

9-2018

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Ganesh Sitaraman

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## Recommended Citation

Ganesh Sitaraman, *Taking Antitrust Away from the Courts* The Great Democracy Initiative. 1 (2018)

Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/1046>

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# Taking Antitrust Away from the Courts

A Structural Approach to Reversing the  
Second Age of Monopoly Power

REPORT BY **GANESH SITARAMAN**  
SEPTEMBER 2018

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GREAT  
DEMOCRACY  
INITIATIVE

# THE GREAT DEMOCRACY INITIATIVE

## ABOUT THE GREAT DEMOCRACY INITIATIVE

The Great Democracy Initiative develops policy blueprints that offer solutions to the most pressing problems of our time. From taming the concentration of power in our economy to fundamentally reforming our broken government, GDI aims to generate policy ideas that confront the forces that have rigged our society in favor of the powerful and connected.

## ABOUT THE AUTHOR

**Ganesh Sitaraman** is the Co-founder and Director of Policy for the Great Democracy Initiative. He is also a professor of law at Vanderbilt University. Sitaraman served as policy director to Senator Elizabeth Warren during her Senate campaign, and then as her senior counsel in the U.S. Senate. He is the author of *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* and *The Counterinsurgent's Constitution: Law in the Age of Small Wars*, which won the 2013 Palmer Prize for Civil Liberties.

# Executive Summary

We live in the second age of monopoly power. A small number of firms hold significant market power in a wide variety of sectors of the economy, leading commentators across the political spectrum to call for a reinvigoration of antitrust enforcement. And yet, the antitrust agencies have been surprisingly timid in response to this challenge, and when they have tried to assert themselves, they have often found that hostile courts block their ability to foster competitive markets.

This report roots this problem in the structure of the antitrust laws and agencies and offers an agenda for reform. In other areas of law, Congress delegates power to agencies, agencies make regulations setting standards, and courts provide deferential review after the fact. Antitrust doesn't work this way. Courts – made up of non-expert, unaccountable judges – set much of antitrust policy. This report provides a set of recommendations to take antitrust away from the courts – to restructure the antitrust laws and agencies in order to enhance the government's ability to enforce antitrust laws more effectively and more transparently.

## Recommendations:

- 1 Reinvent the FTC as a new Anti-Monopoly Agency (AMA)
- 2 Eliminate Duplicative Merger Review Authority
- 3 Require Transparency, Participation, and Justification for Merger Approvals
- 4 Institute Retrospective Review of Mergers
- 5 Transform the Bureau of Economics into a Bureau of Investigations and Research
- 6 Create an Office of Competition Advocate
- 7 Expand Third Party Enforcement
- 8 Restrict Conduct and Conditional Enforcement Remedies
- 9 Require the Small Business Administration to Consider Competition Policies
- 10 Advocate for Competition Policy Abroad
- 11 Require All Agencies to Incorporate Anti-Monopoly Considerations in their Decisions
- 12 Empower the States to Review Mega-Mergers

# Introduction: The Second Age of Monopoly Power

We live in a second age of monopoly power. The first age, which spanned from the Gilded Age of the late 19th century through the Progressive Era in the early 20th century was marked by the growth of corporations into “trusts.” From 1894 to 1904, hundreds of corporations disappeared as the “Great Merger Movement” led to consolidation and concentration in many sectors of the economy.<sup>1</sup> Decried in the general public, the trusts were caricatured as octopuses with tentacles extending across sectors of the economy and into government.

**“There can be no real political democracy unless there is something approaching an economic democracy.”**

Theodore Roosevelt

In response to the first age of monopoly power, Americans across party lines rallied to fight the trusts and monopolies that threatened freedom and democracy. Republican John Sherman of Pennsylvania authored the Sherman Anti-Trust Act of 1890 and was joined by the Republican “Trustbuster” Teddy Roosevelt in seeking to rein in powerful corporations. Democrat Woodrow Wilson signed the Clayton Anti-Trust Act and the Federal Trade Commission Act, supported by advocate and later Supreme Court Justice Louis Brandeis. Right and left, Americans of that era understood that massive economic concentration was a threat not just to a free and competitive marketplace, but a threat to our constitutional democracy. As Theodore Roosevelt put it, “There can be no real political democracy unless there is something approaching an economic democracy.”

In recent years, we have entered a second era of monopoly power, with growing concentration across sectors of the economy. Four airlines now control 80 percent of the market.<sup>2</sup> Three drug stores control 99 percent of the market.<sup>3</sup> Four beef companies control 85 percent of the market.<sup>4</sup> The Fortune 100 now makes up nearly 50 percent of GDP, with the top 20 firms capturing more than 20 percent.<sup>5</sup>

Commentators across the ideological spectrum have noticed and criticized America’s monopoly problem: from progressives like Joe Stiglitz and neoliberals like Bloomberg’s

Noah Smith to conservative Breitbart columnist Virgil and establishment centrists at the Brookings Institution and *The Economist*.<sup>6</sup> Even Congress has gotten involved, with members of the House creating an Antitrust Caucus and the Senate Judiciary Committee holding hearings on the question of the goals of antitrust.

There is widespread interest in corporate consolidation because the concentration of economic power is a threat not just to the American economy but also to freedom and democracy. Economically, monopolists have the ability to hold consumers hostage, raise prices on goods and services, and deliver worse quality goods and services – which is especially problematic when their goods or services are essential in a modern economy. Rising concentration also contributes to widening inequality. As mega-corporations use their market power to squeeze suppliers and consumers to gain higher profits, those benefits accrue to their executives and shareholders, most of whom are on the wealthier side of the population.<sup>7</sup> Some economists have shown that growing concentration is leading to inter-firm inequality and with it, increased inequality in society.<sup>8</sup> Others have found that concentrated markets lead to lower wages.<sup>9</sup> The rise of monopolies also threatens America’s innovative and entrepreneurial status. Powerful companies don’t want competition and are likely to use their market (and political power) to stop, delay, or otherwise prevent disruptive innovators from gaining traction. In recent years, economic researchers have confirmed this: not only is the rate of new companies plummeting across sector and geographies, but consolidation is an important factor contributing to the decline in new business formation.<sup>10</sup>

Economic power is also a danger because it turns into political power.<sup>11</sup> Mega-corporations are able to contribute to candidates, lobby legislators and regulators, dominate trade associations, hold cities hostage for economic giveaways, and shape the law to favor their interests at the expense of everyone else. Unlike small businesses or ordinary individuals, mega-corporations have the resources to hire lobbyists to rig the law in their favor – gaining tax breaks, creating regulatory loopholes, and watering down campaign finance restrictions. When laws and regulations are created to rein them in, they can hire armies of lawyers to fight the government in court – sometimes for years – in order to delay or reverse sensible checks on their power. And even if they lose in court, they can still hire thousands of lawyers to help them exploit every loophole and ambiguity, something smaller businesses and individuals simply can’t do.

Why has growing concentration been allowed to take place? After all, America has a long tradition of anti-monopoly activism, and we have important institutions – the

Federal Trade Commission and Justice Department – that are tasked with preventing the growth of monopolies. The answer comes down to two things: ideology and the structure of the antitrust agencies.

The first failure was one of ideology. America had a robust anti-monopoly philosophy from the founding of the country through the mid-20th century. But starting in the 1970s, a group of professors – largely lawyers and economists – adopted a new ideological approach to antitrust. They argued that bigness was not the problem, that antitrust had nothing to do with political freedom, and that the only thing that mattered in antitrust law was consumer welfare. As a result, they focused antitrust law on reducing consumer prices and increasing economic efficiency, even if that meant allowing mega-mergers to create vertically and horizontally-integrated behemoths that had more power than most governments. Their prescriptions for antitrust law and policy were also largely rooted in economic theory, rather than empirical facts and data. For example, in a wide-ranging lookback at mergers over the last few decades, economist John Kwoka has shown that permissive merger policies have led to an increase in consumer prices, even though the antitrust agencies predicted a decline or at least no increase in prices.<sup>12</sup> Finally as antitrust became the province of technocratic economists, it became more and more narrowly circumscribed within the FTC and Justice Department.

The second failure was the structure of government agencies. Compared to how most of the rest of government works, antitrust is exceptional. Normally, Congress passes laws commanding agencies to act to regulate – the EPA regulates clean air and water, the National Highway Transportation Safety Administration regulates safety in cars and trucks, the Consumer Products Safety Commission regulates children’s toys. These agencies are staffed with experts in the field, they hire scientists and commission studies, and they are designed to receive input from industry and the general public. Agencies are empowered to use their considerable expertise to make regulations setting standards or regulating specific practices. Courts are able to review the agency’s regulations, and they generally give deference to the substance of the regulation as long as it is within the agency’s discretion and so long as the agency has used its expertise to come to a reasoned decision. If a court strikes down an agency’s regulation for failing to consider an aspect of the problem or acting outside their statutory authority, the agency has a chance to correct its failure.

Antitrust doesn't work this way. At first, Congress passed the Sherman Antitrust Act in order to make monopolization and monopolists' practices illegal. The law was written with extremely broad language, and the Supreme Court narrowed the law, declaring that only unreasonable market practices were covered by the statute. In response, Congress passed new antitrust laws, created an antitrust agency (the FTC), and empowered the FTC to interpret its charter and make rules. But in practice, a timid FTC has failed to take up its congressionally-authorized role and has largely abandoned the project of making regulations to interpret and enforce the antitrust laws it administers.<sup>13</sup> This has left the Supreme Court to define the substance of antitrust law. This is a serious problem. Agencies have considerable expertise and are politically accountable to Congress and the President. In contrast, the Court is made up of unelected, unaccountable judges who have no expertise in business realities or any specific sector of the economy. Worse still, the FTC now defers so completely to the Supreme Court's policymaking choices that it has narrowed its own statutory authorities to align with judicially-invented policies. Judicial lawmaking in this arena also ties back to the ideology problem. Normally, the courts provide a check on regulatory agencies, which utilize their expertise and have a transparent process for making regulations. In antitrust, because the courts have no expertise, they rely on the parties in the case and academics to teach them about markets and competition through an ad-hoc process of allowing amicus briefs during litigation.<sup>14</sup> A skewed set of intellectual inputs, and limited public participation, leads to judicial lawmaking that is disconnected from the reality of the economy.

**A timid FTC has failed to take up its congressionally-authorized role and has largely abandoned the project of making regulations to interpret and enforce the antitrust laws it administers.**

Antitrust is also exceptional because it is split between two primary agencies, the FTC and the Department of Justice, and a host of secondary sector-based agencies. Both agencies have power to review proposed mergers. But the division of sectors hasn't been set by statute and is frequently the subject of turf wars between the agencies. This division means duplicative costs, inconsistencies in the application of the law, and confusion in the merger clearance process.<sup>15</sup> In theory, division could mean competition

and a higher standard of enforcement. In practice, it has meant the opposite: weaker enforcement and ineffective administration.

At the same time, because power is diffused across courts, a multimember FTC, and the Department of Justice, it is harder to mobilize in order to hold the regulators and enforcers accountable when they fail to address anticompetitive behavior in the marketplace. When power is diffused across so many actors, no single actor is truly empowered to take action, and it is also less clear to the general public who to organize against and hold accountable when actions fall short.

Ideological and structural failures have left antitrust enforcers vulnerable to the rise of the most important industry of the twenty-first century: technology platforms. While new technologies can often seem unprecedented, antimonopoly legal tools are in fact surprisingly versatile. One of the problems of taking an economic theory approach to antitrust law is that it obscures how sectors of the economy work in practice. Fighting monopolies requires understanding their business models and operations – not in theory, but in practice. Companies like Amazon, Google, Facebook, and others are not completely new and unprecedented in their business practices, structures, and motivations. But without truly understanding how they actually operate, economic theorists, and regulators who adopt their theories, can miss how tech companies might run afoul of antimonopoly principles.<sup>16</sup>

## **Even the best antitrust laws will fail if we do not reverse the unaccountable and diffuse system of implementation and enforcement.**

Reversing the second age of monopoly power requires a complete re-thinking of both what antimonopoly law should achieve and how it should be enforced. This includes reforming the ideology that drives antimonopoly policy and the substance of the laws, as well as rethinking the structure of antitrust agencies and the role of other arms of government in promoting antimonopoly policy. There is an emerging body of work on the substance of antitrust laws, but little thought has been given to how the structure of antitrust policymaking and enforcement should change. Even the best antitrust laws will fail if we do not reverse the unaccountable and diffuse system of implementation and enforcement.

This report offers a blueprint for reforming the structural aspects of antitrust lawmaking. The central philosophy behind these reforms is to replace the common-law, court-centered process of making antitrust policy with a politically-accountable process that relies on expertise and transparent, reasoned decision-making through an agency. Taking antitrust away from the courts means reforming the structure of the antitrust agencies and clarifying the authorities those agencies have. Power and accountability should be aligned, as is the case in most other parts of the Executive Branch, and the agency that makes competition policy should have both the authority to act and should be held more readily accountable for its actions.

## **RECOMMENDATION 1**

# **End Antitrust Exceptionalism: Reinvent the FTC as a newly empowered and accountable Anti-Monopoly Agency (AMA)**

For more than a century, antitrust has largely been a court-centered enterprise in which judges take a “common law” approach to defining violations of antitrust laws. While the court-centric approach does have the benefit of partial insulation from politics, it is also insulated from democratic practice. Court-driven antitrust policy is problematic for a variety of reasons: (1) the courts have imposed extralegal concepts largely from one ideologically motivated wing of economics onto the field as a whole, (2) the courts are not supposed to be economic policymakers, and (3) the courts are not very accountable or responsive to the people. In contrast, under the traditional model of policymaking, which occurs in virtually every other area of regulation, Congress delegates power to the Executive Branch to establish regulations while using its expertise and following fair and transparent procedures.

On its face, the FTC looks like a variety of other agencies. It consists of a multimember commission, whose members are independent of the president; it has rulemaking authority; and it executes a variety of statutes. But it also shares power with the Department of Justice, often doesn’t exercise its rulemaking powers, and has a variety of carve outs in its powers that cripple its ability to address all sectors of the economy swiftly and effectively. In order to make the FTC more similar to a traditional federal department or agency – and in the process, to shift power away from non-expert judges as the primary expositor of the substance of antitrust policy – it is essential to revise the agency’s management structure to align power and responsibility; to endow the agency with strong rulemaking, inspection, and enforcement authority and clarify the reach of its jurisdiction; and to remove unnecessary constraints on the agency’s rulemaking process that inhibit the agency’s ability to operate efficiently.

First, power and accountability. One of the best ways to align power and accountability within an agency is to restructure the FTC into a new Anti-Monopoly Agency (AMA), with a single director rather than a multimember commission. Some might argue that the problems with the FTC have not been due to it being a multimember commission and that there is no reason, therefore, to start fresh with a revised agency structure. But the problems with multimember commissions, the FTC among them, are legion: (1) It is almost impossible to have a majority of active, aggressive regulators on the commission for any length of time, given compromise in the appointments process, (2) Minority commissioners often write dissents that legitimize opposition to regulations and can act as a guide or roadmap for parties to challenge the decision and for ideological judges who want to strike down those regulations, and (3) Politicians manipulate the slots available on the commissions for partisan purposes. Taken together, a multimember competition agency is a roadmap for inaction and delay, weak regulations, and ultimately ex post reversal of those weak regulations.

In contrast, single director agencies that are accountable to the President have significant benefits: (1) They unify power, thereby empowering an active and energetic director to undertake serious actions, (2) They unify responsibility and accountability, creating a focal point for organizing the opposition against a failing or ideological director, (3) As with other agencies (e.g. EPA), active directors will push the ball forward significantly, while regressive directors will only be able to take limited action to undermine policy – due to the stickiness of policy and industry adaptation to new rules. To the extent that the commission structure has been beneficial in recent decades (e.g. in minority commissioners exposing the bad policies of the majority to journalists and the public), this is a function of an era in which competition law was in desuetude. As we move into an era in which competition law needs to be defined and enforced more aggressively, this feature is outweighed by the significant benefits of having an agency that is capable of acting swiftly and effectively.

Second, rulemaking, inspection, and enforcement authority. Currently, the courts explicate the meaning the antitrust laws on a case-by-case basis. In virtually all other areas of law, however, politically accountable and expert agencies are in the driver's seat – making regulations that execute on Congress's wishes, with accountability coming after the fact from the courts. To align with the traditional administrative model, the new AMA should be granted rulemaking power under the Sherman and Clayton Acts, in addition to its currently underused authority under the Federal Trade Commission Act, so that the agency

can define and specify civil violations of these canonical antitrust laws. For example, the agency could set per se rules and presumptions through the ordinary rulemaking process. As is conventional under administrative law, the courts would grant *Chevron* deference to rules made pursuant to the Administrative Procedure Act's notice and comment procedures. Although this grant of rulemaking power is only strictly necessary under the current regime if the courts block agency actions under the act, granting the AMA these powers preemptively and explicitly would give the agency greater flexibility.

**In virtually all other areas of law, however, politically accountable and expert agencies are in the driver's seat – making regulations that execute on Congress's wishes, with accountability coming after the fact from the courts.**

In addition, the FTC Act should be revised to clarify that the AMA would have jurisdiction to regulate the unfair competition practices of common carriers, airlines, and packers and stockyards. The common carrier provision, for example, has been so broadly interpreted that a recent Ninth Circuit decision even held that the FTC cannot regulate AT&T's non-common-carrier-services because the firm as a whole is, in part, a common carrier.<sup>17</sup> The decision was overturned by the entire Ninth Circuit, but making the AMA's power clear would be wise. This clarification also has bipartisan support from Democratic and Republican FTC commissioners and from the Heritage Foundation.<sup>18</sup>

The AMA's enforcement powers should also be clarified in order to make it conform to more traditional agency principles. The agency should, like other supervisory agencies, have an inspections power to accomplish its supervisory goals. In addition, the agency should be able to bring civil enforcement claims to administrative law judges, who should have the power to order damages for violations of the antitrust laws. These decisions would, as in other areas of regulatory enforcement, be appealable to the federal courts.

Finally, normalizing antitrust policymaking under the AMA requires repealing some unnecessary requirements that have burdened the FTC – in particular, the Magnuson-Moss constraints on consumer protection rulemakings. Under the Magnuson-Moss Act, the FTC has to go above and beyond the standard notice-and-comment process for rulemaking and include a variety of trial-like procedures, including oral hearings and cross-examination. On average, when the FTC has been forced to use the Magnuson-

Moss procedures, it takes the agency more than five years to issue rules. In contrast, the average time for the agency to issue rules under ordinary APA procedures is around 290 days.<sup>19</sup> This is an extraordinary delay, one that cripples the agency's ability to act in a dynamic economy. In line with making the AMA follow ordinary administrative law principles, these provisions should be repealed.

## POLICY RECOMMENDATIONS

- (A) The FTC should be relaunched as a new agency, the Anti-Monopoly Agency (AMA), which would be headed by a single director, appointed by the President with the advice and consent of the Senate and protected from political influence through restrictions on their removal. The Sherman, Clayton, and FTC Acts (and other legislation under the FTC's purview) would move to the AMA. The Department of Justice would retain criminal prosecution authority and backup civil authority.
- (B) The AMA should have the power to make rules and regulations to specify and define violations of the Clayton Act, Sherman Act, and any other competition statute. The AMA's interpretations of those statutes shall be granted *Chevron* deference by a reviewing court.
- (C) The AMA would continue as the nation's primary consumer protection agency. Sector-based agencies such as the Federal Communications Commission and the Department of Transportation would retain their authorities, but Section 5(a)(2) of the FTC Act (15 USC §45(a)(2)) would be revised to eliminate the exceptions for common carriers, packers and stockyards, and airlines.
- (D) 15 USC §57a, which establishes onerous procedures for FTC rulemaking on consumer protection issues, under the Magnuson-Moss Act, should be repealed, leaving the agency to make rules under traditional APA procedures.
- (E) The AMA would be granted inspection authority to inspect the books and records and management practices of companies with revenues greater than \$1 billion without suspicion of wrongdoing to deter anticompetitive conduct.
- (F) The AMA should have the authority, after notice and hearing, to order restitution and disgorgement of ill-gotten gains for civil violations of the antitrust laws.
- (G) The AMA should be insulated from the political process of Congressional appropriations. Like the Federal Reserve Board of Governors and the Federal Deposit Insurance Corporation, the AMA should be granted powers to assess reasonable fees for supervision and merger approval.

## **RECOMMENDATION 2**

# **Eliminate Duplicative Merger Review Authority**

The FTC currently splits its authority over pre-merger approvals with the Department of Justice. The conventional argument for splitting authority is that it creates regulatory competition, which, in theory, might be beneficial. But in practice, the theory has not been borne out. First, while divided authority has led to some competition between the agencies for review, it has also led to significant delays. In some cases, the agencies take up more than half of the pre-merger review time period (30 days) determining which agency has the power to review the merger, leaving the agency with little time to conduct a robust review.<sup>20</sup> Second, the division of merger authority is by sector. This arbitrary division was determined based on convention and negotiations between the two agencies rather than by statutory authority. The result has been duplicative costs, inconsistencies in the application of the law, and confusion in the merger clearance process.<sup>21</sup> A better approach is for a single agency – the AMA – to have all pre-merger approval powers, thereby making the agency responsible for all aspects of competition policy.

While pre-merger approval powers would be a change from the status quo, enforcement powers could remain divided, as in conventional in other agencies, like the SEC. Both the AMA and the DOJ would have power to bring civil cases, but the DOJ alone would have power to bring criminal cases.<sup>22</sup>

## **POLICY RECOMMENDATIONS**

- (A)** All pre-merger reviews should be conducted by the AMA.
- (B)** The DOJ would retain criminal investigations and prosecutions authorities, initiated on its own and to criminal investigations and prosecutions referred to it by the AMA, and it would retain backup civil enforcement authority.

## RECOMMENDATION 3

# Require Transparency, Participation, and Justification for Mega-Mergers

Unlike mergers of banks or telecommunications companies, for the majority of big corporations, mergers do not require affirmative consent from their chartering authorities or federal competition regulators. Instead, enforcement agencies must threaten time-consuming litigation taking into account severe resource constraints. This has the effect of biasing market outcomes toward consolidation. In addition, when the FTC or DOJ passively approve a merger, they offer no reasoned explanation, even if there is significant public outcry. This passive approval process makes it hard to understand why mergers are approved and hard to understand retrospectively if the antitrust agencies' ex ante assumptions and analysis of the likely consequences of mergers were accurate. In the extremely limited number of cases when FTC and DOJ do object to a merger, under the current system, they find themselves in court litigating the merger disapproval in front of judges with no expertise on the matter.

### **Merger approvals should be subject to a more transparent and participatory regime.**

As part of making the AMA more akin to an ordinary regulatory agency, merger approvals should be subject to a more transparent and participatory regime. Any merger involving a company with more than 1,000 employees, that has a significant market capitalization (\$1 billion), or that impacts sectors of significant public concern, should have to be affirmatively justified with an open period for public comment and participation. This comment period would allow stakeholders, employees, and competitors, in addition to members of the general public, to weigh in on the desirability of the merger and the likely consequences of the merger. The AMA would then have to consider the public's comments, in addition to the information it has at its disposal, and write a decision approving or disapproving of the merger. This written record will in turn be used to hold the agency accountable for its decision: First, commenters and interested parties can challenge the agency's reasoning under the familiar arbitrary and capricious standard (for either approving or disapproving of

the merger). Second, this written record will facilitate the agency's ability to conduct retrospective reviews of its mergers (see below), in order to learn from its successes and failures.

## POLICY RECOMMENDATIONS

The AMA shall have the sole authority to approve mergers, and all qualified mergers must be affirmatively approved as mergers within the public interest.

- **Definition of a qualified merger:** Any merger (a) in which either party has a market capitalization above \$1 billion, (b) in which either party has 1,000 or more employees, or (c) which the agency determines is critical to the health, safety, or national security of Americans.
- **Public Comment Period:** For any qualified merger, there shall be a public comment period of no less than 60 days in which the AMA shall solicit and collect comments from the general public as to whether the merger should go through, akin to the notice and comment process under the APA.
  - **Documentation:** The AMA will present an administrative record of facts and arguments considered (with appropriate redactions) as justification for its approval/disapproval of the merger.
  - **Consideration of Comments:** The AMA must consider comments in approving a merger and must, in its approval, provide a concise and general statement of the justifications for the merger, including addressing any counterarguments made in the comments.
  - **Review of AMA decision:** Commenters shall be able to challenge the AMA's approval in court if the AMA has inadequately addressed the comments. Courts shall review the AMA's decision under the arbitrary and capricious standard.

## **RECOMMENDATION 4**

# **Institute Retrospective Review of Mergers**

Over the past forty years, one of the problems with antitrust law and policy is that it has relied inordinately on abstract economic theory rather than empirical reality. This is problematic because the benefits and drawbacks of mergers (and of competition policies more generally) might not accord with the academic theories of economists. Indeed, recent empirical research on post-merger approvals has shown that the antitrust agencies have largely failed even on their own terms of achieving lower prices.<sup>23</sup>

The AMA should look backwards at its merger approvals and determine whether their ex ante analysis of mergers has been successful. Retrospective review will help the AMA learn from empirical evidence and modify its behavior accordingly over time.

## **POLICY RECOMMENDATIONS**

The AMA shall conduct retrospective analysis of all qualified mergers 5 years after the merger, in order to assess whether the merger actually led to decreased concentration in the market, more competition, and lower prices. The retrospective analysis should also assess whether the AMA's predictions used to approve the merger were borne out. The AMA's reports shall be delivered to Congress and made publicly available.

## **RECOMMENDATION 5**

# **Transform the Bureau of Economics into a Bureau of Investigations and Research (BIR)**

How do we know if an industry is overly concentrated? How do we know where exclusionary and anticompetitive practices are taking place? In the early 20th century, the answer was simple: the FTC conducted industry-wide investigations.<sup>24</sup> These were in-depth investigations using the FTC's section 6b powers to identify and expose competitive and market power problems in industry. These investigations could then lead to prosecutions for illegal practices. Over time, however, the FTC's investigative mission has atrophied. Today, the FTC's competition work is largely supported by economists, rather than a broader group of diverse professionals needed to conduct industry-specific investigations.

The AMA should reinvigorate its investigatory and research capacities by replacing the Bureau of Economics with a much broader Bureau of Investigations and Research that will be composed of a variety of personnel with the professional skillsets and expertise necessary to conduct effective industry-wide investigations. These investigations will not only inform merger approvals (as the BIR will know a great deal about industries in which mergers are taking place) but also the enforcement of both competition and consumer law.

The BIR would also be tasked with conducting retrospective reviews, rather than the office that approves mergers. Although there is some loss of expertise in dividing approvals and retrospective review, the purpose of separating retrospective reviews is to enhance the independence of the review in order to prevent the natural human-need to justify and defend past actions.

## POLICY RECOMMENDATIONS

The Bureau of Economics should be transformed into new Bureau of Investigations and Research.

- **Authorities:** The BIR will (1) conduct investigations under FTC section 6b and its new inspection powers, and write reports on industry practices, (2) conduct retrospective reviews as provided for above, and (3) provide support to the Bureaus of Competition and Consumer Protection when requested.
- **Composition:** The BIR shall be composed of a diverse group of employees, including lawyers, investigators, accountants, data scientists, sociologists, anthropologists, historians, economists, engineers, technologists, and any others whose training might be relevant for investigatory purposes. No more than 20% of the BIR's full time employees, part time employees, or consultants shall come from any one discipline. The head of BIR shall have experience in investigations.

## RECOMMENDATION 6

# Create an Office of Competition Advocate

Not all knowledge lies with experts, and particularly with experts in government. Knowledge is often diffuse, held by members of the general public. This is perhaps especially true when it comes to knowledge about uncompetitive behavior in a large and diverse economy. Experts in government are often drawn from similar communities as the entities they regulate, which means they might have a limited perspective. While the Bureau of Investigations and Research can conduct independent investigations into particular sectors of the economy, the BIR might not always know about the most pressing or the most cutting-edge sectors in which an investigation might be necessary. The AMA and DOJ can prosecute bad behavior but they might not know where all of the bad behavior is. Members of the general public affected by uncompetitive practices, in contrast, might have that knowledge.

The AMA should, as a result, have an Office of Competition Advocate, which would be tasked with taking complaints from the general public and channeling that diffuse public knowledge into forms that the AMA can use. First, the Competition Advocate would maintain a complaint hotline, in order to assist the AMA in its enforcement mission on both unfair competition consumer practices. Data from the hotline will be public, so that it can be analyzed by independent scholars. To prevent abuse, fraudulent complaints will be punishable by a fine. In addition, the Competition Advocate would work with other agencies throughout the government to identify possible anticompetitive practices from data collected by those agencies.

Second, members of the general public would have the ability to petition the competition advocate with information about an area that is ripe for a BIR investigation. The Competition Advocate would sift through the information and write a report on the comments. The BIR will be able to use the report to identify areas that are worthy of a full investigation. This process has a variety of benefits. Not only does it provide an additional way for the BIR to gain information from the general public, but it also engages the general public through a participatory process.

## POLICY RECOMMENDATIONS

There should be an Office of Competition Advocate (OCA) within the AMA. The competition advocate will take complaints from the general public regarding competition and market power problems in industry, including accepting petitions for BIR investigations that come from the general public.

- **Complaints:** The OCA will maintain a complaint hotline and keep a database on complaints about unfair competition practices. The data from this database shall be made public, and fraudulent complaints shall be punishable by a fine. In addition, the OCA will write an annual report summarizing and analyzing trends and issues raised by complaints, including making recommendations to the AMA based on the complaints. In addition, the OCA should be empowered to contact and learn from community groups and state attorneys general.
- **Petitions for Investigations:** Members of the general public can petition the OCA to recommend that the BIR investigate a particular sector. Each year, the OCA will write a report summarizing the comments received, and it will recommend areas that are particularly worthy of investigation.

## **RECOMMENDATION 7**

# **Expand Third Party Enforcement**

Federal agencies have limited resources. This means that they frequently have to make choices about which entities to investigate and against which entities to enforce the law. The result, however, is the underenforcement of law. In response, Congress has frequently given state attorneys general and even private citizens the power to enforce the laws. Under current law, state attorneys general do not have the authority to enforce violations of the Clayton Act's provisions on price discrimination, exclusive dealing and tying, and interlocking directorates (among other things). Expanding state AG power to include these elements will help ensure that the law is enforced even if the AMA and DOJ are unwilling or unable to enforce it to its fullest extent.

## **POLICY RECOMMENDATIONS**

State Attorneys General should be able to enforce certain Clayton Act provisions: section 2 (price discrimination), section 3 (exclusive dealing and tying), section 8 (interlocking directorates).

## RECOMMENDATION 8

# Restrict Conduct and Conditional Enforcement Remedies and Ensure Full Enforcement of the Antitrust Laws

The DOJ and FTC frequently use conduct and conditional remedies instead of banning mergers outright. The idea is that a merger can still go through if the merging entities agree to a set of conditions that will prevent anticompetitive harms from taking place. While the theory of conduct and conditional remedies is promising, scholars have shown empirically that conduct and conditional remedies are at a minimum ineffectual and at worst counterproductive.<sup>25</sup> In cases where the antitrust agencies have used conduct and conditional remedies, prices have sometimes actually gone up after mergers. The ban on conduct and condition remedies could be implemented by executive order, by the agencies themselves voluntarily, or by statute.

Furthermore, in 2015, the FTC issued a statement of enforcement principles that severely restricts its own enforcement powers, in contravention of legislative intent. It limits enforcement to cases of consumer welfare, conflates section 5 of the FTC Act with the rule of reason, and appears to suggest the FTC has limited discretion to bring challenges under the FTC Act. This document should be disavowed explicitly, so that the AMA is clear that it must act in accordance with the broader goals of antitrust, that section 5 of the FTC Act is broader than the rule of reason, and that the agency has discretion to challenge practices under the FTC Act, Sherman, and Clayton Acts.

## POLICY RECOMMENDATIONS

- (A) The Department of Justice and AMA should be directed not to use conduct and conditional remedies.
- (B) The 2015 FTC's statement of enforcement principles under section 5 should be withdrawn.

## RECOMMENDATION 9

# Require the Small Business Administration to Consider Competition Policies

Surprisingly, the Small Business Administration's Office of Advocacy is not tasked with advocacy on competition and concentration within the United States Government, despite the obvious interest of small businesses in maintaining a competitive economy and preventing economic concentration. Currently, the Office of Advocacy is tasked with measuring the costs of regulations and making proposals to deregulate, when such actions would be in the interest of small businesses. But regulations have benefits, not just costs, and many regulations might help small businesses, particularly if they preserve competition, prevent economic concentration, or expand access to goods and services. The laws directing the office of advocacy's efforts, however, ignore this possibility. This should be changed.

In addition, the Office of Advocacy has not been directed to evaluate the impact of consolidation within industries in the economy on small businesses, provide comments to the FTC and DOJ on the likely harms to small businesses from mergers, and provide comments to agencies on the impact on small businesses of rules that might lead to consolidation in industry. The office should be empowered to do so because such advocacy could be helpful to small businesses.

## POLICY RECOMMENDATIONS

- (A) Require, in 15 U.S.C. §643b(3), the SBA office of advocacy to measure the benefits of regulation and the impact of the failure to regulate on small businesses, and require the office to make proposals for regulations that help small businesses.
- (B) Empower, in 15 U.S.C. §643b, the SBA to evaluate the impact of consolidation within industries in the economy on small businesses, provide comments to the AMA on the likely harms to small businesses from mergers, and provide comments to agencies on the impact on small businesses of rules that might lead to consolidation in industry.

## RECOMMENDATION 10

# Advocate for Competition Policy Abroad

After World War II, the United States engaged in a historic effort to rebuild Europe and Japan through the Marshall Plan. While the story of the Marshall Plan is well known, what is less commonly understood is that the United States exported aggressive antitrust laws to Europe during those post-war years. The Marshall Plan antitrust advisors believed that the massive consolidation in the German economy facilitated and sustained fascism, and they argued that a democratic society required a democratic economy.<sup>26</sup> Today, in the context of increasing concentration, rising authoritarianism, and foreign governments commingling state and markets through state-owned enterprises and state capitalism, promoting economic democracy abroad should be an essential foreign policy objective. And yet, the text of the Trans-Pacific Partnership, a trade agreement designed by the Obama Administration, established the objectives of competition policy as “economic efficiency and consumer welfare,” a narrowly drawn and ideological conception of the purposes of antitrust law that has no basis in U.S. statutory law.<sup>27</sup> Presidents and their administrations should abandon these cramped views of antitrust and instead encourage the adoption of more aggressive antitrust laws abroad.

## POLICY RECOMMENDATIONS

The United States Trade Representative should advocate for aggressive and expansive anti-monopoly standards and practices in its trade agreements and international negotiations.

## **RECOMMENDATION 11**

# **Require All Agencies to Incorporate Anti-Monopoly Considerations in their Decisions**

During his final year in office, President Obama issued an important executive order requiring agencies to identify and use authorities to promote competition.<sup>28</sup> This executive order was a big step forward in pushing departments and agencies to think about anti-monopoly policies. But a new executive order, or a statute, could go further and require that in any rulemaking or major guidance document, any department or agency must consider the impact of the policy on consolidation and competition. Agencies are already required to consider the impact of regulations on federalism, paperwork burdens, and small businesses; adding the impact on consolidation and competition might help build anti-monopoly thinking into the agencies' DNA. In addition, agencies should consider concentration and competition in making contracting and procurement decisions, so that the agencies can facilitate competition instead of furthering concentration.

## **POLICY RECOMMENDATIONS**

Agencies should be required, by executive order or statute, to consider the impact of rulemakings and major guidance on consolidation and competition, and to include anti-monopoly considerations in their contracting and procurement decisions.

## **RECOMMENDATION 12**

# **Empower the States to Review Mega-Mergers**

Historically, corporate charters were granted by legislatures. The reasoning was that the advancement of limited liability and shared investor capital would foster innovation, trade, and economic activity. But today, too many states make the formation of corporations nothing more than a formality. In the absence of corporate chartering at the federal level, states must play their role in ensuring that the pursuits of corporate profit remain aligned with broader public purposes and economic competition.

In addition to affirmative approval by the AMA, the relevant state of incorporation should establish conditions on charters that incorporate antitrust goals. This serves as an important check on whether the corporation is seeking to expand for purposes aligned with the public interest.

Of course, this could lead to the loosening of standards for some states seeking to be friendly to corporations. To prevent a race to the bottom, the AMA should outline minimum standards that chartering agencies should adhere to. Every five years, the AMA should publish a report on state compliance with these standards.

## **POLICY RECOMMENDATIONS**

- States should establish standards for corporate charters that incorporate antitrust goals.
- The AMA should establish minimum standards as guidance for states on how to include antitrust goals as part of corporate chartering, and it should publish a report evaluating the states every five years.

# Endnotes

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