Before We Tear Down the Fence: Understanding the Past and Building the Future of Antitrust Law

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EVERYONE IS ANGRY WITH BIG TECH. At least, that is the impression given by the current political and legal discourse in the United States. Large internet companies are accused of misusing personal data, censoring conservative speech, enabling scammers, exposing children to bullying, and much more. Comprehensive federal privacy legislation and reforms to Section 230 of the Communications Act can help to address concerns about consumer privacy and content moderation, respectively. But the general discontent with a handful of companies—lumped together as "Big Tech" despite the different services they provide—has become a Trojan Horse for breaking into the existing consensus on competition law.

Politicians and other commentators have taken this opportunity to call not only for the breakup of certain businesses, but also for a more general overhaul of antitrust that would affect every sector of the economy. For example, in July 2017 Congressional Democrats released a plan that sought to put the legal burden on companies to prove that their large mergers are procompetitive.[1] In December 2019, Senator Elizabeth Warren drafted but did not introduce legislation that would ban "megamergers" and presume "large" mergers to be anticompetitive.[2]

Similarly, Senator Josh Hawley in April 2021 sponsored one bill to bar companies with more than $1.5 billion in annual global revenue from competing on their platforms with third parties or providing cloud services.[3] In another bill he sponsored, any acquisition by a designated "dominant digital firm" would be presumed to be anticompetitive.

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That same bill would excuse antitrust plaintiffs who show "anticompetitive or otherwise detrimental effects of particular practices" from having to allege a relevant market or the defendant's share of it.[4]

And in February 2021, Senator Amy Klobuchar introduced a bill that would forbid mergers that "create an appreciable risk" of lessening competition by "more than a de minimis amount," and would shift the burden of proof to the merging parties for certain mergers.[5] Her proposed legislation also would explicitly prohibit "exclusionary conduct"—defined as conduct that materially disadvantages competitors or limits their ability or incentive to compete—"that presents an appreciable risk of harming competition."

Perhaps most notably, the U.S. House of Representatives Antitrust Subcommittee of the Judiciary Committee released a staff report in October 2020 that recommends full-scale revisions to the U.S. antitrust laws.[6] After more than a year of investigating Facebook, Google, Amazon, and Apple, the Subcommittee calls on Congress to "restore the antimonopoly goals of the antitrust laws."[7] The report declares that "the courts have significantly weakened these laws" and that the Federal Trade Commission and the Department of Justice Antitrust Division have taken "an approach to antitrust that has significantly diverged from the laws that Congress enacted."[8]

Before tearing down antitrust precedents, however, reformers should understand the historical context that led the judiciary to its present interpretation of the Sherman and Clayton Acts. This context will illuminate concerns about current proposals to overhaul antitrust while acknowledging that some changes, including enhanced agency transparency and increased funding, would be beneficial. That said, reforms should focus on promoting competition on the merits and pushing back on crony capitalism.

The More Intelligent Type of Reformer

In his essay "The Drift from Domesticity," the British writer G.K. Chesterton outlined a principle that is now often called "Chesterton's Fence."[9] He analogized institutions and laws to a fence that has been in place for years. "The more modern type of reformer" says that, as he sees no use for the fence, it should be cleared away.

> To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you *do* see the use of it, I may allow you to destroy it."

Chesterton offers this principle with the understanding that the fence was not built by sleepwalkers. "Some person had some reason for thinking it would be a good thing for somebody. And until we know what the reason was, we really cannot judge whether the reason was reasonable." Chesterton's insight does not mean that all fences should be left up forever. If someone understands how a law or rule came to be, "and what purposes it was supposed to serve, he may really be able to say that they were bad purposes, or that they have since become bad purposes, or that they are purposes which are no longer served."[10]

A Carefully and Soundly Constructed Fence. The United States has arrived at the antitrust standards it now employs not by sleepwalking, but incrementally and through literal trial-and-error, as courts have grappled with real situations to determine whether a merger or conduct was anticompetitive. In the 1890 Congressional debates about the Sherman Antitrust Act, Senator John Sherman explained why the law is written so broadly: "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case."[11]

The courts then spent almost 90 years devising a workable standard to help them determine what conduct should be illegal under the federal antitrust laws. They quickly discarded any attempt to construe the Sherman Act strictly because banning every contract that restrains trade would lead to banning most contracts.[12] Looking back to the common law that pre-dated the Sherman Act, the courts said this new federal statute must be intended to ban only *unreasonable* restraints of trade.[13] Over time, as the government and private plaintiffs brought cases, the courts ascertained that certain kinds of restraints were always unreasonable and anticompetitive, so those were per se illegal. All other restraints had to be judged under the rule of reason, which assesses both the benefits and the harms of the conduct at issue.

Some commentators would turn antitrust into a series of rules that forbids various practices and mergers without examining their actual or likely effects given specific facts. These commentators refer to themselves as neo-Brandeisians.[14] Ironically, it was Justice Louis Brandeis who gave a classic formulation of the rule of reason, in his opinion for the Supreme Court in *Chicago Board of Trade v. United States*:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[15]

The current common law of antitrust was achieved slowly, through government enforcement and private litigation. As late as 1968, the Supreme Court held that setting maximum prices was always illegal.[16] But also by 1968, such rulings drew dissent both within the court and outside it.[17] More than a decade before the publication of his 1978 book, *The Antitrust Paradox*, Robert Bork was arguing in legal journals against the per se illegality of any vertical restraints on the grounds that these restraints could increase total output.[18]

While Bork referred to "the maximization of consumer want satisfaction through the most efficient allocation and use of resources" as "consumer welfare,"[19] the consumer welfare standard today seeks to maximize consumer surplus or, in economic terms, the difference between what each consumer actually pays and what he or she would be willing to pay.[20] The consumer welfare standard is sometimes misunderstood as caring only about prices. But if consumers' willingness to pay goes up based on quality, innovation, or other factors, then the improved version of a product increases consumer surplus even if the price does not decrease.[21] By 1979, the Supreme Court described the Sherman Act as a "consumer welfare prescription."[22]

Increasingly Sophisticated Economics. Both popular and scholarly accounts of this shift point primarily to Bork and the Chicago School for what they view as the failings of antitrust today.[23] But Phillip Areeda and others at Harvard influenced the rethinking of antitrust in the 1970s and 1980s.[24] Moreover, Bork did not originate the idea that competition enforcement should focus on benefiting consumers. It was commonplace in remarks by a diverse set of antitrust enforcers long before Bork popularized his ideas on total welfare. For example, FTC Commissioner Leon Higginbotham in 1963 praised the American competitive enterprise system because, although "our system is not free from fault . . . it has maximized consumer welfare; it has produced economic efficiency and technological progress."[25]

Bork, Areeda, and many other antitrust scholars helped courts understand *what* would benefit consumers. Rather than presuming that mergers, vertical restraints, below-cost pricing, and other business activities were harmful and thus should be illegal per se, these scholars provided a more complete picture of the costs and benefits. Economic research found benign explanations for highly concentrated markets, which broke from prior scholarship that was suspicious of concentration.[26] The updated research undercut the Structure-Conduct-Performance paradigm that had previously guided antitrust policy and judicial decisions.[27]

In the 1970s, the courts increasingly focused on the challenged restraint's market impact to determine whether it was anticompetitive and thus illegal. This evolution led the Supreme Court to overturn several of its own precedents that had deemed various kinds of practices to be per se illegal, opting instead to apply the rule of reason. For example, in *Continental T.V. v. GTE Sylvania*, the Supreme Court relied on economic reasoning to hold that nonprice vertical restraints, including the territorial restraints on franchisees at issue in the case, should be evaluated under the rule of reason.[28] The Court declared that the rule of reason standard must be based upon demonstrable economic effect.[29]

Several decades later, in 2015, the Supreme Court opined that "Congress . . . intended [the Sherman Act's] reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'"[30] Courts have revised the legal analysis as economic understanding has progressed, often with the help of amicus briefs from the FTC and the DOJ.[31] The Commission's Part 3 process also provides an important way to refine and update antitrust analysis. For example, in *Polygram Holding*, the U.S. Court of Appeals for the District of Columbia Circuit endorsed the Commission's abbreviated rule of reason analysis.[32]

International Convergence Toward Consumers. Some antimonopoly activists have attributed what they see as the flaws in U.S. antitrust law to its being judge-made common law.[33] Yet a move toward effects-based analysis is by no means unique to the United States; many civil law jurisdictions around the world that also began with inflexible, rules-oriented competition enforcement have evolved toward a less form-based approach.[34] Competition authorities' gathering in multilateral fora and building strong bilateral relationships have provided opportunities for a rich and continuing dialogue on best practices. Over the course of decades, these conversations have led to a consensus approach focused on the effect of business conduct on consumers.[35] This convergence is particularly notable in merger review, but it has occurred to some extent in the analysis of conduct as well,[36] despite significant variation in nations' legal and economic contexts.[37]

But even as the world has moved toward effects-based economic analysis in competition enforcement, the U.S. bipartisan consensus on antitrust may now be ending. This consensus followed decades of pendulum swings between intense antitrust enforcement and very little enforcement. Sometimes these reversals would occur under the same president—the Franklin Roosevelt administration first encouraged companies to cooperate to stabilize prices during the Great Depression, then prosecuted them for doing so.[38] At its worst, instability of that kind might sap confidence in antitrust policy and legitimize more radical solutions at both ends of the ideological spectrum.

Measuring competition by the consumer welfare standard is democratic because everyone is a consumer, whereas not everyone is a business owner, a shareholder, or even an employee.[39] Some scholars have advocated a "protecting competition standard,"[40] but this fails to satisfy the criteria of being administrable, predictable, and credible. What is a unit of competition? How is it to be measured? It seems to depend on a judgment that conduct "disrupts the competitive process." But in the absence of anticompetitive effects, this may be similar to Justice Potter Stewart's description of obscenity: "I know it when I see it."[41] The goal of protecting the competitive process also can become a slippery slope to the protection of competitors who complain about disruption.

Knowing the history of antitrust and regulatory policy is particularly crucial when evaluating proposals that call for a return to the past. For example, the House Staff Report holds up the now-defunct Interstate Commerce Commission and the now-repealed Congressional approach to regulating railroads as a model for the regulation of Big Tech.[42] The report explains that Congress passed a law in 1906 that banned railroads from transporting any goods that they had produced or in which they held an interest.[43] It connects railroads to technology companies by saying both are dominant intermediaries in network industries.[44] Notably, the report does not mention that this regulatory regime, and the ICC itself, were eventually abolished—as was a similar regulatory regime governing airlines.[45] In fact, a bipartisan consensus drove this deregulatory effort.[46] After decades of hearing complaints from their constituents about high prices and insufficient service, members of Congress realized that the constraints imposed on the railroad and airline industries were harming the very consumers they were designed to protect.[47] Congress therefore deregulated these industries except for the regulations covering health and safety.

The House Staff Report's historical perspective fails to explain how and why U.S. antitrust law evolved to its current state. So far as the report is concerned, there was no fence in 1890, and there should be no fence today.

Bulldozing the Fence

The House Staff Report is perhaps the most comprehensive set of proposals to tear down the antitrust fence, so its recommendations warrant a closer look.[48] Some of its proposals deal with conduct, others with mergers, and yet others with procedural issues. While the report ostensibly focuses on competition in digital markets—the investigation examined Alphabet, Amazon, Apple, and Facebook—many of its recommendations would apply to other sectors of the economy.[49]

Failure to Recognize or Reward Business Acumen. The report takes a static view of markets. A sweeping set of proposals, ranging from the revitalization of the essential facilities doctrine to prohibitions on various type of mergers, looks solely at a snapshot in time. The recommendations do not consider the incentives that led (or would lead) to the creation of facilities, technologies, and platforms. This static approach runs contrary to American lawmakers' dynamic perspective going back to the nation's founding. The Constitution specifically justifies the government grant of the copyright and patent monopolies—"securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"—because it would "promote the progress of science and useful arts."[50]

One such short-sighted proposal in the House Staff Report seeks to reduce a company's "conflicts of interest" through structural separations and restrictions on the lines of business into which it could enter.[51] This proposal fails to consider incentives for investment and innovation. For example, if a firm is already a popular seller of products—whether these are physical products or apps—why would it open a marketplace to third-party sellers, if doing so will mean that it is forbidden to operate in that marketplace itself? Yet the lack of such a marketplace makes both the third-party sellers and consumers worse off. Existing antitrust law already can police against actual anticompetitive conduct, such as exclusion, where it harms consumer welfare.[52]

The report recommends mandating interoperability for dominant firms—in other words, forcing certain tech companies to enable competitors to interconnect with them, so users can communicate across services.[53] Some observers have pointed to the Federal Communications Commission's order on the *AOL/Time Warner* merger as an instance in which the government successfully demanded that a dominant platform provide for interoperability.[54] The FCC feared that the merged company would dominate the advanced instant-messaging-based high-speed services market and conditioned its approval on AOL implementing instant-messaging interoperability.[55] However, AOL eventually said it was unable to make instant-messaging interoperability work and had the order waived.[56] Agencies can order tech companies to do things, but that does not mean those directives will be feasible or even possible to implement.

Interoperability and data portability have the potential to improve consumers' lives and increase competition, but they merit close examination before being turned into legal mandates on the private sector. The FTC is pursuing this kind of examination; in September 2020, it held a virtual workshop on data portability that featured chief technologists from both the public and private sectors.[57] These experts acknowledged the issues that arise from interconnection, including the security of personal data, the problem of identity verification for data transfer requests, and privacy concerns for those whose data may be transferred as part of another person's request.

Reliance on Regulation over Consumer Choice. The House Staff Report also recommends that Congress prohibit the abuse of superior bargaining power, including through potentially targeting contracts deemed to be anticompetitive, and introduce due process protections for individuals and businesses dependent on the dominant platforms.[58] "Abuse" is an amorphous term that, if not carefully cabined by guidelines and case law, can empower enforcers to challenge any conduct they disfavor. For example, some observers have suggested that mandatory arbitration of consumer or worker disputes is an abuse that signals the existence of market power,[59] even though arbitration clauses have become standard in contracts and terms of service from incumbent firms and new entrants alike.[60]

The proposal for the United States to prohibit the abuse of superior bargaining position appears to import the competition laws of some foreign jurisdictions.[61] Regulations like Japan's platform guidelines[62] and enforcement matters like Germany's Facebook case[63] seek to protect consumers from companies' superior bargaining power. But they may have the effect of reducing consumers' choices. Many consumers may rationally conclude that the ability to upload and share an unlimited number of high-definition digital photos or videos online, without paying a penny for server space and webhosting, is a good trade for their data. These emerging competition principles about abuse of superior bargaining position could preclude consumers from rationally choosing to make this trade.

Consumers should have the information necessary to evaluate the pros and cons of this trade, which will require federal privacy legislation that gives them greater transparency regarding which data are collected, and how those data are processed, shared, and monetized.[64] Legislation that limits the types of data that can be collected, shared, and monetized also may provide breathing room for new companies to innovate and enter. Thus, privacy legislation could have the benefit of injecting competition into the tech space. But governments should empower consumers to make genuinely informed choices, not remove their decision-making authority.

Elevation of Bright-Line Rules and Structural Presumptions. Devolving from an effects-based to a form- or rules-based competition regime is no less harmful in the area of mergers than it is for conduct. The House Staff Report calls for Congress to reduce market power through merger presumptions. Any acquisition by a dominant platform—even one in an unrelated market—would be presumed anticompetitive unless the merging parties could show that the transaction is necessary to serve the public interest and that similar benefits could not be achieved through internal growth and expansion.[65]

This proposal is problematic for several reasons. First, it requires defining a market up front to know whether the company is "dominant." This approach harkens back to the outdated structuralist focus on market share, instead of looking at the actual or likely effects of the acquisition.[66] The vague "public interest" standard similarly takes enforcers backward from the consumer welfare standard. Instead of using a metric underpinned by economic tools of analysis to determine whether consumers are harmed or benefited by a merger, this proposal would have enforcers engage in an almost unavoidably political calculus of whose interests to serve.

Second, the merger presumption flips the burden of proof from the enforcer to the private sector and interferes with the free market pursuit of ways to respond to demand. Companies routinely decide whether to "build or buy" new products and capabilities. In acquiring another company to achieve a goal rather than doing so through internal growth and expansion, a company calculates that it is more efficient not to reinvent the wheel using finite resources. An approach that deems merging parties guilty until proven innocent offends long-established American notions of liberty.

Along the same lines, the report recommends that Congress codify bright-line rules and structural presumptions in concentrated markets. Specifically, any transaction that would give a single firm 30 percent or more of a market would be presumptively prohibited, with an even lower market share required for monopsony or buyer power claims.[67] The would-be merging companies would carry the burden of proof to show that the merger would not reduce competition, and they could not point to efficiencies to overcome the presumption.

A codified presumption ignores the many differences among markets, especially regarding barriers to entry and the potential for technological change to enable leaps over those barriers. A 30 percent share in the market for cement in 2005 was not like a 30 percent share in the market for movie rentals at home. No technology was on the horizon to revolutionize adhering bricks to one another, but there *was* technology that displaced the store rental, first with Netflix's mail delivery and then streaming video on demand.[68]

Prohibiting mergers that would create a 30 percent market share also prevents smaller competitors from combining to challenge a market leader. The classic example of this prohibition in U.S. antitrust was the FTC's successful lawsuit to block the merger of two baby food companies that, together, held just over 30 percent market share.[69] Heinz and Beech-Nut argued that Beech-Nut's superior recipes and Heinz's underutilized manufacturing facilities, when combined, would create a stronger rival to the dominant company, Gerber.[70] After an appellate court ruled against the merger, Heinz sold its baby food business, which eventually exited the U.S. market entirely.[71] A 2009 retrospective by an FTC economist found that Beech-Nut lost some market share, while Gerber's share increased and no significant entrants captured the share Heinz previously held.[72]

These consequences suggest that blocking the *Heinz/Beech-Nut* merger may have been an example of erroneous enforcement. Yet, in an assumption that appears to drive the report as a whole, the Subcommittee simply asserts as fact that "false positives" (or erroneous enforcement) are no more costly than "false negatives" (erroneous non-enforcement), and that, when relating to conduct or mergers involving dominant firms, false negatives are costlier.[73] But false positives cannot be corrected by the market, whereas false negatives can. Heinz and Beech-Nut were legally barred from combining. Had they been permitted to merge and prices increased as the FTC's lawsuit predicted, a new entrant still could capture market share by offering a lower-priced option.

The government has a strong track record against horizontal mergers, raising the question of how many outcomes would be affected by changed presumptions. No merger litigated by the DOJ under the 2010 Horizontal Merger Guidelines has closed, and the FTC has won 11 of the 15 challenges it took to court in the past decade. Thus, under the 2010 Guidelines, the federal government has won 77 percent of merger challenges resolved by the courts, and every appellate horizontal merger case since 2010. In many other instances, the parties abandon their transactions after the government investigates or announces its intent to challenge the deal.[74] Altered presumptions therefore might be a solution in search of a problem.

Repairing the Fence

Understanding why a fence was built does not preclude considering whether it needs a fresh coat of paint or new hinges to replace the now-rusty originals. Congress created the FTC to be an expert agency, and the Commission has built that expertise in large part by seeking input from stakeholders on emerging policy issues and updating its approach accordingly. For example, following calls by politicians and antimonopoly activists to ban non-competes in employment agreements, the FTC in January 2020 held a public workshop to examine the legal basis and empirical economic support for promulgating a rule against these contract provisions.[75] This mode of operation complements the common-law development, and illustrates the incremental and evidence-based evolution, of antitrust law. Of course, this evolution will never be complete because economic analysis will continue to advance and dynamic markets will continue to transform. In addition, concerned citizens will continue to demand good government and businesses will continue to benefit from clarity and predictability in law enforcement. For that reason, we agree that some changes to legislation and agency practice would improve the future of antitrust.

Certain recommendations from critics of the status quo are worth embracing. One proposal in the House Staff Report would "enhanc[e] the public transparency and accountability of the antitrust agencies, by requiring the agencies to solicit and respond to public comments for merger reviews, and by requiring the agencies to publish written explanations for all enforcement decisions."[76] Having the FTC publish more written explanations for its enforcement decisions, including those that did not result in the agency's taking action, would be informative for consumers and businesses.[77] Particularly with respect to mergers, several competition authorities, such as those in the United Kingdom, European Union, and Singapore, disclose their thinking when they decline to take enforcement action.

A second laudable proposal in the House Staff Report recommends that Congress consider "requiring the agencies to conduct and make publicly available merger retrospectives on significant transactions consummated over the last three decades."[78] As the *Heinz/Beech-Nut* example illustrates, retrospectives enable competition enforcers to check their homework and refine their enforcement approach.

Citing the submissions of FTC alumni, the report also suggests increasing the budgets of the FTC and the Antitrust Division.[79] The antitrust agencies' funding has not kept pace with the cost of living or even the mandatory salary increases for staff, which means the number of enforcers has declined. At the same time, the size of the economy has increased.[80] To the extent observers believe the agency is falling short, more resources—which may be funded by adjustments to merger filing fees[81]—could go a long way toward addressing those concerns.

Beyond the recommendations of the House Staff Report, Congress should clarify and, in some cases, augment the FTC's authorities. In the wake of the Supreme Court's 9-0 ruling in *AMG Capital Management*,[82] the agency would welcome legislation to affirm the Commission's power to seek permanent injunctive and monetary relief under Section 13(b) of the FTC Act,[83] and to amend the FTC Act to authorize the FTC to enforce competition law against non-profits and common carriers.

From Fences to Walls

The United States is not alone in questioning whether competition laws need to be overhauled. For example, in February 2019 the then-chairman of the United Kingdom's Competition and Markets Authority said the government's "growing concern" about the status quo was "well-founded," given the "increasing signs that the public doubt whether markets work for their benefit."[84] Polls indicate that many young people feel that capitalism is failing them. But capitalism and the system of antitrust law built slowly and carefully over decades should not be torn down. Instead, crony capitalism is the source of obstructions that entrench incumbents, diminish competition, and leave consumers and new entrants out in the cold.

Capitalism is a system in which the production of goods and services is based on supply and demand in the market rather than central planning, and government intervenes only where necessary to address market failures. In contrast, crony capitalism is a system in which lobbyists engage in rent-seeking and legislatures create laws and regulators create rules that pick winners and losers. A labyrinth of government contracts, regulations, and arbitrary enforcement engenders a feeling of hopelessness among citizens, who see no way to better their lives if they are not favored by the rule-makers.[85] Lobbying by dispersed players with an easily identifiable common interest can be just as pernicious for consumers and would-be competitors as lobbying by large companies.[86] The FTC has investigated, advocated against, and in some cases litigated against regulatory boards made up of active market participants who used state power delegated to them to wall off competition from other providers.[87]

In accordance with Chesterton's counsel regarding any existing institution, reformers who wish to take down the walls put up by crony capitalism must first examine whether those walls had any good purpose, and whether the walls actually serve that purpose.[88] For example, a large scholarly literature indicates that many occupational licensing restrictions protect incumbent profits more than consumers' health and safety, and particularly impede immigrants and other new workers.[89]

Rejecting crony capitalism will help restore the faith of the citizenry in our antitrust regime. As must all wise reformers, those who wish to tear down that regime should demonstrate that they understand why it exists and should explain why it no longer serves citizens. The United States and many other jurisdictions already have tried competition law that sought to serve multiple constituencies through enforcement based on bright-line rules. After seeing that approach fail, these diverse legal systems built a consensus for enforcement driven by effects-based economic analysis under the consumer welfare standard as the best way to benefit consumers and earn their trust.

The right approach is not to overhaul antitrust, but to clear away the unnecessary obstacles to free market competition—protections for incumbents, restrictions on market entry, and exemptions from antitrust liability[90]—that government has created. Once government is no longer putting its thumb on the scales, citizens will enjoy the freedom to compete on the merits as entrepreneurs, and to enjoy the fruits of free market competition as consumers.

1 Policy Statement, U.S. Sen. Democrats, A Better Deal: Cracking Down on Corporate Monopolies (July 24, 2017), https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf.

2 Anti-Monopoly and Competition Restoration Act § 2(a)(12) (draft copy of SIL19C37). With respect to anticompetitive conduct, the bill would have prohibited vertical market allocation for products that have been on the market longer than a year, non-compete clauses in employment contracts and no-poach agreements affecting franchisees. The bill's text also said the courts have "misinterpreted antitrust laws by adopting the misguided consumer welfare standard."

3 Bust Up Big Tech Act, S. 1204, 117th Cong. (2021).

4 Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong. (2021). Condemnation based on companies' size rather than anticompetitive effects or even market share—the "big is bad" ethos—has become popular among some scholars as well. *See, e.g.*, Zephyr Teachout, Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform 4 (Jan. 23, 2014) (suggesting "that a company that grows larger than $10 billion in assets or liabilities should lose its limited liability, and the government should be authorized to break it up").

5 Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Congress (2021).

6 *See* H. Comm. on the Judiciary, Subcomm. on Antitrust, Commercial, and Administrative Law, Investigation of Competition in Digital Markets: Majority Staff Rep. and Recommendations, 116th Cong. (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter House Staff Report]. The Judiciary Committee formally adopted the report on a party-line vote in April 2021.

7 *See* House Staff Report, *supra* note 6, at 391.

8 *Id.*

9 G.K. Chesterton, *The Drift from Domesticity*, *in* 3 The Collected Works of G.K. Chesterton 157 (Ignatius Press 1990).

10 *Id.*

11 21 Cong. Rec. 2460 (1890) (statement of Sen. Sherman).

12 *See* United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 327–28 (1897). On how antitrust overcame void for vagueness problems, see Nash v. United States, 229 U.S. 373, 376–78 (1913).

13 *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").

14 *See, e.g.*, Open Markets, *Restoring Antimonopoly Through Bright-Line Rules*, ProMarket (Apr. 26, 2019), https://promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. Eur. Competition L. & Prac. 131, 131–32 (2018). (Khan is currently Chair of the Federal Trade Commission.)

15 246 U.S. 231, 238 (1918).

16 *See* Albrecht v. Herald Co., 390 U.S. 145, 152–53 (1968), *overruled by* State Oil Co. v. Khan, 522 U.S. 3, 7 (1997).

17 *Id.* at 156 (Harlan, J., dissenting).

18 *See* Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 Yale L.J. 950, 950–64 (1968).

19 *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part I*, 74 Yale L.J. 775, 781 (1965).

20 *See* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 336 (2010).

21 This antitrust principle has long been understood. *See, e.g.*, United States v. Am. Can Co., 230 F. 859, 901–04 (D. Md. 1916). For a general review of populist claims, see D. Daniel Sokol, *Antitrust's "Curse of Bigness" Problem*, 118 Mich. L. Rev. 1259 (2020).

22 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

23 *See, e.g.*, Ayad Akhtar, Homeland Elegies, 232–66 (2020); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It, supra* this issue, at 39.

24 *See, e.g.*, William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1, 6 (2007) ("The habit of analyzing modern U.S. antitrust experience as a Chicago School/Post-Chicago School struggle obscures a critical intellectual foundation for the U.S. system and, by diminishing our understanding of the sources of doctrine and enforcement policy, clouds our view of how the system might change in the future. One source of my discomfort has been the awareness that two Harvard School scholars, Phillip Areeda and Donald Turner, spurred the rethinking of modern predatory pricing doctrine with their proposal in 1975 that a dominant firm can ordinarily be presumed to be acting legally under the antitrust laws when it sets its prices at or above its average variable costs.") (citing Phillip Areeda & Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975)).

25 Leon A. Higginbotham, Can a Vigorous FTC Enforcement Policy be Pro-Business? Address before Ohio State Bar Association and the Ohio Manufacturers Association's Seventh Annual Institute on Corporate Legal Problems (June 20, 1963), https://www.ftc.gov/public-statements/1963/06/can-vigorous-ftc-enforcement-policy-be-pro-business.

26 *See, e.g.*, Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* Industrial Concentration: The New Learning 164 (Harvey J. Goldschmid et al. eds., 1974)); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 945 (1979) (summarizing this work in economics).

27 The Structure-Conduct-Performance paradigm claimed that higher industry concentration was correlated with higher prices and profit margins. *See generally* Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing 1936–1940*, 65 Q.J. Econ. 293 (1951). The new economic learning challenged the basis for decisions like *FTC v. Procter & Gamble*, 386 U.S. 568, 575 (1967) (upholding the Commission's decision against Procter's acquisition of Clorox on the grounds that Procter's "huge assets and advertising advantages . . . would dissuade new entrants and discourage active competition from the firms already in the industry due to fear of retaliation by Procter").

28 433 U.S. 36, 54–57 (1977).

29 *Id.* at 58–59.

30 Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461 (2015) (contrasting the courts' "exceptional law-shaping authority" in antitrust with "the usual strong force" of stare decisis in patent cases).

31 *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, State Oil Co. v. Khan, 522 U.S. 3 (1997) (No. 96-871).

32 Polygram Holding, Inc. v. FTC, 416 F. 3d 29, 35–38 (D.C. Cir. 2005) (upholding the Commission's decision that that PolyGram's agreement with Warner not to discount or advertise albums by the Three Tenors likely harmed consumers).

33 *See, e.g.*, Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655, 1679 (2020) (book review) ("Several of the flaws that Wu identifies in current antitrust law trace back to (or at least were enabled by) this institutional structure.") (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018)).

34 *See, e.g.,* Damien M.B. Gerard, *The Effects-Based Approach Under Article 101 TFEU and its Paradoxes: Modernisation at War with Itself? in* Ten Years of Effects-Based Approach in EU Competition Law Enforcement 18, 18–22 (J. Bourgeois & D. Waelbroeck eds., 2012); Koki Arai, *Merger Assessment in Japan: The Declining Importance of Market Shares*, 6 J. Eur. Competition L. & Prac. 337, 344 (2015).

35 *See, e.g.*, Alberto Pera & Vito Auricchio, *Consumer Welfare, Standard of Proof and the Objectives of Competition Policy*, Eur. Competition J., vol. 1, issue 1, at 153 (2005) ("[T]his convergence has led to the general acceptance of consumer welfare as the standard for the evaluation of restrictive practices."); OECD, Report on Country Experiences with the 2005 OECD Recommendation on Merger Review 62 (2013) ("The antitrust community has increasingly recognised over the last 10–15 years that maximisation of consumer welfare is best achieved by a competition policy centred on the analysis of the likely effects of firms' conduct.").

36 *See generally* Margaret Bloom, *The U.S. and EU Move Towards Substantial Antitrust Convergence on Consumer Welfare Based Enforcement*, Antitrust, Summer 2005, at 18.

37 *See, e.g.*, OECD, Regulatory Reform in Japan: The Role of Competition Policy in Regulatory Reform 6 (1999) ("Japan's economic success now makes it possible, indeed imperative, to shift policy goals from 'catch-up' development to consumer welfare.");

38 *See* Daniel A. Crane, *The Story of* United States v. Socony-Vacuum*: Hot Oil and Antitrust in the Two New Deals*, *in* Antitrust Stories 94 (Eleanor Fox & Daniel Crane eds., 2007) ("The 27 oil companies and 56 of their employees were shocked to be criminally indicted in Madison, Wisconsin for violating Section 1 of the Sherman Act. After all, the misconduct alleged was participating in a petroleum stabilization program that had originated in the highest echelons of the very federal government that was now bringing the indictment. But such is the political nature of antitrust enforcement. Today's dogma is tomorrow's relic. The historical volatility of antitrust may come [as] a surprise to those weaned on the Chicago School consensus of the past thirty years, which has largely driven dissenting voices to the margins of the antitrust conversation. With few exceptions, competition policy has come to be perceived as technocratic, conservative, and incremental. But it was not always this way.").

39 *See* President John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest (Mar. 15, 1962) ("Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision.").

40 *See, e.g.*, Shapiro, *supra* note 23, at 33; Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, 1 Antitrust Chron. 12 (2018). (Wu is currently Special Assistant to the President for Technology and Competition Policy at the National Economic Council.) *See also* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 Antitrust L.J. 713 (2014).

[41] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[42] *See* House Staff Report, *supra* note 6, at 383.

[43] *See id.* at 380; *see also* Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906), https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/34/STATUTE-34-Pg584.pdf.

[44] House Staff Report, *supra* note 6, at 383.

[45] The House Staff Report notes that in 1958, the Antitrust Subcommittee "exposed the behind-the-scenes anticompetitive campaign that incumbent air carriers and their advocacy group, the Air Transport Association of America (ATA), had been waging to prevent the Civil Aeronautics Board (CAB) from approving market entry by new air carriers," and recommended an investigation by the Antitrust Division. House Staff Report, *supra* note 6, at 34. As for international air transportation, the report concluded that Pan American's dominance in the market was the "result of its use of devices to foreclose competition in order to secure and maintain control over markets in which it does business," and recommended that the CAB undertake a broad investigation of the company. *Id.* It does not acknowledge that the CAB, and its market-regulating power to approve or disapprove entry, no longer exists.

[46] *See, e.g.*, William H. Jones, *Carter Backs Airline Regulation Reform*, Wash. Post, Feb. 24, 1977, at C13 ("President Carter indicated yesterday that his administration plans to support broad reform of federal airline regulations, as proposed recently by Sens. Edward M. Kennedy (D-Mass.) and Howard W. Cannon (D-Nev.)"); Nancy L. Rose, *After Airline Deregulation and Alfred E. Kahn*, 102 Am. Econ. Rev., 376, 376 (2012) ("Alfred E. 'Fred' Kahn is widely remembered as 'The Father of Airline Deregulation.' Though he consistently redistributed credit for the reform, Kahn's candor, wit, and willingness as chairman of the Civil Aeronautics Board to step outside the 'regulation as usual' box established him as the face at its forefront. This legacy is enormous, as the 1978 Airline Deregulation Act may be one of the greatest microeconomic policy accomplishments of the past fifty years.").

[47] Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. Antitrust Enforcement 10, 13–14 (2020).

[48] This article was drafted before the introduction of H.R. 3816, H.R. 3825, H.R. 3826, and H.R. 3849.

[49] Emily Birnbaum, *Jim Jordan Dissents from Antitrust Report*, Politico (Apr. 23, 2021) ("[T]he Subcommittee's investigation concerned 'digital markets'—something clear from the staff report's table of contents describing 'markets investigated,' and from the body of the staff report. However, despite the limited scope of the investigation, the Democrats' staff report concludes with a broad set of recommendations. If implemented, many of these recommendations would overhaul antitrust laws that apply to every sector of the American economy.").

[50] U.S. Const. art. I, § 8, cl. 8; *cf.* "To James Madison from Thomas Jefferson, 28 August 1789," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/01-12-02-0242 ("I must now say a word on the declaration of rights you have been so good as to send me. I like it as far as it goes; but I should have been for going further. For instance the following alterations & additions would have pleased me . . . . Art. 9. Monopolies may be allowed to persons for their own productions in literature & their own inventions in the arts, for a term not exceeding __ years but for no longer term & no other purpose.").

[51] House Staff Report, *supra* note 6, at 378.

[52] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58–80 (D.C. Cir. 2001).

[53] House Staff Report, *supra* note 6, at 385.

[54] *See, e.g.*, *Hearing on Online Platforms and Market Power, Part 3: The Role of Data Privacy and Privacy in Competition Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 6–7 (2019) (written testimony of Rohit Chopra, Commissioner, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1549812/chopra_-_testimony_at_hearing_on_online_platforms_and_market_power_part_3_10-18-19.pdf ("More recently, the government conditioned the America Online (AOL) and Time Warner merger by requiring that the dominant AOL Instant Messenger chat platform become interoperable, spawning new competition and innovation.").

[55] *See* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL-Time Warner, Inc.

[56] *See* Petition of AOL Time Warner Inc. for Relief from the Condition Restricting Streaming Video AIHS, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, F.C.C. 03-193 (2003) ("AOL Time Warner has now requested the elimination of this condition, pursuant to procedures specified in the Order. . . . [W]e grant the petition and remove the condition.").

[57] *Data To Go: An FTC Workshop on Data Portability*, Fed. Trade Comm'n, (Sept. 22, 2020), https://www.ftc.gov/news-events/events-calendar/data-go-ftc-workshop-data-portability.

[58] House Staff Report, *supra* note 6, at 389–390.

[59] *See, e.g.*, Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 245 (2019) ("[S]ome companies may abuse their market power to impose arbitration agreements with one-sided terms for the purpose of suppressing consumer claims"), https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf

[60] For example, three companies called by the majority as witnesses for the Subcommittee's "Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy," to testify about their difficulties with the large tech companies, feature arbitration clauses in their consumer terms of service. *See* Sonos, Inc. Terms of Use, License and Warrant Agreement, Binding Arbitration Agreement (last updated June 2020), https://www.sonos.com/pdfs/eula/2020-eula-en-us.pdf; Tile Terms of Service, Section 25, Dispute Resolution by Binding Arbitration (last updated Jan. 21, 2021), https://www.thetileapp.com/en-us/terms-of-service#Dispute_Resolution_by_Binding_Arbitration; PopSockets LLC Terms of Use, Arbitration Provision, https://www.popsockets.com/pages/app-termsconditions.html.

[61] *See* Christine S. Wilson, Commissioner, Fed. Trade Comm'n, Global Innovation, Local Regulation: Navigating Competition Rules in the Digital Economy, Remarks at UIC John Marshall Law School Center for Intellectual Property, Information and Privacy Law Conference Digital Platforms: Innovation, Antitrust, Privacy & the Internet of Things (Mar. 13, 2020).

[62] *See* Press Release, Japan Fair Trade Comm'n, Request for Public Comments on Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act on the Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. (Aug. 29, 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829.html.

[63] *See* Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (July 2, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

[64] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Free Markets, Regulation, and Legislation: A Place for Everything, and Everything in Its Place, Remarks at the Free State Foundation Twelfth Annual Telecom Policy Conference, Washington, D.C. 13 (Mar. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1568831/wilson_-_free_state_foundation_keynote_3-10-20.pdf.

[65] House Staff Report, *supra* note 6, at 387–88.

[66] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.0 (2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[67] House Staff Report, *supra* note 6, at 393.

[68] *See* Paul Bond, *Blockbuster Ready To Get Hostile*, Hollywood Rep. (Mar. 17, 2005) (describing Blockbuster Video's view, in the context of its attempted acquisition of rival video rental chain Hollywood Entertainment, that it is constrained by cheap video sales, subscription DVD-by-mail services, video-on-demand and digital video recorder technologies).

[69] *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 727 (D.C. Cir. 2001).

[70] *See id.* at 722.

[71] *See* Viola Chen, *The Evolution of the Baby Food Industry 2000–2008*, 6 J. Competition L. & Econ., 423, 428 (2010).

[72] *See id.* at 441.

[73] House Staff Report, *supra* note 6, at 399.

[74] *See* Ian R. Conner, *2020: Remote Work with Real Results*, Competition Matters (Jan. 5, 2021) https://www.ftc.gov/news-events/blogs/competition-matters/2021/01/2020-remote-work-real-results ("[A]nother ten mergers were abandoned after we started our investigation").

[75] Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020) https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

[76] House Staff Report, *supra* note 6, at 403.

[77] OECD, Policy Brief: What Is Competition on the Merits? 6–7 (June 2006) ("It is desirable to make the reasoning in competition agencies' decisions more transparent because doing so will clarify how competition laws are being interpreted and enforced. . . . the US Federal Trade Commission aims to explain its no-action decisions . . . . No-action decisions likewise need to be very clear in explaining why conduct that might appear to be superficially unlawful is actually competition on the merits when looked at soberly in the light of market facts."). *But see* Pallavi Guniganti, *FTC Cautious About Closing Statements After* Staples*, Agency Official Says*, Global Competition Rev. (Dec. 3, 2018).

[78] House Staff Report, *supra* note 6, at 403.

[79] *Id.*

[80] *See* Dissenting Statement of Comm'r Rebecca Kelly Slaughter on the Fed. Trade Comm'n Fiscal Year 2021 Budget Request (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566145/p859900budgetslaughterstatement_0.pdf ("[M]ore funding is necessary to meet the increasing demands on the FTC to protect American consumers.").

[81] S. 1937, 116th Cong., Merger Filing Fee Modernization Act of 2019.

[82] AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

[83] S. 4626, 116th Cong., SAFE DATA Act (affirming the authority of the Commission to seek permanent injunction and equitable remedies).

[84] *See, e.g.*, Letter from Andrew Tyrie, Chairman, Competition & Mkts. Auth., to Greg Clark, Sec'y of State for Bus., Energy & Indus. Strategy, Dep't. for Bus., Energy & Indus. Strategy 4 (Feb. 25, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.

[85] In developing economies, the harms may be suffered even more severely. *See, e.g.*, Lin Noueihed, *Peddler's Martyrdom Launched Tunisia's Revolution*, Reuters (Jan. 19, 2011), https://www.reuters.com/article/tunisia-protests-bouazizi-idAFLDE70G18J20110119 ("Local authorities had confiscated Bouazizi's unlicensed cart several times before, but the turning point for the 26-year-old, and for his town and ultimately his country, came on December 17. The breadwinner in a family of eight, Bouazizi argued with a policewoman who took away his goods and scales. . . . 'In Sidi Bouzid, those with no connections and no money for bribes are humiliated and insulted and not allowed to live.'").

[86] *See, e.g.*, Richard J. Pierce Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537, 550 (1998) ("The unanimous enactment of [the Small Business Regulatory Enforcement Fairness Act] completes the picture of a political environment in which small business is a far more potent special interest group than big business.").

[87] *See, e.g.,* FTC v. N.C. State Bd. of Dental Exam'rs, 574 U.S. 494 (2015); Statement of the Fed. Trade Comm'n on Commission Vote To Close Investigation of Texas Medical Board's Conduct (June 21, 2017), https://www.ftc.gov/system/files/documents/public_statements/1225993/1510180_texas_medical_board_statement_of_the_commission_6-21-17.pdf ("[T]he Commission voted to close its investigation into whether the Texas Medical Board ('TMB') violated federal antitrust law by adopting rules restricting the practice of telemedicine and telehealth in Texas . . . after Texas enacted a law that establishes a regulatory structure that fosters the growth of competitive and innovative healthcare services for Texas consumers, overriding the TMB's restrictive rules."); FTC Comment to Texas Attorney General Raises Concerns About Likely Competitive Effect of Proposed Regulations Imposing Additional Supervisory Requirements on Texas Certified Nurse Anesthetists (Sept. 14, 2020) (FTC staff clarifying that it has never recommended mandatory physician supervision of CRNAs or other advanced practice nurses).

[88] *See supra* note 9, at 157.

[89] *See, e.g.*, *Hearing on License to Compete: Occupational Licensing and the State Action Doctrine Before the United States S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy, and Consumer Rights* (prepared testimony of Jason Furman Feb. 2, 2016) and The Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor, "Occupational Licensing: A Framework for Policymakers" (2015) (collecting and summarizing the literature).

[90] For example, these obstacles manifest in the health care provider sector as restrictions on the scope of practice, interstate practice, and telemedicine; certificate of need laws; and certificates of public advantage that immunize against federal antitrust law. *See generally* Christine S. Wilson & Pallavi Guniganti, *Deregulating Health Care in a Pandemic—and Beyond*, Antitrust, Summer 2020, at 14.