-report.pdf.

305. Press Release, Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas. For the history and ineffectiveness of corporate deferred and non-prosecution agreements, see BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

306. United States v. Adobe Sys., Inc., No. 10 cv 1629, 2011 U.S. Dist. LEXIS 83756 (D.D.C. Mar. 18, 2011). In October 2016, the DOJ and FTC put out guidance stating that this type of collusion could be subject to criminal prosecution. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.justice.gov/atr/file/903511/download.

legal attacks on tech companies that did not abide by the "no-poaching" agreement for skilled professionals.[307] Google fired a human resources official who breached this agreement and sought to recruit an Apple employee.[308] Although this conspiracy was a per se violation, the DOJ held off on pursuing a criminal case and entered into a civil settlement with Apple, Google, and Intel, among others.[309] This settlement required no admission of guilt from the companies and only mandated that they not engage in collusive wage suppression for a fixed period of time.[310] Neither the government complaint nor the settlement named the individual wrongdoers, suggesting the DOJ was not even willing to shame Jobs and his fellow conspirators.[311] It took a private class action on behalf of workers hurt by the wage suppression pact to reveal the identities of the elite conspirators.[312] In a recent case against a no-poach agreement between two rail equipment manufacturers, the DOJ once again accepted a civil settlement.[313] Along with this general leniency toward large businesses and their executives, the DOJ appears to be more forgiving toward companies that engage in comparatively sophisticated forms of collusion-like restraints.[314]

307. Mark Ames, *Revealed: Apple and Google's Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO (Mar. 22, 2014), https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/. Mark Ames, *Steve Jobs Threatened Palm's CEO, Plainly and Directly, Court Documents Reveal*, PANDO (Feb. 19, 2014), https://pando.com/2014/02/19/court-documents-reveal-steve-jobs-blistering-threat-to-ceo-who-wouldnt-join-wage-fixing-cartel/ [hereinafter Ames, *Steve Jobs Threatened*].

308. Robert Faturechi, *Apple, Google Agree to Settle Antitrust Class Action, Lawyer's Office Says*, L.A. TIMES (Apr. 24, 2014), http://www.latimes.com/business/technology/la-fi-tn-apple-google-agree-to-settle-antitrust-class-action-lawyers-office-says-20140424-story.html.

309. *Adobe*, 2011 U.S. Dist. LEXIS 83756, at *4; Ames, *Steve Jobs Threatened*, *supra* note 307.

310. *Adobe*, 2011 U.S. Dist. LEXIS 83756, at *1, 4–5, 12.

311. *Id.* at *4.

312. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1111–12 (N.D. Cal. 2012); David Streitfeld, *Engineers Allege Hiring Collusion in Silicon Valley*, N.Y. TIMES (Feb. 28, 2014), https://www.nytimes.com/2014/03/01/technology/engineers-allege-hiring-collusion-in-silicon-valley.html.

313. Press Release, Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

314. Consider the KeySpan-Morgan Stanley matter. In 2011, DOJ uncovered a collusive financial swap agreement between KeySpan, a large power generator in New York City, and a rival generator, using Morgan Stanley as an intermediary. The DOJ did not pursue a criminal prosecution and instead settled the civil complaint by requiring KeySpan to disgorge less than twenty-five percent of its estimated profits from the illegal conspiracy. United States v. Keyspan Corp., 763 F. Supp. 2d 633, 636–27, 642 (S.D.N.Y. 2011); *see also* N.Y. State Pub. Serv. Comm'n, Comment Letter on Proposed Final Judgment in *United States v. Keyspan Corp.* 11 (Apr. 30, 2010), https://www.justice.gov/atr/cases/f259700/259704-5.pdf ("KeySpan's ill-gotten gains far exceeded the $12 million payment DOJ is seeking. DOJ alleges the KeySpan Swap was effective from January 16, 2006 until March, 2008. Under the swap agreement, if the market price for capacity exceeded $7.57 per kW-month, the financial services company . . . would pay KeySpan the difference

At the same time as it practices leniency with American corporate giants, the DOJ has brought a number of criminal actions against small-time price fixers.[315] It successfully prosecuted a number of individuals for rigging the auctions for foreclosed homes in Alabama, California, and Georgia[316] and obtained prison sentences and fines for conspirators.[317] At these auctions, banks and other financial institutions sell foreclosed homes and recover the amount outstanding on the mortgage of the defaulting homeowners.[318] The DOJ admitted the principal victims of this type of collusion are financial institutions and other investors, not distressed homeowners.[319] In its anti-cartel activities in the financial sector, the DOJ conformed to a disappointing pattern seen in other areas: treat banks that cheat the public gently, punish those who cheat the banks harshly.[320]

The DOJ brought a number of other criminal cartel cases of dubious public value. The DOJ targeted collusion in the obscure market for heir location services, which "identify people who may be entitled to an inheritance from the estate of a relative who died without a will."[321] Over the past decade, other cartel cases involved ready-mix cement makers in Northern

between the market price and $7.57, times 1800 MW." (footnote omitted) (citing 75 Fed. Reg. 9950 (Mar. 4, 2010))

315. *Prosecuting Collusion and Fraud at Real Estate Foreclosure Auctions: Division Update Spring 2016*, DEP'T OF JUSTICE (Apr. 8, 2016), https://www.justice.gov/atr/division-operations/division-update-2016/real-estate-foreclosure-auctions [hereinafter *Division Update*].

316. *E.g.*, Press Release, Dep't of Justice, Georgia Real Estate Investor Convicted of Bid Rigging and Bank Fraud at Public Foreclosure Auctions (June 16, 2017), https://www.justice.gov/opa/pr/georgia-real-estate-investor-convicted-bid-rigging-and-bank-fraud-public-foreclosure-auctions; Press Release, Dep't of Justice, Northern California Real Estate Investor Convicted of Rigging Bids at Public Foreclosure Auctions (Apr. 18, 2017), https://www.justice.gov/opa/pr/northern-california-real-estate-investor-convicted-rigging-bids-public-foreclosure-auctions; Press Release, Dep't of Justice, Alabama Real Estate Investor Sentenced for Bid Rigging and Fraud at Public Foreclosure Auctions (Apr. 13, 2017), https://www.justice.gov/opa/pr/alabama-real-estate-investor-sentenced-bid-rigging-and-fraud-public-foreclosure-auctions.

317. *E.g.*, Press Release, Dep't of Justice, Northern California Real Estate Investor Sentenced to Prison for Rigging Bids at Public Foreclosure Auctions (July 26, 2017), https://www.justice.gov/opa/pr/northern-california-real-estate-investor-sentenced-prison-rigging-bids-public-foreclosure.

318. *Division Update*, *supra* note 315.

319. *See* Press Release, Dep't of Justice, Two Georgia Real Estate Investors Plead Guilty to Rigging Bids at Public Home Foreclosure Auctions (Jan. 4, 2016), https://www.justice.gov/opa/pr/two-georgia-real-estate-investors-plead-guilty-rigging-bids-public-home-foreclosure-auctions ("[T]he purpose of the conspiracies was to suppress and restrain competition and divert money to the conspirators that otherwise would have gone to pay off the mortgage and other holders of debt secured by the properties and, in some cases, the defaulting homeowner.").

320. DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD 240 (2016); David Dayen, *Big Bank Punishment Don't Fit Their Crimes*, AM. PROSPECT (Oct. 22, 2013), http://prospect.org/article/big-bank-punishments-dont-fit-their-crimes.

321. Press Release, Dep't of Justice, First Charges Brought in Investigation of Collusion Among Heir Location Services Firms (Dec. 23, 2015), https://www.justice.gov/opa/pr/first-charges-brought-investigation-collusion-among-heir-location-services-firms.

Iowa,[322] gasoline stations in a town in Oklahoma,[323] online sellers of lanyards and wristbands,[324] third-party retailers of wall posters on Amazon,[325] and sellers of packaged ice in Cincinnati and Minneapolis.[326]

While expressing the strongest condemnation of collusion, the Supreme Court weakened private enforcement and thereby helped undermine cartel deterrence efforts.[327] Over the past forty years, the Court raised the procedural barriers for private plaintiffs, in particular class action plaintiffs.[328] The Court reinterpreted the Federal Rules of Civil Procedure to allow defendants to get cases dismissed more easily, whether at the pleadings[329] or summary judgment stage.[330] Along with rewriting pleading standards in a business-friendly manner, the Court raised the burden for certifying classes[331] and re-

322. Press Release, Dep't of Justice, Iowa Company Pleads Guilty to Participating in Ready-Mix Concrete Price-Fixing and Bid-Rigging Conspiracy (Aug. 24, 2011), https://www.justice.gov/opa/pr/iowa-company-pleads-guilty-participating-ready-mix-concrete-price-fixing-and-bid-rigging.

323. Press Release, Dep't of Justice, Convenience Store Company and Individual Charged with Retail Gasoline Price Fixing in Oklahoma (Sept. 19, 2008), https://www.justice.gov/archive/opa/pr/2008/September/08-at-838.html.

324. Press Release, Dep't of Justice, E-Commerce Company and Top Executive Agree to Plead Guilty to Price-Fixing Conspiracy for Customized Promotional Products (Aug. 7, 2017), https://www.justice.gov/opa/pr/e-commerce-company-and-top-executive-agree-plead-guilty-price-fixing-conspiracy-customized.

325. Press Release, Dep't of Justice, Online Retailer Pleads Guilty for Fixing Prices of Wall Posters (Aug. 11, 2016), https://www.justice.gov/opa/pr/online-retailer-pleads-guilty-fixing-prices-wall-posters.

326. Press Release, Dep't of Justice, Cincinnati Packaged-Ice Manufacturer Sentenced to Pay $9 Million for Its Role in a Customer and Territory Allocation Conspiracy (Mar. 2, 2010), https://www.justice.gov/opa/pr/cincinnati-packaged-ice-manufacturer-sentenced-pay-9-million-its-role-customer-and-territory; Press Release, Dep't of Justice, Minneapolis Packaged-Ice Company Agrees to Plead Guilty to Customer Allocation Conspiracy (Oct. 13, 2009), https://www.justice.gov/opa/pr/minneapolis-packaged-ice-company-agrees-plead-guilty-customer-allocation-conspiracy.

327. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1272, 1285 (2013) (finding that private enforcement likely deters more anticompetitive behavior than the DOJ's anti-cartel enforcement activities).

328. Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U. N.H. L. REV. 303, 323–37 (2016).

329. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) (ruling that a plaintiff's pleading must be plausible on its face and rise above a speculative level).

330. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (granting summary judgment for defendants because there is no plausible motive for predatory price fixing); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (finding summary judgment for defendants because there is no plausible motive for price fixing); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (ruling that the non-movant must show there is a genuine dispute of material fact to avoid summary judgment).

331. Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 US. 338, 349–50 (2011).

quired the enforcement of mandatory arbitration clauses in nearly all instances, including those that deprive injured parties of the right to litigate on a collective basis through class actions.[332] Class actions are often the only means of seeking redress for illegal conduct, such as a price-fixing conspiracy, that inflicts small harm on a large number of individuals.[333] In antitrust actions, the Court also limited consumer standing to direct purchasers, meaning consumers more than one level removed from an antitrust violator cannot obtain damages under federal antitrust law.[334]

B. Workers in the Antitrust Crosshairs

1. Enforcement Actions Against Workers' Collective Action

Even as the courts and agencies relaxed antitrust doctrine concerning corporate mergers and monopolies and presided over dramatic increases in market concentration, they continue to police the collective action of workers. The agencies and courts mechanically apply the logic that horizontal coordination among independent economic actors is the "supreme evil of antitrust"[335] and employed antitrust against the efforts of workers and other small players to build power through joint action.[336] While the courts do recognize the statutory exemption in the Clayton Act for organized labor,[337] this exemption protects only workers who have, or are seeking, employee status.[338] Given employers' increasing classification—and misclassification[339]—of workers as independent contractors across the economy,[340] the

332. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

333. *See* CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY § 5.2.1, at 9–10 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (finding that consumers in financial services markets rarely file individual arbitration claims for amounts of less than $1,000).

334. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977).

335. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

336. Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 196 (2001).

337. Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996).

338. *E.g.*, Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1012–13 (D. Alaska 1990); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1032–33 (2016).

339. *See* Danny Vinik, *The Real Future of Work*, POLITICO MAG., Jan.–Feb. 2018, https://www.politico.com/magazine/story/2018/01/04/future-work-independent-contractors-alternative-work-arrangements-216212 ("[S]tate-level audits indicate that about 10 percent to 30 percent of American workers are currently misclassified. There are also some indications that misclassification is becoming more widespread.").

340. *See* Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Arrangements in the United States, 1995–2015*, at 2 (Nat'l Bureau of Econ. Research, Working Paper No.

Clayton Act's exemption for labor, as currently interpreted, provides many workers with no protection from antitrust investigations and lawsuits.

The Supreme Court and lower courts held that workers who are not employees under the National Labor Relations Act[341] can be liable for collusive conduct under the antitrust laws. Consider the case *FTC v. Superior Court Trial Lawyers Ass'n*.[342] A group of public defenders believed the District of Columbia underpaid them for their services and organized a boycott of the city's public defender service.[343] Through this boycott, the public defenders obtained an increase in their hourly rates from the city council.[344] The FTC brought an enforcement action against the attorneys, alleging they engaged in a group boycott and price fixing, in violation of Section 1 of the Sherman Act.[345] The Supreme Court ruled in favor of the FTC, holding that the public defenders committed a per se violation.[346] While the lawyers' action resembled a strike, the Court did not even address whether the lawyers were protected by the Clayton Act's labor exemption, likely because the lawyers were independent contractors.[347]

While they appear to ignore labor market practices and structures that hurt workers,[348] the federal antitrust agencies, especially the FTC, have made policing collusion between workers a priority. The FTC brought a number

22667, 2016) (finding "that the percentage of workers engaged in alternative work arrangements—defined as temporary help agency workers, on-call workers, contract company workers, and independent contractors or freelancers—rose from 10.7 percent in February 2005 to 15.8 percent in late 2015"). Remarkably, Katz and Krueger find that ninety-four percent of the net employment growth in the U.S. economy between 2005 and 2015 happened in these alternative work arrangements. *Id.* at 7. For the growth of outsourcing of previously core business functions and the rise of alternative labor arrangements, see generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

341. 29 U.S.C. §§ 151–169 (2012).

342. 493 U.S. 411 (1990).

343. *Id.* at 416–18.

344. *Id.* at 418.

345. *Id.* at 418–19.

346. *Id.* at 436.

347. Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1563 (2018).

348. *See supra* Section III.A (discussing DOJ's slap on the wrist remedy against tech giants that colluded against workers); *see also* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 542 (2018) ("Relying, we suspect, on the traditional assumption of economists that labor markets are competitive, the agencies have never blocked a merger because of its effect on labor markets—or, even, as far as we know, given the labor market effects of a potential merger more than cursory attention."); Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html ("Some of fast-food's biggest names, including Burger King, Carl's Jr., Pizza Hut and, until recently, McDonald's, prohibited franchisees from hiring workers away from one another, preventing, for example, one Pizza Hut from hiring employees from another."); José Azar et al., *Labor Market Concentration* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017) ("We find that higher labor market concentration is associated with significantly lower real wages.").

of actions against professionals who undertook conduct that limited competition and downward pressure on incomes. The FTC has gone after practices that resemble strike-like conduct. In two actions, the FTC alleged that physicians groups in Modesto, California and Boulder, Colorado "refuse[d], and threaten[ed] to refuse, to deal with insurance providers, unless they raised the fees paid to the groups' doctors."[349] Over the past few decades, the FTC brought numerous cases against doctors across the country who engaged in collective bargaining or similar activity with private and public payors.[350] Of the seven cases the FTC has litigated before the Supreme Court since 1986, three involved dentists and another involved public defenders.[351] While this figure does not necessarily reflect the agency's overall enforcement activities, it calls for a critical examination of the agency's priorities. The DOJ brought multiple similar actions against medical professionals who acted in concert.[352] To put this enforcement activity in perspective, the DOJ since the year 2000 filed more cases against chiropractors for collective bargaining than against monopolists for exclusionary conduct.[353]

While doctors generally earn six-figure salaries and enjoy high status in the United States,[354] they, like many other workers, often face powerful corporate buyers for their services—namely private insurance companies—and typically possess little bargaining power as individual practitioners.[355] Yet, the antitrust actions against doctors ignored the power of the insurers. The United States Court of Appeals for the Fifth Circuit, in affirming an FTC

349. Press Release, Fed. Trade Comm'n, FTC Settles Price-Fixing Charges Against Two Separate Doctors' Groups (Dec. 24, 2008), https://www.ftc.gov/news-events/press-releases/2008/12/ftc-settles-price-fixing-charges-against-two-separate-doctors.

350. *E.g.*, N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008); *In re* Santiago, 155 F.T.C. 874 (2013); *In re* Higgins, 149 F.T.C. 1114 (2010); *In re* Conn. Chiropractic Ass'n, 145 F.T.C. 163 (2008); *In re* Me. Health Alliance, 136 F.T.C. 616 (2003).

351. The three cases involving dentists are *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). The case concerning public defenders is *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

352. Press Release, U.S. Dep't of Justice, Idaho Orthopedists Charged with Engaging in Group Boycotts and Denying Medical Care to Injured Workers (May 28, 2010), https://www.justice.gov/opa/pr/idaho-orthopedists-charged-engaging-group-boycotts-and-denying-medical-care-injured-workers; United States v. Chiropractic Assocs., Ltd., No. CV 13-04030-LLP, 2013 U.S. Dist. LEXIS 141345 (D.S.D. Sept. 3, 2013); United States v. Okla. State Chiropractic Indep. Physicians Ass'n, No. 13-CV-21-TCK-TLW, 2013 U.S. Dist. LEXIS 90485 (N.D. Okla. May 21, 2013)

353. *Compare, e.g.*, *Chiropractic Assocs.*, Ltd., 2013 U.S. Dist. LEXIS 141345, *and Okla. State Chiropractic Indep. Physicians Ass'n*, 2013 U.S. Dist. LEXIS 90485, *with* U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 5, *and* .S. DEP'T OF JUSTICE, 2000–2009 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 6 (showing a total of one Sherman Act monopoly complaint filed in court from 2000 to 2017).

354. Elisabeth Rosenthal, *Medicine's Top Earners Are Not the M.D.s*, N.Y. TIMES (May 17, 2014), https://www.nytimes.com/2014/05/18/sunday-review/doctors-salaries-are-not-the-big-cost.html.

355. John B. Kirkwood, *Buyer Power and Healthcare Prices*, 91 WASH. L. REV. 253, 284–85 (2016).

order against a group of physicians in the Fort Worth area, showed this disregard for buyer-side power. The court did not consider whether the insurers had the capacity to depress payments to physicians and upheld the FTC's decision, in part, because the physicians' group "us[ed] collective bargaining power to demand higher fees for physicians who are already under contract with a payor."[356]

These antitrust enforcement activities against workers and small proprietors have not been restricted to medical professionals or other well-heeled professionals. These actions run the gamut of occupations. The FTC brought enforcement actions against animal breeders,[357] electricians,[358] ice skating teachers,[359] managers of commercial and residential properties,[360] music teachers,[361] organists,[362] and public defenders (again)[363] for adopting codes of ethics that restrained direct competition in an effort to maintain or raise members' incomes and promote a shared identity among members.[364] FTC investigations sweep even more broadly than enforcement actions would suggest. For instance, the FTC investigated truck drivers at several ports for seeking to organize for higher wages, reduced hours, and improved working

356. N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 369 (5th Cir. 2008).

357. *In re* Nat'l Ass'n of Animal Breeders, Inc., No. C-4558, 2015 F.T.C. LEXIS 267 (Nov. 2, 2015).

358. *In re* Prof'l Lighting & Sign Mgmt. Cos., Inc., 159 F.T.C. 261 (2015).

359. *In re* Prof'l Skaters Ass'n, 159 F.T.C. 758 (2015).

360. *In re* Nat'l Ass'n of Residential Prop. Managers, Inc., No. C-4490, 2014 F.T.C. LEXIS 217 (Oct. 1, 2014).

361. *In re* Music Teachers Nat'l Ass'n, Inc., No. C-4448, 2014 F.T.C. LEXIS 68 (Apr. 3, 2014); *In re* Nat'l Ass'n of Teachers of Singing, Inc., No. C-4491, 2014 F.T.C. LEXIS 218 (Oct. 1, 2014).

362. *In re* Am. Guild of Organists, No. C-4617, 2017 F.T.C. LEXIS 76 (May 26, 2017).

363. *In re* Lewis, 138 F.T.C. 213 (2004).

364. Some of these occupations appear to provide very modest remuneration for workers. *See, e.g.*, William Peek, Comment on *In re* Am. Guild of Organists (May 2, 2017), https://www.ftc.gov/system/files/documents/public_comments/2017/05/00013-140686.pdf ("Church organists are often highly skilled, highly trained musicians. A quick perusal of the church jobs listed on the AGO website reveals that the majority require a minimum of a Bachelor's degree in music, and many require a Masters and more. Yet that same perusal reveals that the salaries that are offered are very modest; most less than $20,000 per year."). And some of the challenged rules have social value in promoting occupational camaraderie and collective identity among members of the professional associations. *See, e.g.*, Paula Neihouse Moseman, Comment on Proposed Consent Agreement *In re* Music Teachers Nat'l Ass'n, Inc. (Jan. 16, 2014), https://www.ftc.gov/policy/public-comments/comment-00233-5 ("The provision in the MTNA Code of Ethics is simply a statement to encourage teachers to maintain a high level of professionalism. It is common courtesy to not actively try to steal another teacher's students away from their studio. It has absolutely nothing to do with discouraging competition! Private music teachers are always in demand and the consumer searching for a teacher makes their choice based on a number of factors. If they don't like one teacher, there are always many more available.").

conditions.[365] And private employers and purchasers of labor services can also use antitrust to discipline workers.[366]

A January 2015 blog post revealed the FTC's attitude toward concerted action by professionals. In this post, an FTC official put professionals and other independent contractors on notice that the FTC would take action against them in the future for collective action that did not produce offsetting consumer benefits.[367] This post elided any differences between large businesses and workers and stated they are both "subject to the same antitrust rules of the road,"[368] in effect adopting the position that antitrust applies equally to "a combination of all the great industrial enterprises" and "a combination of maidservants."[369]

The antitrust threat to labor today is arguably even greater than it was during the first Gilded Age. A century ago, workers engaging in secondary actions to advance organizing campaigns violated federal antitrust law. In general, however, workers could undertake primary actions to unionize a workplace.[370] Today, however, professionals and other independent contractors cannot engage in primary action and face judicial condemnation for bargaining collectively with purchasers of their services.[371]

2. Advocacy Against State and Local Policies That Can Help Workers

Along with their enforcement activities, the agencies advocated against collective bargaining rights at the state and local level. They wrote amicus briefs and comment letters urging state legislators not to grant collective bargaining rights to medical professionals.[372] In November 2017, the DOJ and

365. Paul, *supra* note 338, at 981.

366. *See, e.g.*, Michael Paulson, *Theater Producers Accuse Casting Directors of Forming Illegal Cartel*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/theater/producers-lawsuit-casting-directors.html ("The producers and casting directors have been at odds for more than a year, as the casting directors have sought the right to collectively bargain as part of an effort, they say, to win health care and pension benefits. They have sought representation from Teamsters Local 817, which already represents casting directors in film and television. . . . The producers have argued that casting directors are independent contractors, not production employees, and therefore do not have the right to bargain collectively as a union.").

367. Geoffrey Green, *Unflattering Resemblance*, FED. TRADE COMM'N (Jan. 13, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/unflattering-resemblance.

368. *Id.*

369. Int'l Harvester Co. v. Missouri, 234 U.S. 199, 213 (1914).

370. United Leather Workers, 265 U.S. 457, 471 (1924).

371. Green, *supra* note 367.

372. *E.g.*, Press Release, Fed. Trade Comm'n, FTC Staff Opposes Alaska Proposal to Allow Physician Collective Bargaining (Jan. 31, 2002), https://www.ftc.gov/news-events/press-releases/2002/01/ftc-staff-opposes-alaska-proposal-allow-physician-collective; Press Release, Fed. Trade Comm'n, FTC Staff Opposes Washington State Proposal to Allow Physician Collective Bargaining (Feb. 14, 2002), https://www.ftc.gov/news-events/press-releases/2002/02/ftc-staff-opposes-washington-state-proposal-allow-physician.

FTC filed a brief that, while formally about the scope of the state action doctrine,[373] attacked the City of Seattle's ordinance granting collective bargaining rights to Uber and other cab drivers.[374] In 2008, the FTC wrote a letter to an Indiana legislator regarding a bill to grant collective bargaining rights to home health workers.[375] Home care providers offer critical care to the ill and are disproportionately women of color and notoriously underpaid and overworked.[376] In an article on this important and exploited group of workers, Vann R. Newkirk II, a staff writer at *The Atlantic*, described their plight:

> Home-care workers are not . . . afforded wages or protections commensurate with their importance, with over a quarter living under the poverty line and more than half reliant on public assistance. That economic vulnerability is especially notable because of just who tends to work in home care: Women of color are the largest demographic group within the home-care workforce. Their vulnerability reflects a long history of exploitation of women of color working in-home jobs, and highlights a growing inequality in the health-care workforce, even as health coverage expands to more and more Americans.[377]

Notwithstanding these economic and social realities, the FTC expressed opposition to the Ohio bill on competition policy grounds and stated that the proposed collective bargaining rights could violate federal antitrust law.[378]

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373. Brief for the United States & Fed. Trade Comm'n as Amici Curiae in Support of Appellant & in Favor of Reversal, Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640), 2017 WL 5166667.

374. Marshall Steinbaum, *The Feds Side Against Alt-Labor*, ROOSEVELT INST.: NEXT NEW DEAL (Nov. 16, 2017), http://rooseveltinstitute.org/feds-side-against-alt-labor/.

375. Letter from Maureen K. Ohlhausen et al., Fed. Trade Comm'n, to William J. Seitz, Ohio Senate 4–5 (Feb. 14, 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.william-j.seitz-concerning-ohio-executive-order-2007-23s-establish-collective-bargaining-home-health-care/v080001homecare.pdf.

376. Vann R. Newkirk II, *The Forgotten Providers*, ATLANTIC (Sept. 29, 2016), https://www.theatlantic.com/politics/archive/2016/09/home-health-care-workers-wages/502016/.

377. *Id.*

378. Letter from Maureen K. Ohlhausen et al. to William J. Seitz, *supra* note 375, at 7. The FTC has also repeatedly opposed antitrust exemptions that would allow independent pharmacies to negotiate collectively with private health insurers. *E.g.*, *Hearing on H.R. 1946 Before the Subcomm. on Intellectual Prop., Competition & the Internet of the H. Comm. of the Judiciary*, 112th Cong. (2012) (statement of Richard Feinstein, Dir. of the Bureau of Competition, Fed. Trade Comm'n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-h.r.1946-preserving-our-hometown-independent-pharmacies-act-2011/120329pharmacytestimony.pdf; *Antitrust Enforcement in the Health Care Industry: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Richard Feinstein, Dir. of the Bureau of Competition, Fed. Trade Comm'n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-antitrust-enforcement-health-care-industry/101201antitrust-healthcare.pdf; *The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the Comm. on Commerce, Sci. & Transp.*, 11th Cong. (2009) (statement of Richard Feinstein, Dir. of

The antitrust agencies, especially the FTC, also devoted considerable advocacy resources against occupational licensing regulations at the state and local level. According to a former FTC official, the agency submitted "hundreds of comments and amicus curiae briefs" on occupational licensing issues to state and local governmental bodies from the 1970s to the present day.[379] In its general competition advocacy, the FTC subscribes to questionable or false assumptions about the state, markets, and antitrust law.[380] Among these assumptions, the FTC supposes that markets exist apart from and pre-exist the state—rather than arise from extensive state action.[381] In its advocacy concerning occupational licensing, the FTC has treated occupational licensing as an artificial imposition instead of as market-structuring rules akin to property, contract, and tort rules.[382]

Licensing can protect consumer health and safety[383] and also yield important benefits for workers, such as higher wages.[384] The percentage of workers subject to licensing increased at the same time as the percentage of workers in a union declined.[385] Although it would be mistaken to infer a causal connection between the two trends, these developments suggest that the expansion of occupational licensing may function for workers as an imperfect substitute to unionization.[386] Licensing may also mitigate the effects of gender and racial discrimination in the labor market.[387] In light of its implication of myriad public interests, occupational licensure is an example of

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the Bureau of Competition, Fed. Trade Comm'n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-importance-competition-and-antitrust-enforcement-lower/090716healthcaretestimony.pdf.

379. *Competition and the Potential Costs and Benefits of Professional Licensure: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 9 (2014) (statement of Andrew Gavil, Dir. Of the Office of Policy Planning, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf (footnote omitted).

380. Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 955–87 (2008).

381. *Id.* at 954. *See generally* Sandeep Vaheesan & Frank Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 ANN. REV. L. & SOC. SCI. 309 (2018).

382. Vaheesan & Pasquale, *supra* note 381, at 317.

383. WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 11 (2016).

384. *See id.* at 14 ("Estimates that account for differences in education, training, and experience find that licensing results in 10 percent to 15 percent higher wages for licensed workers relative to unlicensed workers.").

385. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 678–79 (2010).

386. *See* Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 ILR REV. 142, 169–70 (2016) (finding wage premia in both unionized and licensed labor markets but higher wage premia for unionized segments).

387. Peter Q. Blair & Bobby W. Chung, *Occupational Licensing Reduces Racial and Gender Wage Gaps: Evidence from the Survey of Income and Program Participation* 36 (Univ. of Chicago, Working Paper No. 2017-050, 2017), https://ideas.repec.org/p/hka/wpaper/2017-50.html.

policy that requires moral and political judgments and should not be cabined in a narrow technocratic frame.[388]

Rather than acknowledging the nuances of licensing, the FTC adopts an almost categorical position, treating licensing as a general economic menace and calling on states to evaluate licensing rules solely through the prism of consumer welfare and consumer protection.[389] To be sure, occupational licensing today is not perfect nor above criticism. It should be subject to careful examination and reformed as appropriate.[390] The FTC, however, defines the *legitimate* purposes of occupational regulation narrowly and appears to believe that the appropriate scope of democratic policymaking is limited. In a letter exemplifying this economistic ideology, the FTC wrote to a Chicago alderman concerning a taxicab regulation under consideration in the city that "[a]ny restrictions on competition that are implemented should be no broader than necessary to address *legitimate subjects of regulation, such as safety and consumer protection*, and narrowly crafted to minimize any potential anti-competitive impact."[391]

IV. HOW REMAKING ANTITRUST LAW COULD HELP END THE NEW GILDED AGE

Congress, the antitrust agencies, and federal courts should restore the original anti-monopoly, pro-worker vision for the antitrust laws. For much of their history, these laws had a pro-capital, anti-worker orientation. Notwithstanding this record, these laws can be reoriented to police capital and accommodate labor in accord with the intent of Congress. In passing these laws, Congress aimed to curtail the power of capital and also preserve space for workers to organize.[392] The antitrust agencies and federal courts should

388. *See* RAHMAN, *supra* note 40, at 99 ("The analysis of complex multifaceted problems necessarily entails value judgments of some kind—particularly in the case of political problems which are generally ill formed, with tremendous uncertainty and no single optimal solution. In these settings, technocratic judgment cannot fully determine the all-things-considered 'best' public policy.").

389. *See, e.g.*, Letter from Susan S. DeSanti et al., Fed. Trade Comm'n, to Loris Jones, Tex. Bd. of Veterinary Med. Exam'rs 4 (Aug. 20, 2010), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf ("The proposed rule would modify existing Texas regulations to effectively prohibit non-veterinarians from providing specific and commonly-available forms of horse floating, absent veterinarian supervision. If enacted, the rule appears likely to significantly restrict competition without providing any countervailing benefit, thereby harming consumers.").

390. *E.g.*, Alexia Elejalde-Ruiz, *New Illinois Laws Loosen Employment Restrictions for Ex-Offenders*, CHI. TRIB. (Jan. 17, 2017), http://www.chicagotribune.com/business/ct-illinois-laws-criminal-records-118-biz-20170117-story.html.

391. Letter from Andrew I. Gavil et al., Fed. Trade Comm'n, to Brendan Reilly, Chi. City Council 4 (Apr. 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf (emphasis added).

392. *See supra* Part I.

reject the ahistorical and deficient efficiency paradigm and embrace the political economy framework of the sponsors of the antitrust laws. Specifically, they need to reinterpret antitrust to restore competitive market structures and limit the power of large businesses over consumers, producers, rivals, and citizens. Along with imposing checks on the power of large businesses, Congress, the agencies, and the courts must preserve freedom of action for workers acting in concert.

New statutes and executive and judicial reinterpretation of antitrust law, in accord with congressional intent, would help remedy many economic and political injustices in the United States today. Monopoly and oligopoly appear to contribute to a host of societal ills. These include increased inequality,[393] diminished income for workers[394] and other producers,[395] and declining business formation.[396] At the same time, protecting workers' collective action against antitrust challenges would create more space for workers to organize and claim a fairer share of income and wealth.[397] Restoring antitrust law to its original goals would likely produce a more just and equitable society. Although no means a panacea for what ails the United States, antitrust law should be part of a broader social democratic agenda that reduces the yawning inequalities in wealth and power today.[398]

393. A large fraction of monopoly and oligopoly profits likely accrue to the most affluent segment of society. In 2012, the top 0.1% of the wealth distribution captured 33% of capital income, defined to include "dividends, taxable interest, rents, estate and trust income, the profits of S-corporations, sole proprietorships and partnerships." Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Data*, 131 Q. J. ECON. 519, 530 (2016); *see also* William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q. J. ECON. 177, 189–93 (1975) (estimating monopoly's contribution to income inequality in the 1960s). *See generally* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017) (discussing economic and political connections between market power and inequality).

394. Azar et al., *supra* note 348, at 12; Simcha Barkai, Declining Labor and Capital Shares 26 (2016) (unpublished Ph.D. dissertation, University of Chicago), https://www.gsb.stanford.edu/sites/gsb/files/jmp_simcha-barkai.pdf.

395. Ariel Ezrachi & Maurice Stucke, *The E-Scraper and E-Monopsony*, AUTHORS GUILD (Apr. 12, 2017), https://www.authorsguild.org/industry-advocacy/law-profs-antitrust-enforcers-rein-super-platforms-look-upstream/ (correlating the decline in average income for authors to the growing monopsony power of Amazon over book publishers); DARCY TAJ & EMILY KERR, FED. RESERVE BANK OF DALL., GO FIGURE: WHAT'S DRIVING WIDE GAP BETWEEN CATTLE AND BEEF PRICES? (2017), https://www.dallasfed.org/~/media/documents/research/swe/2017/swe1702f.pdf (identifying a possible connection between increased concentration in meatpacking and food retailing and growing spread between beef prices paid by consumers pay and cattle prices paid to ranchers).

396. Stacy Mitchell, *The View from the Shop—Antitrust and the Decline of America's Independent Businesses*, 61 ANTITRUST BULL. 498, 502 (2016) (noting growth in the political power of large businesses and the decrease in small business formation).

397. For an examination of the relationship between labor organization and inequality, see Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532 (2011) (finding that the decline of unions explains between one-fifth to one-third of the increase in wage inequality).

398. *See generally* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? (2015).

Reinterpreting and reviving antitrust law will require new legislation from Congress,[399] a radical remaking of the federal antitrust agencies and the courts, or some combination of both. Congress, the DOJ, the FTC, and the courts would have to undo a thick accretion of pro-business, anti-worker case law and guidelines.[400] The current Supreme Court and the Trump administration are, if anything, likely to entrench the consumer welfare antitrust that failed consumers and workers, to continue to tolerate the abuses of monopolies and monopsonies, and to deploy antitrust against the powerless.[401] Yet, administrations and the composition of the Supreme Court are not destined to remain the same.

Already signs of progress are clear. Along with bills on strengthening antitrust in Congress, a number of members of Congress and candidates for Congress are making antitrust a centerpiece of their agenda.[402] At least on the Democratic side, antitrust and anti-monopoly appear likely to be important themes in the contest to be the party's presidential nominee in 2020. And if and when an administration committed to the revival of antitrust and control of corporate power is elected, it would have an opportunity to pursue a different course on antitrust through both appointments to the federal antitrust agencies and to the judiciary. In relying on the executive branch and the courts, the conservative reinterpretation—and retrenchment—of antitrust

399. *See* Chuck Schumer, *A Better Deal for American Workers*, N.Y. TIMES (July 24, 2017), https://www.nytimes.com/2017/07/24/opinion/chuck-schumer-employment-democrats.html ("We are going to fight to allow regulators to break up big companies if they're hurting consumers and to make it harder for companies to merge if it reduces competition."). In the fall of 2017, Senator Amy Klobuchar and nine Democratic co-sponsors introduced a bill to strengthen the Clayton Act's merger provisions. Press Release, Senator Amy Klobuchar, Klobuchar, Senators Introduce Legislation to Modernize Antitrust Enforcement (Sept. 14, 2017), https://www.klobuchar.senate.gov/public/index.cfm/2017/9/klobuchar-senators-introduce-legislation-to-modernize-antitrust-enforcement.

400. *See supra* Part III.

401. Sandeep Vaheesan, *Corporations Have a Friend in Judge Kavanaugh*, HILL (Aug. 29, 2018), https://thehill.com/opinion/finance/404167-corporations-have-a-friend-in-judge-kavanaugh; Sandeep Vaheesan, *Neil Gorsuch's Alarming Views on Antitrust and Monopoly*, WASH. MONTHLY (Mar. 17, 2017), http://washingtonmonthly.com/2017/03/17/neil-gorsuchs-alarming-views-on-antitrust-and-monopoly/; Cecilia Kang, *How Trump's Pick for Top Antitrust Cop May Shape Competition*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/technology/how-trumps-pick-for-top-antitrust-cop-may-shape-competition.html/; Brian Fung, *Trump Names Maureen Ohlhausen as Acting FTC Chairwoman*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/01/25/trump-names-maureen-ohlhausen-as-acting-ftc-chairwoman/?utm_term=.46441ca17764.

402. *E.g.*, Senator Elizabeth Warren, Keynote Remarks at New America's Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf; Matthew Yglesias, *Booker Calls on Antitrust Regulators to Start Paying Attention to Workers*, VOX (Nov. 1, 2017), http://www.vox.com/policy-and-politics/2017/11/1/16571992/booker-antitrust-letter; David Dayen, *Anti-Monopoly Candidates Are Testing a New Politics in the Midterms*, INTERCEPT (Oct. 1, 2017), http://theintercept.com/2017/10/01/anti-monopoly-candidates-are-testing-a-new-politics-in-the-midterms/.

offers one model for reviving the field.[403] And even in the near term, litigation can yield important advances. Some lower courts appear receptive to reinvigorating or at least honoring mid-century precedents the Supreme Court has not overruled.[404]

A. Confronting the Power of Capital

A reinterpretation of the antitrust laws needs to be founded on the political economy embodied in the legislative histories of the principal antitrust laws. The Congresses that enacted these statutes were not concerned with narrow economics or some abstract notion of competition. Instead, they sought to control the power of the new monopolies and trusts that dominated the American political economy. They had a broad conception of the power of large-scale enterprise and considered—and condemned—the trusts' power over consumers, producers, competitors, and citizens.[405] A review of the legislative histories reveals economic and political ideas that are consonant with popular concerns about corporate power today.[406]

Permissive merger and monopoly policy resulted in a highly concentrated industrial structure.[407] Numerous sectors across the economy became

403. Consider the conservative Supreme Court's weakening of antitrust precedent on vertical restraints over four decades. The Court overturned the per se rule for territorial and other non-price restraints in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In the 1980s, it undermined the effectiveness of the long-standing per se rule against resale price maintenance in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). In 2007, thirty years after *Sylvania*, the Court overruled the nearly-century old per se ban on resale price maintenance. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

404. *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347–48 (3d Cir. 2016) (citing *Brown Shoe Co. v. United States*, *United States v. Philadelphia National Bank*, and *FTC v. Procter & Gamble* for the proposition that the Supreme Court has not adopted an efficiencies defense for otherwise illegal mergers and that Congress supported decentralized market structure even at the cost of some merger-related efficiencies). Nonetheless, the antitrust agencies in their guidelines have recognized an efficiencies defense. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets.").

405. *See supra* Section I.A.

406. *See, e.g.*, Ryan Cooper, *Google Is a Monopoly—and It's Crushing the Internet*, WEEK (Apr. 21, 2017), http://theweek.com/articles/693488/google-monopoly—crushing-internet; Lina M. Khan, *Amazon Bites Off Even More Monopoly Power*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/opinion/amazon-whole-foods-jeff-bezos.html.

407. COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 7 (2016); *Riding the Wave*, ECONOMIST (Oct. 3, 2013), http://www.economist.com/news/business/21587207-corporate-dealmakers-should-heed-lessons-past-merger-waves-riding-wave.

more concentrated over the past two decades.[408] A few examples are illustrative. In the airline industry, the number of major carriers declined from nine to four since 2005.[409] Two duopolies dominate railroads—one east of the Mississippi and one west of it.[410] The wireless industry has four major players,[411] with AT&T and Verizon accounting for approximately seventy percent of market share by revenue.[412] In agriculture, concentration increased dramatically in markets throughout the supply chain, starting with inputs such as fertilizer and seeds through processing of farmers' crops, livestock, and poultry and food retailing.[413] Most local labor markets in the United States, and in rural areas in particular, are highly concentrated (as defined by the *Horizontal Merger Guidelines*)[414] and have become more concentrated since the 1970s.[415]

Consumer welfare antitrust failed even on consumer welfare grounds. In metropolitan areas across the country, hospital mergers created highly concentrated markets for hospital services and contributed to higher costs in health care.[416] John Kwoka has shown that the antitrust agencies often failed to challenge mergers that had subsequent anticompetitive effects (higher short-term consumer prices).[417] Furthermore, Kwoka found that merger remedies, especially behavioral remedies, often failed to preserve competition.[418]

408. COUNCIL OF ECON. ADVISERS, *supra* note 407, at 4.

409. *A Lack of Competition Explains the Flaws in American Aviation*, ECONOMIST (Apr. 22, 2017), https://www.economist.com/leaders/2017/04/22/a-lack-of-competition-explains-the-flaws-in-american-aviation; Dominic Rushe, *American and US Airways Officially Merge to Create World's Biggest Airline*, GUARDIAN (Dec. 9, 2013), https://www.theguardian.com/business/2013/dec/09/american-us-airways-merge-worlds-biggest-airlines.

410. *Doing the Locomotion*, ECONOMIST (Feb. 11, 2016), https://www.economist.com/business/2016/02/11/doing-the-locomotion.

411. FED. COMMC'NS COMM'N, DA 16-1061, ANNUAL REPORT & ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES 5 (2016), https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1061A1.pdf.

412. *Id.* at 14.

413. Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 WIS. L. REV. 337, 341–44 (2014).

414. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 5.3.

415. Azar et al., *supra* note 348, at 9–10, http://www.marinescu.eu/AzarMarinescuSteinbaum.pdf; Efraim Benmelech et al., Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages? 3 (2018) (unpublished manuscript), https://www.kellogg.northwestern.edu/faculty/benmelech/html/BenmelechPapers/BBK_2018_January_31.pdf.

416. Martin Gaynor et al., *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LITERATURE 235, 238–39, 259–61 (2015); *see* Gerard F. Anderson et al., *It's the Prices, Stupid: Why the United States Is So Different from Other Countries*, 22 HEALTH AFF. 89, 103 (2003) (finding that higher health care spending in the United States is due to higher unit prices for services rather than higher utilization of services).

417. *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 110–11 (2015).

418. *Id.* at 120.

Other research has also shown that increased market concentration contributes to higher consumer prices.[419]

The failures of consumer welfare antitrust become even clearer when a broader set of economic and political interests are examined. Higher consumer prices are one manifestation of business power but only one and arguably not the most important one. Concentration in labor and product markets contributes to lower wages.[420] Just from a consumer angle, dominant online platforms, with their huge troves of user data and lack of effective competition, pose serious threats to personal privacy.[421] Companies that control infrastructure that support a range of activity, whether they are the electric grid or a search engine monopoly, have the power to shape large swaths of the economy over time.[422]

The economic power of large business can also translate into great political power.[423] Empirical research found that big business exercises disproportionate influence over the political system.[424] John Browne, the former CEO of oil and gas giant BP, explained the nexus between economic power and political power. In an interview with *The Wall Street Journal* in 2003, he described how BP's size gives it political power:

> We do get the seat at the table because of our scope and scale. Whether we are the second or the third largest (oil) company is of very little import, but we're certainly up there and we operate in places which are important to the United States government, and the United States government is important to us. . . . We have large numbers of employees in the United States. That's very important in a political system. And they are highly concentrated. So we

419. Blonigen & Pierce, *supra* note 229, at 24; Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 14, 16, 32 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017); Gustavo Grullon et al., Are U.S. Industries Becoming More Concentrated? 41 (Oct. 2016) (unpublished manuscript), https://finance.eller.arizona.edu/sites/finance/files/grullon_11.4.16.pdf.

420. Azar et al., *supra* note 348, at 2; Barkai, *supra* note 394, at 38–39.

421. Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1022–24 (2013).

422. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973) ("The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. The District Court determined that Otter Tail has 'a strategic dominance in the transmission of power in most of its service area' and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." (citing United States v. Griffith, 334 U.S. 100, 107 (1948))). *See generally* K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1647, 1656, 1666–69 (2018).

423. Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSP. 113, 122–25 (2017).

424. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

> have a very significant presence in Texas, Illinois, Alaska, California. These are important because our employees are voters.[425]

Economic power extends beyond influence over politicians, regulators, and other public officials. Comcast and Google illustrate this hegemonic power. These giants use their power and wealth to shape the terms of debate through financial support for academics and non-profit organizations, including organizations with otherwise progressive reputations.[426] In their funding of academics and think tanks, these companies are representative of large-scale capital, rather than outliers. Large businesses outside telecommunications and technology also use their wealth and power to manipulate the parameters of public discussion,[427] including by attempting to discipline critical voices.[428]

Current legal standards fail to provide a check on the prerogatives of large businesses and do not even protect consumers from the burden of monopoly and oligopoly. Antitrust legal standards, such as the rule of reason and the analytically comparable *Horizontal Merger Guidelines*, impose onerous burdens on plaintiffs challenging anticompetitive conduct and call for complicated, speculative inquiries into whether a business practice or merger

425. *BP Won't Abandon Driving Force*, WALL ST. J. (Nov. 25, 2003), https://www.wsj.com/articles/SB106970996323058900 (interviewing John Browne, CEO, BP).

426. *E.g.*, Brody Mullins & Jack Nicas, *Paying Professors: Inside Google's Academic Influence Campaign*, WALL ST. J. (July 14, 2017), https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286; David Dayen, *Google's Insidious Shadow Lobbying: How the Internet Giant Is Bankrolling Friendly Academics—and Skirting Federal Investigations*, SALON (Nov. 24, 2015), http://www.salon.com/2015/11/24/googles_insidious_shadow_lobbying_how_the_internet_giant_is_bankrolling_friendly_academics_and_skirting_federal_investigations/; Lee Fang, *Civil Rights Groups, Funded by Telecoms, Back Donald Trump's Plan to Kill Net Neutrality*, INTERCEPT (Feb. 13, 2017), https://theintercept.com/2017/02/13/naacp-trump-netneutrality/; Tom Hamburger & Matea Gold, *Google, Once Disdainful of Lobbying, Now a Master of Washington Influence*, WASH. POST (Apr. 12, 2014), https://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74_story.html?utm_term=.581d579f17af.

427. Eric Lipton & Brooke Williams, *How Think Tanks Amplify Corporate America's Influence*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/us/politics/think-tanks-research-and-corporate-lobbying.html. The fossil fuel and tobacco industries, in particular, have a notorious history of funding research to discredit evidence that the burning of fossil fuels contributes to climate change and that cigarette smoking contributes to a host of serious illnesses, respectively. Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html; David Heath, *Contesting the Science of Smoking*, ATLANTIC (May 4, 2016), https://www.theatlantic.com/politics/archive/2016/05/low-tar-cigarettes/481116/.

428. *E.g.*, Kenneth P. Vogel, *Google Critic Ousted from Think Tank Funded by the Tech Giant*, N.Y. TIMES (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/us/politics/eric-schmidt-google-new-america.html?mcubz=1.

led to or will likely lead to consumer harm in the near term.[429] These standards ensure plaintiffs rarely win and help protect monopolistic and oligopolistic domination of markets.[430] Largely quantitative analysis, likely defective even for the consumer welfare standard,[431] cannot do justice to the qualitative manifestations of business power identified in the legislative histories of the Sherman, Clayton, and FTC Acts.[432] These standards cannot protect the open markets or the American political system from private business power. And these standards, by elevating complexity over simplicity, favor well-heeled interests who can afford to retain the most expensive lawyers and consultants—the monopolies and oligopolies themselves.[433]

To limit the power of large corporations, Congress, the antitrust agencies, and the courts must embrace clear rules and presumptions and reject the prevailing rule of reason approach. The Supreme Court once recognized the importance of rules in antitrust law and the unworkability of complicated standards.[434] For antitrust enforcement to be effective and efficient, per se rules and presumptions of illegality must become the default in antitrust law.[435] At present, rules are the norm only for price fixing and similar forms of horizontal collusion.[436] Per se rules or presumptions of illegality should govern a range of conduct that threatens structurally competitive markets. Conduct that carries this competitive threat includes horizontal and vertical mergers in concentrated markets and predatory pricing, exclusive dealing, and tying by monopolists and near-monopolists. Under these presumptions, certain firm conduct would be illegal unless the business could present credible business justifications.

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429. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1385–86, 1466 (2009).

430. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009).

431. Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 17–22 (2016).

432. *See supra* Section I.A.

433. *See* Stucke, *supra* note 429, at 1461.

434. United States v. Topco Assocs., 405 U.S. 596, 611–12 (1972).

435. *See* Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"*, 2 J. COMPETITION L. & ECON. 215, 220 (2006); *see also* Stucke, *supra* note 429, at 1460–65. Maurice Stucke writes:

> Rule-of-reason litigation . . . is a crusade, enlisting legions of economists, lawyers, and paralegals. It is unclear how many private litigants (even with the prospect of trebled damages) will incur the "litany of costs" and risks associated with suing companies with market power by embarking on such a crusade—especially if their chance of prevailing is less than one in three.

Id. at 1461.

436. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

B. Recognizing Labor Is Not Just Another Commodity

The antitrust laws also need to be reinterpreted to preserve the rights of workers to engage in collective action. The present interpretation of the statutory exemption is far too narrow and only protects workers with employee status under federal law.[437] Workers of all types face serious obstacles when they seek to establish a collective voice by forming a union. For workers without employee status under federal law, they face the additional threat of antitrust liability. Even as antitrust law permits monopolies and oligopolies to dominate the economy, it is used to thwart the efforts of many American workers to build countervailing power. In contrast to present administration and interpretation of the antitrust laws, the Congresses that passed both the Sherman and Clayton Acts sought to protect workers from antitrust attacks. The sponsors of these statutes viewed the new laws and labor organizing as complements in challenging and controlling the power of large-scale businesses. They made clear distinctions between capital and labor and did not conceive of the antitrust laws as prescriptions for maximizing competition categorically across American society. In their approach toward labor, the framers of the antitrust statutes wanted workers to have the freedom to act in a collective capacity.[438]

The present, restrictive interpretation of the statutory antitrust exemption creates a significant legal threat to the organizing efforts of a large fraction of workers. While the exemption protects workers who are employees under federal labor law, it does *not* protect workers without employee status under federal labor law—workers classified as independent contractors may face antitrust liability for engaging in collective action.[439] Given that nearly nine percent of workers are now classified or misclassified as independent contractors,[440] this threat is not merely an academic one. Antitrust law may help deter millions of workers from organizing for higher wages and better working conditions. The rise of precarious employment arrangements could arguably make these "alt-labor" organizing activities as important as traditional labor organizing in the coming years.[441] A critical segment of labor organizing is now focused on workers outside of conventional employee-employer relationships.[442]

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437. L.A. Meat & Provisions Drivers Union v. United States, 371 U.S. 94, 104 (1962).

438. *See supra* Section I.B.

439. Paul, *supra* note 338, at 981. *E.g.*, Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1013 (D. Alaska 1990) (holding that marine pilots are not "employees" and, therefore, not entitled to antitrust exemption).

440. Katz & Krueger, *supra* note 340, at 8.

441. Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), http://prospect.org/article/alt-labor.

442. *See* Michael M. Oswalt, *The Right to Improvise in Low-Wage Work*, 38 CARDOZO L. REV. 959, 983–86 (2017).

Congress or the Supreme Court should revisit the statutory exemption and extend it to cover not just workers in traditional employee-employer arrangements but workers of all types.[443] Workers, regardless of formal legal label and unlike capitalists, face "[p]ressures of economic necessity to work in order to provide for one's family and to accommodate the needs of the person who is paying for the services are applicable to every person engaged in a trade, calling or profession."[444] They "must work to support themselves and their families and must make themselves available to render services at such times as they are needed."[445] It is long past due for the federal antitrust agencies and the courts to recognize the qualitative difference between home health care workers banding together to demand a living wage and corporate mergers that seek to enhance market control and bolster profits. All those who labor for a living should be entitled to the antitrust exemption, not only those workers who are "employees" under federal law.[446]

While congressional or judicial expansion of the labor exemption may not happen in the near term, the federal antitrust agencies, in the meantime, should reconsider their current enforcement priorities. They should stop investigating the concerted activity of workers, professionals, and other small players and bringing enforcement actions against them. This proposition should not be controversial. At a time of agency budget cuts[447] and monopolies and oligopolies in a number of sectors,[448] the antitrust agencies cannot justify using public money to bring enforcement actions against music teachers and organists. Even under the existing antitrust paradigm centered on consumer welfare, the music teachers' restrictive code of ethics does not seem like a major threat to consumer interests.[449] Assuming that preserving low consumer prices in the short run is the exclusive or primary goal of antitrust law, limits on price competition between music teachers appears inconsequential in the larger universe of anticompetitive conduct.

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443. Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. 177, 177–79 (2017).

444. Taylor v. Local No.7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965).

445. *Id.*

446. Justice William O. Douglas explained how nominal independent contractors are often economically more similar to workers than they are to entrepreneurs and contended that economic realities should trump formal labels in determining whether these contractors were entitled to antitrust immunity. L.A. Meat & Provisions Drivers Union v. United States, 371 U.S. 94, 108–09 (1962) (Douglas, J., dissenting).

447. *E.g.*, Alexei Alexis, *FTC Budget Would Shrink Under Trump Plan*, BLOOMBERG BNA (May 24, 2017), https://www.bna.com/ftc-budget-shrink-n73014451436/.

448. *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing.

449. *In re* Music Teachers Nat'l Ass'n, Inc., No. C-4448, 2014 F.T.C. LEXIS 68 (Apr. 3, 2014); *In re* Nat'l Ass'n of Teachers of Singing, Inc., No. C-4491, 2014 F.T.C. LEXIS 218 (Oct. 1, 2014).

The agencies should also reevaluate their competition advocacy priorities and terminate their advocacy against occupational licensing. The present focus on occupational licensing is misguided. While hardly perfect or immune from criticism, occupational licensing can have myriad benefits. Occupational licensing rules can protect consumer health and safety and also raise the wages of workers.[450] In insisting on analyzing occupational licensing through the lens of consumer welfare, the FTC acknowledged only the protection of consumers. It ignored the other policy goals frequently animating licensing statutes and regulations. Incredibly, the FTC has not merely offered a consumer welfare angle on these regulations; it has deemed considerations besides the protection of consumer interests to be illegitimate.[451] Given the forty-year stagnation in wages for ordinary Americans,[452] the FTC's monomaniacal fixation on (short-term) consumer interests and dismissiveness toward the welfare of workers is untenable. In attacking occupational licensing, the FTC strayed far outside its purview and demanded that states and municipalities conform to its narrow ideology. While the FTC is chasing the phantom menace of a "guilded" age, it may actually be promoting a new Gilded Age.[453]

V. CONCLUSION

In enacting the principal antitrust laws, Congress aimed to curtail the power of large-scale capital and also protect labor unions from federal interference. The framers of the antitrust laws understood corporate power broadly. These representatives and senators were not concerned with just one manifestation of this power, such as higher prices for consumers; they sought to protect Americans in their capacity as consumers, producers, businesses, and citizens from the power of the monopolies and trusts. Notwithstanding their great promise, the antitrust laws have a mixed record. At times, the antitrust laws have been applied to control corporate consolidation and

450. *See generally* Vaheesan & Pasquale, *supra* note 381, at 314, 317–18.

451. *See, e.g.*, Letter from Andrew I. Gavil et al. to Brendan Reilly, *supra* note 391, at 4 ("Any restrictions on competition that are implemented should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact."); Letter from Tara Isa Koslov et al., Fed. Trade Comm'n, to Suzanne Geist, Neb. Senate 7 (Mar. 15, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb_ol_letter_to_senator_geist.pdf ("[T]he purported consumer protection benefits of licensing may not justify the costs. Reductions in competition caused by licensing can also cause quality, choice, and access to decline.").

452. Scott Horsley, *Despite an Economy on the Rise, American Paychecks Remain Stuck*, NPR (May 26, 2015), http://www.npr.org/sections/itsallpolitics/2015/05/26/408555544/despite-economic-climb-american-paychecks-remain-stuck.

453. The author credits Frank Pasquale for this line. Instead of using their statutory powers against big corporations, the antitrust agencies, especially the FTC, target state and local occupational licensing rules, or so-called modern guilds.

even break up durable monopolies. For much of the mid-twentieth century, the antitrust laws served as a powerful check on mergers and monopolies. At other periods in their history though, the antitrust laws failed to check the growth of corporate power and instead were used to thwart collective action by workers. In the first Gilded Age and the new Gilded Age in which we live, the antitrust laws have generally respected the prerogatives of monopolistic and oligopolistic businesses and often curtailed the liberty of workers.

Despite their recent history, the antitrust laws can play an important role in addressing the staggering inequality in American society today. These laws can and should be reinterpreted to curtail the power of capital and preserve the freedom of workers to act collectively. Strong federal checks are necessary to maintain and restore competitive market structures and protect Americans from corporate domination of markets, politics, and society. So long as Congress, the federal antitrust agencies, and the courts acquiesce to or follow the antitrust status quo, they will accept and enable the supremacy of concentrated capital and also subvert the efforts of workers to build countervailing economic and political power. The history of antitrust law, however, shows that an animating vision and determined political action can restore "the Magna Carta of free enterprise"[454] and redistribute power and wealth from the "economic royalists"[455] to ordinary Americans.

454. United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

455. Acceptance of the Renomination for the Presidency, 5 PUB. PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 234 (June 27, 1936).