RETHINKING BREAKUPS

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ABSTRACT

Trust-busting is once again a subject of national attention. And the attention is well-deserved: unprecedented levels of corporate concentration, firm dominance, and inequality demand robust debate about how antitrust solutions can ensure that our economy works for everyone. One simple remedy to "bigness" has stolen the spotlight within that debate—"breaking up" big firms into smaller ones to decrease corporate power and lower prices. But calls to break up firms from Big Tech to Big Ag have focused on how breakups could benefit consumers and, in some cases, small businesses. Absent from these debates is how breakups benefit or harm the workers and labor markets affected by firm dismantling.

This Article is the first to focus on how firm breakups—and antitrust enforcement and remedial design more generally—can and have significantly impacted workers' countervailing power and earning potential. Firm structure matters for worker power. Dismantling dominant firms can result in more firms competing for workers' services, which can lift worker wages. But it can also dismantle structures of worker power that have arisen to successfully counter dominant employers. A leading example, as this Article documents, is the devastating effect of the 1980s breakup of the Bell System on the Communications Workers of America, gutting union density within the telecommunications industry from 56 percent prebreakup to 24 percent by 2001. Breakups, much like workplace "fissuring," can decimate labor market institutions that advocate on workers' behalf, but also

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have and can result in layoffs, increased obstacles for worker coordination, lower overall wage rates, and dramatic reductions in earned benefits, job security, and the quality of working conditions.

The Article fills the gap in antitrust scholarship and policy debates that have ignored the effects of antitrust remedies on workers. It offers the first comprehensive scholarly treatment of these effects and argues that, for historical, theoretical, and empirical reasons, antitrust enforcers and scholars must attune their prescriptions and remedial mechanisms to ensure that antitrust remedies do not perpetuate the long history of antitrust law's alternating hostility to or disregard for worker welfare. It begins by summarizing the debates around firm breakups and reveals their disregard for labor market competition and worker welfare. It then unearths case studies and social scientific analyses to assess the effects of breakups and offers a theoretical and empirical overview of when breaking up firms can benefit or harm labor market competition and workers' countervailing power against dominant employers. It concludes by proposing alternative remedies to monopolization and corporate consolidation that better secure worker welfare.

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INTRODUCTION

Trust-busting is once again a subject of national attention. And the attention is well deserved: unprecedented levels of corporate concentration, firm dominance, and inequality demand robust debate about how antitrust solutions can ensure that our economy works for everyone.[1] Corporate power, including employers' monopsony power

1. On the rise of corporate concentration and firm dominance, see generally TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (discussing policy failures that gave rise to corporate concentration and firm dominance); OPEN MKTS. INST., AMERICA'S CONCENTRATION CRISIS (2019), https://concentrationcrisis.openmarketsinstitute.org [https://

as unilateral wage setters, contributes to higher prices to consumers, lower quality goods and services, stagnant wages, and the decline of labor's share of national income.[2] And consolidated private power has

perma.cc/K3DR-FS5M] (documenting corporate concentration in health-care markets and its impact on inequality); Joseph E. Stiglitz, *Market Concentration Is Threatening the US Economy*, PROJECT SYNDICATE (Mar. 11, 2019), https://www.project-syndicate.org/commentary/united-states-economy-rising-market-power-by-joseph-e-stiglitz-2019-03 [https://perma.cc/HU2G-5WBN] (linking rising inequality to market concentration); ORG. FOR ECON. COOP. & DEV., MARKET CONCENTRATION - NOTE BY THE UNITED STATES TO THE DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION (2018), https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf [https://perma.cc/F2F6-RUK2] (reporting sector-specific market concentration and limitations of current data regarding economy-wide concentration). On the rise of income inequality, see generally THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014) (documenting the rise of income inequality based on returns on capital exceeding economic growth); ESTELLE SOMMEILLER, MARK PRICE & ELLIS WAZETER., ECON. POL'Y INST., INCOME INEQUALITY IN THE U.S. BY STATE, METROPOLITAN AREA, AND COUNTY (2016), https://files.epi.org/pdf/107100.pdf [https://perma.cc/R56R-6DBU] (providing detailed statistics of income inequality in the United States); Jae Song, David J. Price, Fatih Guvenen, Nicholas Bloom & Till von Wachter, *Firming Up Inequality*, 134 Q.J. ECON. 1 (2019) (analyzing the contribution of firms to earnings inequality); Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca & Jimmy Narang, *The Fading American Dream*, 356 SCIENCE 398 (2017) (estimating rates of absolute income inequality).

2. Monopsony power is buyer-side market power allowing firms to set prices or wages profitably below competitive levels. *See* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 3 (2005) (defining "monopsony"). On labor market concentration, the effects of employer monopsony, and the decline of labor's share of national income, see generally José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, J. HUM. RES. (May 12, 2020), http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9914R1.full.pdf+html [https://perma.cc/3CRP-4MSE] (finding average U.S. labor market to be highly concentrated); *Nonfarm Business Sector: Labor Share for All Employed Persons*, FRED (Dec. 7, 2020) [hereinafter FRED Data], https://fred.stlouisfed.org/series/PRS85006173 [https://perma.cc/Y6H8-T59T]; Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, J. HUM. RES. (May 12, 2020), https://kevinrinz.github.io/concentration.pdf [https://perma.cc/TWJ4-UTAZ] (documenting labor market concentration trends and impacts on earnings and inequality); Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets*, 2 AER 33 (2020) (finding substantial monopsony power and low labor supply elasticities in online on-demand labor markets); YUE QIU & AARON SOJOURNER, IZA INST. OF LAB. ECON., LABOR-MARKET CONCENTRATION AND LABOR COMPENSATION (2019), http://ftp.iza.org/dp12089.pdf [https://perma.cc/G97W-59JR] (estimating the effects of labor market concentration on labor compensation across the U.S. private sector since 2000); David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power* (IZA Inst. of Lab. Econ., Working Paper No. 12276, 2019), http://ftp.iza.org/dp12276.pdf [https://perma.cc/HG8X-DHAX]; Brad Hershbein, Claudia Macaluso & Chen Yeh, *Concentration in US Local Labor Markets* (Soc'y for Econ. Dynamics, Working Paper No. 1336, 2019), https://ideas.repec.org/p/red/sed019/1336.html [https://perma.cc/WY96-9ZXW] (finding increased labor market concentration associated with decreased average hourly wages); JOSH BIVENS, LAWRENCE MISHEL & JOHN SCHMITT, ECON. POL'Y INST., IT'S NOT JUST MONOPOLY AND MONOPSONY: HOW MARKET POWER HAS AFFECTED AMERICAN WAGES (2018), https://files.epi.org/pdf/145564.pdf [https://perma.cc/L9AZ-YLBA]; David Card, Ana Rute

broader impacts on the political process, marketplace of ideas, consumer choice, and privacy.

How we *remedy* the problem of corporate power is just as important as our diagnosis of its sources. One single remedy to the problem of "bigness" has stolen the spotlight within our current debate: "breaking up" big firms into smaller ones by forcing them to divest business lines or assets to decrease corporate power and to lower prices. But calls to break up dominant firms have focused only on how breakups could benefit consumers and, in some cases, small businesses. Missing from the discussion is how dismantling firms might benefit or harm workers and labor markets impacted by the breakups.

This Article is the first to focus on how firm breakups—and antitrust remedial design more generally—can and have significantly impacted workers' countervailing power and earning potential. Firm structure matters for worker power. As many antitrust commentators have presumed, based primarily on industrial organization ("IO") economic assumptions,[3] dismantling dominant firms can result in more firms competing for workers' services, which can lift their wages.[4] But it can also dismantle structures of worker power that have arisen to successfully counter dominant employers. This Article documents how the breakup of the Bell System in the 1980s debilitated the Communications Workers of America, eviscerating union density among telecommunications workers from 56 percent prebreakup to 24 percent by 2001.[5] Breakups, much like workplace "fissuring" through

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Cardoso, Joerg Heining & Patrick Kline, *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON. S13 (2018); José Azar & Xavier Vives, *Oligopoly, Macroeconomic Performance, and Competition Policy*, IESE BLOG NETWORK (Dec. 18, 2018), https://blog.iese.edu/xvives/files/2018/12/Azar-Vives-Dec-2018.pdf [https://perma.cc/D4K9-CVGY]; David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. 180 (2017); Lijun Zhu, Industrial Concentration and the Declining Labor Share (Dec. 2017) (unpublished manuscript), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/7/815/files/2018/01/Job-market-paper_Lijun-Zhu-11pb4sz.pdf [https://perma.cc/B64K-AQPQ].

3. *See, e.g.*, JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 18–21 (7th ed. 1994).

4. *See, e.g.*, ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 147–53 (2020) (describing how companies in concentrated industries suppress worker wages because they have monopsony power in the labor market); WU, *supra* note 1, at 42, 72–73, 132–33 (arguing that firm consolidation can result in depressed wages for workers).

5. *See* JOHN SCHMITT & JORI KANDRA, ECON. POL'Y INST., DECADES OF SLOW WAGE GROWTH FOR TELECOMMUNICATION WORKERS 7–8 (2020); U.S. DEP'T OF COMM. & BUREAU OF THE CENSUS, CURRENT POPULATION SURVEY: ANNUAL DEMOGRAPHIC FILE (2001).

vertical integration and outsourcing,[6] can decimate labor market institutions that advocate on workers' behalf. They can also result in layoffs, increased obstacles to worker coordination, inferior workplace quality, and reduced wage rates, earned benefits, and job security.

Workers' fates could not be more central to discussions about antitrust's role in shaping our economy and ensuring free and fair access to economic opportunity. For the first time in the history of U.S. competition policy, regulating employer power has taken center stage in antitrust enforcement, congressional debates about antitrust law reforms, and presidential priorities.[7] In a monumental Executive Order on "Promoting Competition in the American Economy," the Biden administration committed to extending antitrust policy "to promote the interests of American workers" held back by corporate consolidation from "bargain[ing] for higher wages and better work[ing] conditions."[8] The order called for a "[w]hole-of-[g]overnment [c]ompetition [p]olicy" extending beyond the antitrust agencies to assess how the absence of robust competition impacts labor markets.[9] But as of yet, no scholarship has studied how current and proposed antitrust remedies targeting corporate consolidation and market power affect labor markets and worker power.

This Article fills that gap. It offers the first comprehensive scholarly treatment of those effects and lays the groundwork for a theoretical and empirical understanding of how structural and behavioral remedies impact employer power relative to worker power. It argues that antitrust enforcers and scholars must not merely assume that breakups benefit workers but instead ensure that antitrust remedial design consider and prevent harm to worker welfare. And it

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6. For workplace fissuring, see generally DAVID WEIL, THE FISSURED WORKPLACE 8 (2014) ("Large businesses . . . no longer directly employ legions of workers to make products or deliver services. Employment has been actively shed by these market leaders and transferred to a complicated network of smaller business units.").

7. *See, e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/AGK2-2TNF]; *Antitrust and Economic Opportunity: Competition in Labor Markets: Testimony Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 16 (2019) (statement of Doha Mekki, Counsel, Assistant Att'y Gen.); *Oversight of the Enforcement of the Antitrust Laws: S. Comm. on the Judiciary*, 115th Cong. 20–23 (2018) (statement of Joseph Simons, Chairman, Fed. Trade Comm'n); Devin S. Hayes, *Criminal Prosecutions Have Begun for No-Poach Agreements and Wage-Fixing Violations*, NAT'L. L. REV. (Feb. 3, 2021), https://www.natlawreview.com/article/criminal-prosecutions-have-begun-no-poach-agreements-and-wage-fixing-violations [https://perma.cc/5SL9-3CHC].

8. Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,987, § 1 (July 9, 2021).

9. *Id.* §§ 2, 5.

provides the first guidance yet to enforcement agencies and courts on how to ensure robust labor market competition when devising and implementing antitrust remedies.

Antitrust remedial debates have and continue to contend with courts' and government enforcers' role in economic regulation. This Article begins by situating the current breakup debates within a broader historical context. Part I argues that, between the passage of the Sherman Act in 1890 and World War II, policymakers and administrative officials viewed competition and labor policy as integrally connected components of domestic economic policy, even if those policies alternately favored and disfavored collective worker power. But the postwar intellectual consensus predominantly ignored and continues to ignore the ways in which the antitrust remedies sought by enforcers and approved by the courts impact labor market competition and worker power, even though antitrust law allows and even requires consideration of those impacts.

Part II then offers a set of theoretical and empirical approaches that can be used to evaluate how antitrust remedies, such as breaking up firms, can benefit or harm labor markets and workers. Part II begins with an illuminating case study at the center of the breakup debates: the breakup of the Bell System through court-ordered divestiture. It draws lessons from that case study as well as theoretical and empirical approaches from a variety of economic and social scientific traditions to parse the effects of antitrust remedies on workers. Specifically, it explains that these effects critically depend on both traditional economic analyses of concentration levels and barriers to entry, but also, and importantly, on the labor market institutions workers form to respond to preremedial firm structures and the labor market realities and histories of employment bargaining that have shaped workers' ability to bargain effectively.

Finally, the Article concludes by proposing a series of reforms and best practices for agencies and courts to incorporate labor market effects analysis into remedial design and compliance measures. It details the authority and mechanisms by which government enforcers can better solicit, incorporate, and consider the interests of workers in their attempts to regulate dominant firm conduct and draws from broader innovations in administrative state governance to ensure stakeholder participation in remedial design and monitoring. Ensuring that antitrust remedies avoid creating or entrenching employer monopsony power should be at the center of any robust labor antitrust policy. But improved remedial design and administration in antitrust

regulation would also further broader federal labor policy goals of strengthening worker bargaining power, economic opportunity, and macroeconomic growth.

I. THE BREAKUP DEBATES

The call to break up dominant firms has elicited heated debates about the scope and limitations of our current antitrust laws and about the effectiveness of agency and judicial remedies for "bigness." This Part seeks to situate those debates within the broader context of their emergence. Part I.A begins with describing the underlying problem: increased corporate concentration and firm dominance. Parts I.B and I.C then offer an overview of the types of remedies available to antitrust agencies to rectify that problem and the law governing breakups and their labor market effects. Part I.D historically contextualizes the breakup debates. Part I.E concludes by calling for restoring labor market analysis to remedial debates.

A. Increased Corporate Concentration and Firm Dominance

The breakup debates respond to mounting evidence of increased corporate concentration and firm dominance, from Big Tech to Big Ag.[10] Between 1982 and 2012, three-quarters of U.S. industries became more concentrated, and since 2000, market concentration (as measured by the Herfindahl-Hirschman Index, or "HHI") has increased in over 75 percent of industries.[11] As firms' market power has grown, so have corporate profits and markups on goods, which have as much as tripled from 21 to 61 percent above firms' marginal costs.[12]

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10. *See, e.g.*, TEACHOUT, *supra* note 4, at 1–16; WU, *supra* note 1, at 14–23, 132–33.

11. Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 698 (2019). *See generally* Autor et al., *supra* note 2, at 180 (evaluating claims of the superstar firm explanation); Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23687, 2019), http://www.janeeckhout.com/wp-content/uploads/RMP.pdf [https://perma.cc/F2YD-TLA4] (documenting the evolution of market power in the U.S. economy since 1955).

12. De Loecker et al., *supra* note 11, at 10; *see also* Robert E. Hall, *Using Empirical Marginal Cost To Measure Market Power in the U.S. Economy* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25251, 2018), https://www.nber.org/papers/w25251 [https://perma.cc/WHY5-XHDC] (finding support for the hypothesis that sellers across many U.S. industries have substantial market power); James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* (Stigler Ctr., Working Paper No. 17, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120849 [https://perma.cc/MSU6-GLU8] (finding that markups are

Firms' increased market power has a range of adverse economic effects. Most directly, and most squarely within the ambit of traditional antitrust law, firms' market power—their economic power allowing their unilateral control of the scarcity of their goods and services—harms consumers through higher prices, lower quality, and less innovation and choice.[13] Market power also allows firms to set profitable unilateral conditions for consumer use of their goods and services without too many consumers switching to other products.[14]

But the effects of corporate concentration and firm dominance are not limited to markets in which firms sell products to consumers. Those effects extend to markets in which firms have market power as *buyers*, or monopsony power, including markets of employers as buyers of labor services. Empirical studies have found high levels of corporate concentration among employers in American labor markets, increasing employers' wage-setting power and reducing workers' wages, work quality, and hiring rates.[15] Labor market concentration and employer monopsony are highest and most impactful on wage bargains and hiring in local labor markets.[16] Wage setting by powerful employers in

increasing in firm size and vary by sector). Markups are the difference between the product's price and the marginal cost it takes to produce a single additional unit. JAN EECKHOUT, THE PROFIT PARADOX: HOW THRIVING FIRMS THREATEN THE FUTURE OF WORK 28 (2021).

13. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 8 (4th ed. 2005) ("The ability to price profitably above the competitive level is referred to as market power . . . ."); PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 5.01 (4th ed. 2017) ("Market power is the ability to raise price profitably by restricting output.").

14. *See, e.g.*, John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. (forthcoming 2022) (manuscript at 46–48), https://ssrn.com/abstract=3866725 [https://perma.cc/BC36-DULJ] (collecting cases).

15. *See generally* Rinz, *supra* note 2 (documenting labor market concentration trends and impacts on earnings and inequality); Qiu & Sojourner, *supra* note 2 (estimating the effects of labor market concentration on labor compensation across the U.S. private sector since 2000); Dube et al., *supra* note 2 (finding substantial monopsony power and low labor supply elasticities in online on-demand labor markets); Hershbein et al., *supra* note 2 (finding increased labor market concentration associated with decreased average hourly wages); Azar & Vives, *supra* note 2 (finding the average U.S. labor market to be highly concentrated).

16. *See generally* ENRICO MORETTI, THE NEW GEOGRAPHY OF JOBS (2012) (describing "Great Divergence" between local labor markets resulting in widening income and geographic inequality); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24307, 2018), https://www.nber.org/papers/w24307 [https://perma.cc/SWJ6-LE24] (analyzing the effects of local labor market concentration on wages); RAVEN MOLLOY, CHRISTOPHER L. SMITH & ABIGAIL WOZNIAK, FED. RSRV. BD., DECLINING MIGRATION WITHIN THE US: THE ROLE OF THE LABOR MARKET (2014),

local markets can have spillover effects because the wage floors and ceilings establish local standards against which smaller employers benchmark their own wage offers.[17]

While the most immediate effects of employer monopsony are in reduced worker earnings and employment levels, reduced labor market competition more deeply entrenches already high levels of inequality and labor's declining share of income relative to capital.[18] And because firms' market power allows them to collect monopoly rents and transfers wealth from consumers and workers to firm owners and shareholders, it can aggravate economic inequality and give firms outsize influence over commercial relationships, the news and public debates, private information, and perhaps most importantly, the political process.[19]

These economic and sociopolitical effects of firm dominance have contributed to a growing consensus around the need for antitrust reforms and more aggressive government enforcement.[20] Current law

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https://www.federalreserve.gov/pubs/feds/2013/201327/201327pap.pdf [https://perma.cc/JTH9-WDCZ] (finding a decrease in interstate labor market transitions).

17. *See, e.g.*, Ellora Derenoncourt, Clemens Noelke & David Weil, Spillover Effects From Voluntary Employer Minimum Wages 1–3 (Feb. 28, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793677 [https://perma.cc/WPJ8-ANUB].

18. *See* Simcha Barkai, *Declining Labor and Capital Shares*, LXXV J. FIN. 2421, 2421–24 (2020); BIVENS ET AL., *supra* note 2; FRED Data, *supra* note 2; Autor et al., *supra* note 2. On income inequality, see *supra* note 1.

19. *See, e.g.*, WU, *supra* note 1, at 15; Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647, 647 (2021); James Niels Rosenquist, Fiona M. Scott Morton & Samuel N. Weinstein, *Addictive Technology and Its Implications for Antitrust Enforcement*, 100 N.C. L. REV. (forthcoming) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787822 [https://perma.cc/BQX8-NRJZ]; Joshua Gans, Andrew Leigh, Martin Schmalz & Adam Triggs, *Inequality and Market Concentration, When Shareholding Is More Skewed than Consumption* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25395, 2018), https://www.nber.org/papers/w25395 [https://perma.cc/3USG-3Z9N]; Sean Ennis, Pedro Gonzaga & Chris Pike, *Inequality: A Hidden Cost of Market Power* 1 (Org. for Econ. Coop. & Dev., Working Paper, 2017), https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf [https://perma.cc/W9H9-5P3Y].

20. *See, e.g.*, COUNCIL OF ECON. ADVISORS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 1 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf [https://perma.cc/235T-C6KB]; Diane Bartz, *U.S. Antitrust Official Says Competition in Labor Markets a Top Concern*, REUTERS (Oct. 1, 2021, 6:21 PM), https://www.reuters.com/world/us/us-antitrust-official-says-competition-labor-markets-top-concern-2021-10-01 [https://perma.cc/5AFF-96HA]; William Boak, *Biden Executive Order on Competition Targets Labor Markets, Including Non-Compete Agreements and Information Sharing*, JD SUPRA (July 23, 2021), https://www.jdsupra.com/legalnews/biden-executive-order-on-competition-4866322 [https://perma.cc/7QBZ-V54M].

regulates firm dominance under three core antitrust statutes.[21] First, § 7 of the Clayton Act prohibits firms from merging with or acquiring other firms if the effect "may be substantially to lessen competition, or to tend to create a monopoly."[22] Prohibiting or conditioning mergers and acquisitions is a means of "arrest[ing] in its incipiency" the adverse effects of bigness before they have taken hold in an industry.[23] Second, § 2 of the Sherman Act prohibits firms from unlawfully acquiring, maintaining, or attempting or conspiring to acquire or maintain monopoly or monopsony power.[24] Section 2 has both a market power element as well as a conduct element: a firm must have engaged in some kind of exclusionary or predatory anticompetitive conduct in acquiring or maintaining its monopoly or monopsony power to be held liable.[25] And, finally, § 5 of the Federal Trade Commission Act, enforceable only by the Federal Trade Commission ("FTC"), prohibits "[u]nfair methods of competition," including by dominant firms.[26]

The U.S. Department of Justice ("DOJ") and FTC have leveraged these core antitrust statutes to investigate and challenge Big Tech firms like Google, Facebook, and Amazon, and the Biden administration has appointed leading progressive antitrust advocates in the White House, DOJ, and FTC to preside over the "Trust-Busting Biden Presidency."[27] In addition, Congress has sought to buttress current law with proposals to expand this arsenal through reform legislation strengthening merger policy, antitrust agency authority, and expanding the range of prohibited conduct under § 2 beyond its current judicial interpretations.[28] States have joined the antimonopoly movement with

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21. *See also* Robinson-Patman Act, 15 U.S.C. § 13 (prohibiting price discrimination).

22. *Id.* § 18.

23. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 588 (1957).

24. 15 U.S.C. § 2. Section 2 prohibits unlawful monopolization on the *buy*-side as well as on the sell-side. *See*, *e.g.*, Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 315 (2007).

25. *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

26. 15 U.S.C. § 45.

27. *See, e.g.*, Shirin Ghaffary, *Biden Stacks His Administration with Yet Another Tech Foe*, VOX (July 20, 2021, 5:05 PM), https://www.vox.com/recode/22585851/jonathen-kanter-biden-google-facebook-tech-antitrust-department-justice-tim-wu-lina-khan-apple [https://perma.cc/ 8BWP-FSPB]; Zephyr Teachout, *A Blueprint for a Trust-Busting Biden Presidency*, NEW REPUBLIC (Dec. 18, 2020), https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting [https://perma.cc/2DUY-YEA8].

28. *See, e.g.*, Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (2021); Tougher Enforcement Against Monopolists (TEAM) Act, S. 2039, 117th Cong. (2021);

abuse of dominance legislation that goes beyond federal antitrust law by prohibiting a wider spectrum of dominant firm conduct and even firm dominance itself.[29]

B. Antitrust Remedies to Concentration and Dominance

There has been significant movement in the executive and legislative branches to tackle the problem of bigness through more robust agency practice and more expansive substantive law extending the scope of firm antitrust liability. But exactly how to *remedy* the problem is the subject of considerable debate.

The Sherman and Clayton Acts grant government and private enforcers a number of remedies for found violations of antitrust law, including criminal penalties (fines or imprisonment),[30] civil penalties (treble damages and attorney's fees),[31] and injunctive or other equitable relief.[32] The breakup debates—and this Article—focus on injunctive or equitable remedies, which include breakups and other forms of divestiture. Courts impose equitable relief to remedy harms for which no remedy at law—primarily, money damages—is sufficient or adequate.[33] Antitrust enforcers and the courts seek and impose these remedies to achieve the purposes of the antitrust laws—restoring competition and deterring anticompetitive conduct in the market or markets harmed by unlawful conduct—in a manner that is both administrable and avoids externalities or conflicts with federal policy in other regulated areas.[34] Imposing equitable relief requires an

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American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021).

29. *See, e.g.*, S.B. 933A, Reg. Sess. (N.Y. 2021); Assemb. B. 1812A, Reg. Sess. (N.Y. 2021) (seeking to criminalize even mere attempts to create monopolies or monopsonies through anticompetitive conduct); S.B. 20-064, Reg. Sess. (Colo. 2020) (repealing a Colorado law that prevented the Attorney General from challenging mergers or acquisitions already reviewed by a federal department under the Clayton Act).

30. 15 U.S.C. § 2.

31. *Id.* § 15(a).

32. *Id.* § 4.

33. *Id.*

34. *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004); U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 20 (2011) [hereinafter 2011 REMEDY POLICY GUIDE], https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf [https://perma.cc/CFY3-5XSM]; Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 12 (2009); A. Douglas Melamed, *Afterword: The Purposes of Antitrust Remedies*, 76 ANTITRUST L.J. 359, 359–67 (2009). Courts defer to the government and resolve "all doubts as to the remedy . . .

"adequate explanation" that the relief will "unfetter" markets, deprive antitrust defendants of the "fruits of [their] statutory violation," and "ensure that there remain no practices likely to result in monopolization in the future."[35]

Federal courts have significant and broad discretion to craft their own standards for equitable relief for unlawful conduct under antitrust law.[36] Equitable antitrust remedies are generally divided into two categories: structural and behavioral, or conduct, remedies.[37] Structural remedies seek to restore competition through firm restructuring—"breaking up" firms to create new market actors or to aid existing market actors in their ability to compete with dominant firms. Structural remedies include divestiture through transfer or sale of a firm's assets or of an existing, intact business entity or unit (a single division of a firm or spinning off an acquired business line from a merged firm) to a purchaser that could become an "[e]ffective, [l]ong-[t]erm [c]ompetitor."[38] Divestitures are routinely imposed in the merger setting to require sales of product lines, intellectual property rights, and retail stores or plants in local geographic markets, for example. Wholesale firm "break ups" on the scale of the 1982 Bell System divestiture or the 1911 divestitures of Standard Oil and American Tobacco in the § 2 context are rarer.[39]

Behavioral, or conduct, remedies impose duties and obligations on firms to engage in conduct that antitrust enforcers and the courts believe will restore or preserve competition in the market or markets in which the firms operate. Conduct remedies include firewall provisions to prevent information sharing that could facilitate

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in its favor" once the government establishes an antitrust violation. Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961)).

35. United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) (first quoting United States v. United Shoe Mach. Corp., 391 U.S. 244, 250 (1968); and then quoting *Ford Motor Co.*, 405 U.S. at 577); *see also* United States v. Grinnell Corp., 384 U.S. 563, 577 (1966) ("We start from the premise that adequate relief in a monopolization case should . . . deprive the defendants of any of the benefits of the illegal conduct . . . ."); Schine Chain Theatres v. United States, 334 U.S. 110, 128–29 (1948) (describing the functions of equitable divesture in antitrust cases).

36. *See, e.g.*, *Ford Motor Co.*, 405 U.S. at 573; *Microsoft*, 253 F.3d at 105.

37. *See, e.g.*, 2011 REMEDY POLICY GUIDE, *supra* note 34, at 6–18.

38. *Id.* at 7–12.

39. *See, e.g.*, William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1111–39 (1989).

anticompetitive behavior, nondiscrimination provisions that prohibit self-preferencing or favoring nonrival firms, mandatory intellectual property licensing requirements, transparency requirements with regulatory agencies, prohibitions against retaliation against upstream or downstream purchasers and suppliers for dealing with competitors, and prohibitions on certain exclusive contracting practices.[40] Conduct remedies can be combined with structural remedies to ensure competition, particularly to remedy mergers of horizontal competitors.[41]

Courts impose structural and conduct remedies following merits determinations of antitrust liability in criminal and civil cases. But both types of remedies are also negotiated as components of proposed consent decrees resolving cases between antitrust enforcers and defendants before judicial resolution of liability. When the FTC accepts consent decrees in its enforcement actions, it must seek public comment to ensure any settlement is in the public interest, but judicial review is limited to examining whether the consent decrees bear a "reasonable relation to the unlawful practices found to exist."[42] The Antitrust Division of the DOJ is required to follow more formal procedures of judicial approval for settlements reached in its enforcement actions under the Tunney Act.[43] It requires that proposed consent decrees accepted by the Antitrust Division be filed in federal district court, and after a period of public comment, be reviewed and only approved by that court upon its finding that the proposed settlement is in the public interest.[44] Once entered, consent decrees become binding court orders, often administered by the courts through their continued jurisdiction over the dispute. Well over 93 percent of

40. 2011 REMEDY POLICY GUIDE, *supra* note 34, at 12–17.

41. *Id.* at 12, 17–19.

42. For statutory and regulatory requirements of public comment regarding consent agreements, see 15 U.S.C. § 46(f) and FTC Rule 2.34, 16 C.F.R. 2.34 (2021). For the standard governing judicial review of consent decrees filed by the FTC and antitrust defendants, see FTC v. Nat'l Lead Co., 352 U.S. 419, 428–29 (1957).

43. *See* Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h). The Tunney Act was passed in 1974 and amended in 2004. For the Tunney Act's legislative history, see Darren Bush, *The Death of the Tunney Act at the Hands of an Activist D.C. Circuit*, 63 ANTITRUST BULL. 113, 114–17 (2018).

44. *See* 15 U.S.C. § 16(e)–(f).

antitrust agencies' civil enforcement actions get resolved by consent decrees.[45]

While much criticism of current antitrust enforcement has focused on limitations in substantive antitrust law, judicial interpretations of that law, and lax agency enforcement, critics have also challenged court and agency remedial design as too heavily favoring weak conduct remedies over more aggressive structural remedies.[46] The following Section provides legal background on the law governing structural remedies like breakups, explaining how the law allows, and, in certain circumstances, requires the consideration of worker welfare effects, despite the little attention paid to these effects by current breakup debates.

C. The Law Governing Breakups and Their Labor Market Effects

The antitrust laws and the Tunney Act allow and even require agencies and the courts to evaluate the labor market effects of antitrust remedies.

First, and most generally, it is "settled" law that antitrust courts can impose equitable remedies that extend "beyond the narrow limits of the proven violation,"[47] including prohibiting lawful conduct if that prohibition "represents a reasonable method of eliminating the consequences of the illegal conduct."[48] As the Supreme Court has stated, "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed."[49]

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45. Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177–78 (Charbit et al. eds., 2013) ("[T]he [Antitrust] Division resolv[es] nearly its entire antitrust civil enforcement docket by consent decree . . . . Since 1995, the FTC has settled 93 percent of its competition cases."); A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 13 (1995) (describing antitrust enforcement as moving "from the Law Enforcement Model toward the Regulatory Model"); Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, 9 (1995) (noting "a shift on the policy continuum toward bureaucratic regulation").

46. *See infra* Part I.D (discussing the "third phase" of breakup debates and collecting literature).

47. Trabert & Hoeffer, Inc. v. Piaget Watch Corp., 633 F.2d 477, 485 (7th Cir. 1980); *see* PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 325c (4th ed. 2020).

48. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 699 (1978).

49. *Pro. Eng'rs*, 435 U.S. at 698 (quoting Int'l Salt Co. v. United States, 332 U.S. 392, 400 (1947)).

Thus, in imposing equitable remedies like breakups for dominance violations under § 2 of the Sherman Act or § 5 of the FTC Act, courts can consider how those remedies could trigger anticompetitive effects in labor markets. Both statutes prohibit unlawful buyer monopsony in labor markets, just as they prohibit unlawful seller monopoly in product markets.[50] While very few § 2 or § 5 cases have directly targeted employer monopsony—targeting instead dominant firm conduct in *product* markets—if a court's imposition of equitable relief in a product market would cause anticompetitive harm in a labor market, it would be within courts' equitable discretion to consider evidence of that harm before ordering that relief and to seek to obviate that harm in imposing its remedy. Consider a divestiture that could result in less labor market competition because it would restructure a firm into two competitor firms in a product market but would increase concentration in local labor markets. In that case, the court's imposition of the remedy would itself be generating labor market competition harms that contravene antitrust policy.[51] Case law has yet to address labor market effects in remedial design in § 2 or § 5 product market cases on the merits; courts have only yet addressed such effects in Tunney Act proceedings.[52]

In reviewing and crafting equitable remedies to unlawful mergers under the Clayton Act's § 7, courts must consider the labor market effects of those remedies. This is obviously true, of course, if a merger is challenged on grounds that it may decrease competition in a labor market. Mergers and acquisitions are unlawful whenever their effects

50. *See generally* Weyerhaeuser v. Russ-Simmons Hardwood Lumber, 549 U.S. 312 (2007) (considering the anticompetitive effects of predatory bidding and pricing); Le v. Zuffa, 216 F. Supp. 3d 1154 (D. Nev. 2016) (finding that mixed martial arts fighters had pleaded sufficient facts of the Ultimate Fighting Championship's monopolistic power to survive a motion to dismiss); *Oversight of the Enforcement of the Antitrust Laws, Questions for Joseph Simons, Chairman, Fed. Trade Comm'n Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rts. of the S. Comm. on the Judiciary*, 115th Cong. (2018) (discussing the enforcement of antitrust laws); *FTC Hearing #2: Monopsony and the State of U.S. Antitrust Law*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/events-calendar/2018/09/ftc-hearing-2-competition-consumer-protection-21st-century [https://perma.cc/BNM7-2JY8] (discussing the evolution of antitrust law and monopsony power).

51. Such a remedy would also conflict with federal labor policy under the NLRA seeking to ensure "equality of bargaining power between employers and employees." 29 U.S.C. § 151; *see* Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 664–73 (2021) [hereinafter Hafiz, *Structural Labor Rights*].

52. For an analysis of judicial discussions of labor market effects in Tunney Act proceedings, see *infra* Part I.E.2.

"may be substantially to lessen competition, or tend to create a monopoly" in "any line of commerce," including labor markets.[53] But effects on labor markets must also be considered in crafting remedies for mergers challenged as having anticompetitive effects in product markets. Section 7 applies equally to product and labor markets, and the antitrust agencies have clarified in their Merger Guidelines interpreting § 7 that they "will challenge the merger if likely to be anticompetitive in *any* relevant market," including labor markets affected by the transaction.[54] Thus, even where mergers are successfully challenged in product markets under § 7, imposing any remedy for found violations would contravene the statute were it to result in substantially lessening competition in a labor market.

Courts and enforcers face the most challenge designing remedies to ensure against anticompetitive effects when merging parties or enforcers claim the remedies imposed would reduce labor costs. In those circumstances, courts will be tasked with determining whether to credit purported reduced costs as procompetitive efficiency gains or, instead, increased buyer power in the relevant labor market. But just as courts should not credit cross-market efficiencies in one market at the expense of anticompetitive effects in another market on the merits of a § 7 claim, so should they not when assessing the effects of imposed remedies in separate markets. "[B]enefits premised on reductions in competition are not cognizable . . . ."[55] In many cases, lower labor costs may reduce output, thus resulting in harms to *both* labor and product markets. Even where that may not be the case, courts must consider and ensure that any remedies they impose do not lessen competition in labor markets to avoid contravening § 7.[56]

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53. 15 U.S.C. § 18; *see* DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES]; Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1033–37 (2019); Scott Hemphill & Nancy Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2079–82 (2018).

54. HORIZONTAL MERGER GUIDELINES, *supra* note 53, § 10, at 30 n.14 (emphasis added); 15 U.S.C. § 18.

55. Hiba Hafiz, *Labor's Antitrust Paradox*, 86 U. CHI. L. REV. 381, 398 (2019); *see* 15 U.S.C. § 18; HORIZONTAL MERGER GUIDELINES, *supra* note 53, at § 10, at 30 n.14; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 88 (2019); Hemphill & Rose, *supra* note 53, at 2108–09; *see also* United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963); United States v. Anthem, Inc. 855 F.3d 345, 345 (2017) (rejecting defendant Anthem's claimed purchasing efficiencies).

56. Hemphill & Rose, *supra* note 55, at 2078, 2106.

Finally, and perhaps most importantly, courts must consider the labor market effects of proposed antitrust remedies upon review of DOJ consent decrees in Tunney Act proceedings subject to a public interest standard.[57] Specifically, Congress requires courts to consider the following enumerated factors when entering judgment:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, . . . and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[58]

In conducting public interest reviews, courts can solicit testimony from government officials or experts (either upon the motion of any party or participant in the Tunney Act proceedings or upon its own motion) and may appoint a special master or outside experts regarding any aspect of the proposed consent decree.[59] Courts may also hold trial-like proceedings with full or limited participation by interested parties, including workers' organizations or unions affected by the remedial

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57. 15 U.S.C. § 16(e); *see* Bush, *supra* note 43 and accompanying text; *see also* Johnson Prods. Co. v. FTC, 549 F.2d 35, 38 (7th Cir. 1977) (stating that the FTC's public interest mandate requires it to act "in furtherance of the public interest" and entitles it to reserve to itself withdrawal of its acceptance of a consent decree after the public comment period). *See generally* 15 U.S.C. § 16 (requiring every consent judgment to be entered in the public interest and permitting courts to consider certain factors); Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 96 CHI.-KENT L. REV. 37 (2020) [hereinafter Hafiz, *Interagency Merger Review*] (documenting how regulatory agencies often review mergers under a public interest standard). Again, while the FTC is not subject to the Tunney Act, it may only bring litigation to enforce the FTC Act if doing so "would be to the interest of the public." 15 U.S.C. § 45(b). In settling such litigation, it solicits public comment to ensure such settlements are in the public interest. 16 C.F.R. § 3.25(f) (2021).

58. 15 U.S.C. § 16(e)(1). The 2004 Amendments were intended "to explicitly restate the original and intended role of District courts . . . by mandating that the court make an independent judgment based on a series of enumerated factors." 150 CONG. REC. 6328 (2004) (statement of Sen. Patrick Leahy).

59. 15 U.S.C. § 16(f)(1)–(2).

structure proposed by the consent decree, and may solicit comments from affected parties.[60]

For example, in *United States v. AT&T*,[61] the canonical Tunney Act decision ordering the divestiture of the Bell System, the court explicitly sought AT&T employees' expertise on remedial effects: "The increasing expertise of so-called public interest advocates and for that matter the more immediate concern of a defendant's competitors, employees, or antitrust victims may well serve to provide additional data, analysis, or alternatives which would improve the outcome."[62] *AT&T* also established the core standard for "harmoniz[ing] competitive values with other legitimate public interest factors" in approving consent decrees reached between the government and antitrust defendants:

> If the decree . . . effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest—it will be approved. If the proposed decree does not meet this standard, the Court will . . . require modifications which would bring [it] within the public interest standard . . . .[63]

Courts' analysis in Tunney Act proceedings includes considering whether the relief impinges on other public policies under federal law.[64] Federal labor law ensures equal bargaining power between workers and their employers.[65] Thus, antitrust law's substantive and remedial provisions allow, and even require, judicial consideration of the labor market effects of antitrust remedies in found violations or in resolving enforcement actions.

D. The Breakup Debates: A Historical Trajectory

Early antitrust enforcers and scholars shared a general consensus supporting the use of structural remedies to break up proposed and consummated mergers, and, in more rare circumstances, monopolies. This consensus was motivated first by institutional economic thought,

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60. *Id.* § 16(f)(3)–(4).

61. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

62. *Id.* at 148 n.70 (quoting 119 CONG. REC. 3452 (1973) (statement of Sen. John Tunney)).

63. *Id.* at 153.

64. *See, e.g.*, United States v. Airline Tariff Pub. Co., 836 F. Supp. 9, 11–12 (D.D.C. 1993).

65. *See* 29 U.S.C. § 151; Hafiz, *Structural Labor Rights*, *supra* note 51.

and then by the structure–conduct–performance ("SCP") model developed by early Industrial Organization ("IO") economists like Joe Bain starting in the late 1950s.[66] Institutional economists viewed structural remedies, accompanied by government regulation, as essential for equalizing bargaining power and ensuring competition.[67] Under their influence and guidance, antitrust enforcers most extensively deployed divestitures between 1904 and 1920, restructuring American Tobacco, the Standard Oil Trust, various railroad interests, and more "following an intense period of merger activity at the turn of the century."[68] Although antitrust enforcement under the Harding and Coolidge administrations took a decidedly deregulatory turn, the Roosevelt administration revived industrial planning and more aggressive antitrust enforcement during the Great Depression.[69] In the late 1930s and 1940s, a separate Antitrust Division within the DOJ was structured to strengthen antitrust enforcement and agency expertise, and Roosevelt recruited a brain trust to guide antitrust policy and remedial design.[70] By the time the DOJ embarked on its high-profile

66. On institutional economics and remedies, see JOHN COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 108–14 (1924). For the SCP model, see JOE S. BAIN, INDUSTRIAL ORGANIZATION 4 (2d ed. 1968); DONALD TURNER & CARL KAYSEN, ANTITRUST POLICY 3–99 (1959); Joe Bain, *Workable Competition in Oligopoly*, 40 AM. ECON. REV. 35, 36–38 (1950). For approaches to divestiture under § 2 cases, see Waller, *supra* note 34, at 14–16.

67. *See* JOHN COMMONS, INSTITUTIONAL ECONOMICS 338–39 (1934); WALTON HAMILTON & IRENE TILL, ANTITRUST IN ACTION 116–19 (1940); Walton Hamilton, *The Anti-Trust Laws and the Social Control of Business*, *in* THE FEDERAL ANTI-TRUST LAWS 11–12 (Milton Handler ed., 1932) [hereinafter Hamilton, *The Anti-Trust Laws*]; *A Resolution for an Investigation of Certain Charges Concerning the Administration of Industrial Codes by the National Recovery Administration: Hearing on S. Res. 79 Before the S. Comm. on Fin.*, 74th Cong. 2025–27 (1935) (statement of Walton Hamilton). For an overview of institutional economists' thoughts on monopoly, see generally MALCOLM RUTHERFORD, THE INSTITUTIONALIST MOVEMENT IN AMERICAN ECONOMICS, 1918–1947 (2011).

68. William Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1295 (1999); *see, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 79–80 (1911); United States v. Am. Tobacco Co., 221 U.S. 106, 187 (1911); United States v. Union Pac. R.R., 226 U.S. 61, 97–98 (1912); Kovacic, *supra* note 39, at 1114–15 & n.52–64 (collecting cases); *see also* Edward Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 182–83 (1947) (describing historical periods of merger movements and regulation).

69. *See* William Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 610, 619–20 (1982).

70. *See generally* SPENCER WEBER WALLER, THURMAN ARNOLD 78–110 (2005) (describing rise of DOJ's Antitrust Division and recruitment of personnel during Roosevelt administration under Thurman Arnold's leadership); Kovacic, *supra* note 68, at 1115–19 (recounting history of antitrust law); Walter Adams, *Dissolution, Divorcement, Divestiture*, 27 IND. L.J. 1, 2–13 (1951) (same).

effort to rein in the Hollywood studio system, the Supreme Court was positioned to make its support of divestiture remedies clear, holding in 1948 that a district court's order of conduct remedies alone was insufficient.[71]

Antitrust enforcers' approach to both policy and remedial design was increasingly informed by the rise of IO economics and the SCP paradigm in the 1950s and 1960s.[72] Under the SCP paradigm, industry market *structure*, believed to enable antitrust defendants' anticompetitive conduct and markets' resulting economic performance, governed remedial design.[73] Divestiture, and structural remedies more generally, was considered a critical tool for altering firm behavior and competition outcomes by increasing the number of firms in the market.[74] A classic example of this approach is the DOJ's enforcement action against DuPont for its acquisition of General Motors and United States Rubber Company stock. In reviewing that case, the Supreme Court agreed with the DOJ's challenge to the merger as unlawful and established divestiture as the preferred remedy to such unlawful mergers because "[i]t is simple, relatively easy to administer, and sure."[75]

But the breakup of AT&T[76] marked this first phase's swan song. By the late 1970s and early 1980s, the Chicago School's laissez-faire

71. United States v. Paramount Pictures, 334 U.S. 131, 166–76 (1948).

72. For foundational texts, see generally JOE BAIN, INDUSTRIAL ORGANIZATION (1st ed. 1959) (introducing and applying IO economics and the SCP paradigm to industrial concentration); RICHARD CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, AND PERFORMANCE (3d ed. 1972) (providing a systematic introduction to IO economics and the SCP paradigm); Charles Mueller, *The New Antitrust: A "Structural" Approach*, 1 ANTITRUST L. & ECON. REV. 87, 88 (1967).

73. *See, e.g.*, Frederic M. Scherer, *Structure-Performance Relationships and Antitrust Policy*, 46 ANTITRUST L.J. 864, 867–69 (1977); Herbert Hovenkamp, *The Neal Report and the Crisis in Antitrust*, 5 COMPETITION POL'Y INT'L 219 *passim* (2009).

74. *See* Daniel Crane, *A Premature Postmortem on the Chicago School of Antitrust*, 93 BUS. HIST. REV. 759, 764 (2020) ("Structuralism prevailed in the academy, antitrust agencies, courts, and political institutions until the mid-1970s."). *See generally* Kevin O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV. J. ON LEGIS. 687 (1976) (arguing that divestiture should be the presumptive remedy for Sherman Act § 2 violations).

75. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 330–31 (1961).

76. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). For general accounts of the dissolution of the Bell System, see generally STEVE COLL, THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T (1987); PETER TEMIN, THE FALL OF THE BELL SYSTEM (1987). On the DOJ's IBM case and Robert Bork, see Donald I. Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV. 898, 899 n.13 (1986).

aversion to the use of structural remedies had built a growing ideological consensus against the use of divestiture in favor of conduct remedies, ushering in a second phase of the breakup debates.[77] The Chicago School consensus was grounded in two primary concerns directed at limiting remedial design decisions to narrow consumer welfare considerations. The first was that court-imposed divestitures might reduce efficiencies and increase firm costs, leading to higher consumer prices.[78] Scholars and, later, enforcers, viewed courts' expertise as deficient relative to private market actors when it came to firm and industry structure and day-to-day "business decisions about . . . pricing, product introduction, and investment in risky ventures."[79] Second, divestiture critics viewed courts as limited in their ability to evaluate the administrative costs of imposing structural remedies in ways that could ultimately harm consumers.[80] Imposing divestitures after mergers created an "unscrambling" problem that could disrupt integration efficiencies to consumers and require complex decisions about which assets should constitute a new firm.[81]

Many IO economists supported these criticisms, labeling the agency-instigated divestitures of the 1960s and 1970s as failures and offering empirical evidence that divestitures failed to reestablish acquiring firms as effective competitors that reduced prices through

77. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW 103, 278 (2d ed. 2001); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 945 (1979); Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J.L. & ECON. 229, 262–63 (1977); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 5 (1973).

78. *See, e.g.*, Peltzman, *supra* note 77, at 262–63; Demsetz, *supra* note 77, at 5.

79. Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 34 (2001).

80. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 953 (1981).

81. *See, e.g.*, Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 54–74 (1969); William Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 830 (1997) ("Once a merger takes place and the firms' operations are integrated, it can be very difficult, or impossible, to unscramble the eggs and reconstruct a viable, divestable group of assets.").

competition.[82] Overall, then, breakup remedies could cause more harm than good and produce more inefficiencies than they eliminate.[83]

The scholarly turn against breakups significantly impacted agency practice and judicial reasoning. After the Bell breakup, antitrust enforcers did not abandon structural remedies on paper and in guidance documents, but in practice, they rarely sought or achieved structural separations in merger and monopolization cases.[84] For example, the Antitrust Division's *Policy Guide to Merger Remedies* became increasingly more partial to conduct remedies. In 2004, it maintained its historical preference for structural remedies,[85] but by 2011, it shifted to emphasize its view that conduct remedies were a "valuable tool" in reinvigorating merger enforcement.[86] The Bush and Obama administrations were reluctant to pursue divestiture remedies, likely in part due to court hostility to imposing them.[87] A prominent

82. Elzinga, *supra* note 81, at 47–53; Robert A. Rogowsky, *The Economic Effectiveness of Section 7 Relief*, 31 ANTITRUST BULL. 187, 189, 196, 212 (1986) (classifying 75 percent of divestitures as deficient or unsuccessful); James C. Ellert, *Mergers, Antitrust Law Enforcement and Stockholder Returns*, 31 J. FIN. 715, 716–27 (1976) (examining divestiture success of firms challenged between 1950 and 1972 based on shareholder returns before and after divestiture, finding no significant difference in returns of divesting companies compared to returns of companies with different outcomes); Malcolm R. Pfunder, Daniel J. Plaine & Anne Marie G. Whittemore, *Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 ANTITRUST BULL. 19, 20–21 (1972). *But see* Rory Van Loo, *In Defense of Breakups: Administering a 'Radical' Remedy*, 105 CORNELL L. REV. 1955, 1976–81 (2020) (challenging Professor Robert Rogowsky's and Professor James Ellert's methodologies and findings as deficient and irrelevant based on more recent quantitative studies showing higher success rates).

83. *See* Demsetz, *supra* note 77, at 2–9; Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1163 (1982) (arguing that "we may as well forget about attempting to disestablish" integrated firms); Menesh S. Patel, *Merger Breakups*, 2020 WIS. L. REV. 975, 1007 (warning of the "fundamental difficulties of unwinding consummated mergers" and collecting sources).

84. Spencer Weber Waller, *Access and Information Remedies in High-Tech Antitrust*, 8 J. COMP. L. & ECON. 575, 577 (2012).

85. U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7–8 (2004).

86. *Compare id.* at 7 (stating that structural remedies are "preferred to conduct remedies in merger cases" because they are "clean and certain, and generally avoid costly government entanglement in the market" relative to behavioral remedies, which were "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent"), *with* 2011 REMEDY POLICY GUIDE 6 (stating that structural remedies were the "best choice" only "[i]n certain factual circumstances" and that behavioral remedies were a "valuable tool").

87. *See* Van Loo, *supra* note 82, at 1970. *See generally* Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture*, 86 MINN. L. REV. 565 (2002) (recounting the history of divestiture, including under the Bush administration).

example is the D.C. Circuit's rejection of the district court's divestiture order in *United States v. Microsoft Corp.*[88] on grounds that "wisdom counsels against adopting radical structural relief" when the "logistical difficulty" of splitting a company weighed against it.[89]

But political alignments have now primed a pendulum swing back in favor of divestiture remedies. A new "third phase" of the breakup debates evinces a fragile consensus between progressive, centrist, and conservative policymakers and scholars on firm dominance. In arguing for breakups, progressives—often dubbed the "New Brandeis School"[90]—have emphasized the urgent need to combat "bigness" not only to restore competition and access to economic opportunity for smaller businesses, but also to protect democratic values, the political process, and underrepresented stakeholders, including workers. For example, Professor Tim Wu seeks a return to Louis Brandeis' vision of economic policy.[91] In this vision, the government uses its antitrust authority to secure worker protections against monopoly power that grants large firms a bargaining advantage and more resources to extract rents from labor, impose abusive employment conditions, restrict worker mobility, and engage in union busting, wage discrimination, and worker misclassification.[92] Professor Zephyr Teachout similarly points to the need for more aggressive structural relief on grounds that big firms are both bad for consumers as well as workers in depressing wage rates and increasing economic inequality.[93]

This progressive position[94] has coincided with a more centrist Democratic consensus on the need for antitrust reforms, prompted by evidence of firm dominance, corporate concentration, and the limited efficacy of conduct remedies in preventing traditional antitrust harms like higher consumer prices.[95] Antitrust scholars and advocates who

88. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

89. *Id.* at 80, 98, 106–07.

90. *See, e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).

91. WU, *supra* note 1, at 33–44.

92. *Id.* at 42, 72–73.

93. *See, e.g.*, TEACHOUT, *supra* note 4, at 145–62.

94. For the alignment of the Neo-Brandeisians with the progressive, antimonopoly wing of the Democratic Party, see, for example, Teachout, *supra* note 27.

95. *See, e.g.*, Anna Edgerton, *Unlikely Senate Alliance of Klobuchar, Lee Paints a Bull's-Eye on Big Tech*, BLOOMBERG (May 10, 2021, 2:00 AM), https://www.bloomberg.com/news/articles/2021-05-10/left-right-odd-couple-in-senate-paints-a-bull-s-eye-on-big-tech [https://perma.cc/9M4L-6ACL]. For progressive advocacy of breakups, see, for example, TEACHOUT, *supra* note 4, at 6–

favor structural remedies have received recent empirical support not only from the FTC's own remedial retrospectives, but also from independent economic experts who found that behavioral remedies are significantly less effective than structural remedies in preventing future price increases.[96] These observed postmerger price increases were twice as large when behavioral remedies were used as compared to divestitures.[97] Pro-divestiture scholars also reject the Chicago School's administrability concerns surrounding breakups by pointing to the comparatively high administrability costs of behavioral remedies that require postmerger monitoring, and by discounting the purported unworkability of divestiture remedies given their consumer welfare benefits, deterrence value, and common voluntary use by firms as a form of private ordering that increases firm efficiencies.[98]

Even conservative policymakers have increasingly called for more breakups, motivated in part by perceptions of liberal bias and censorship of conservative viewpoints by dominant media and internet platforms. Since the Trump administration, Republicans have converged on the need for antitrust reforms to break up Big Tech, favoring structural remedies as the best way to do so that avoids long-term government involvement in markets.[99] In 2017, the Trump FTC

13, 213–14; WU, *supra* note 1, at 73, 132–33; Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985–86, 1063–64, 1074–75 (2019) (arguing that structural remedies are preferable to behavioral ones because they are "highly administrable" and require less ongoing monitoring); Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSPS. 94, 94–117 (2019) (arguing that divestitures can increase competition and innovation while reducing monopolists' impact in politics).

96. *See, e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 120 (2014); Steven C. Salop, *Modifying Merger Consent Decrees To Improve Merger Enforcement Policy*, ANTITRUST, Fall 2016, at 15, 18; Waller, *supra* note 34, at 15; Kovacic, *Designing Antitrust Remedies*, *supra* note 68, at 1303.

97. John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 636, 641 (2013).

98. *See, e.g.*, Van Loo, *supra* note 82, at 1959, 1965, 1980.

99. *See, e.g.*, Ben Brody, *Republican Senator Slams Conservative Tech Lobbyists to Their Faces*, PROTOCOL (June 22, 2021), https://www.protocol.com/mike-lee-netchoice-antitrust [https://perma.cc/UY4L-JEMC]; Rob Copeland, *Breakup of Tech Giants 'on the Table,' U.S. Antitrust Chief Says*, WALL ST. J. (Oct. 22, 2019, 2:00 PM), https://www.wsj.com/articles/breakup-of-tech-giants-on-the-table-u-s-antitrustchief-says-11571765689 [https://perma.cc/U4KX-VECZ] (quoting Makan Delrahim, former head of the DOJ Antitrust Division); Makan Delrahim, Assistant Att'y Gen., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar [https://perma.cc/Y24H-DY9T]; *see also* F. David Osinski, *Merger Remedies and the Undersupply of Economic Research*, 18 A.B.A. SEC. ANTITRUST L. ECON. COMM. NEWSL., Fall 2017, at 5, 6–7 ("While the exact remedy may be

released the results of its retrospective review of its use of merger remedies between 2006 and 2012, which estimated an 80 percent success rate of restoring competition where structural remedies were imposed on antitrust defendants.[100]

This emerging consensus across the political spectrum in favor of breakups portends meaningful changes in remedial antitrust policy, whether through legislation or remedial proposals and decisions by agencies and the courts. This makes it all the more important that current breakup debates squarely address the effects of such remedies on workers as crucial recipients of antitrust protection.

E. Restoring Labor Market Analysis in Remedial Debates

Policymakers, the antitrust agencies, and scholars have either ignored the labor market effects of antitrust remedies or, in the case of many progressives, merely assumed that such breakups benefit rather than harm workers. But fully understanding the effects of antitrust remedies on workers is critical to the renewed attention to antitrust law's role in ensuring labor market competition.[101]

This Section first revives the forgotten history of New Deal enforcement that centered labor market effects of antitrust remedies in agency analysis and economic policy. It then details how the breakup debates and enforcers' remedial design in the postwar period have either ignored or actively worsened antitrust remedies' effects on workers and labor market competition. It offers the first comprehensive review of existing court decisions and antitrust agencies' approved consent decrees resolving enforcement actions

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unique to each transaction, generally structural remedies are the preferred method for alleviating competitive effects of horizontal overlaps in mergers.").

100. BUREAU OF COMPETITION & BUREAU OF ECON., FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS 2 (2017).

101. For analysis that considers the connection between antitrust and labor market problems, including the effect on workers, see generally Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMP. & LAB. L. (forthcoming 2022) (on file with author); Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, J. HUMAN RES. (June 9, 2021), http://jhr.uwpress.org/content/early/2021/06/02/jhr.monopsony.0219-10030R1.full.pdf+html [https://perma.cc/2CFK-T9L4]; Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2020); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); Hafiz, *supra* note 55; Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65 (2019); Marinescu & Hovenkamp, *supra* note 53; Hemphill & Rose, *supra* note 53; Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017).

against mergers and dominant firms between 1992 to the present. This documents, at best, enforcers' failure to include labor market competition protections in their remedial design and, at worst, their imposition of remedial provisions that *reduce* labor market competition.

1. *Early Labor Market Effects Analysis in Antitrust Remedial Design and Enforcement.* While analysis of the labor market effects of antitrust remedies has been largely absent in judicial opinions and scholarly discussions of remedial design—including the most recent breakup debates—it was not alien to earlier antitrust policy enforcement. In fact, competition regulation was deeply intertwined with labor market regulation from the Great Depression through even the Nixon and Carter administrations. Specifically, aggressive regulation of industry occurred in tandem with industry-wide wage regulation through labor boards and wage stabilization boards. It began with the National Industrial Recovery Act of 1933 ("NIRA"), extended into the War Labor Boards of World Wars I and II and the Wage Stabilization Board during the Korean War, and culminated in the Price Commission, Pay Board, and Council of Wage and Price Stability in the Nixon, Ford, and Carter administrations.[102] New Deal government regulators and experts that first administered industry-wide codes of fair competition and wage standards were trained in the institutional economics of John Commons, Thorstein Veblen, and Wesley Mitchell, and were recruited to both the Antitrust Division and various labor agencies based on that expertise.[103]

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102. *See* LEWIS L. LORWIN & ARTHUR WUBNIG, LABOR RELATIONS BOARDS: THE REGULATION OF COLLECTIVE BARGAINING UNDER THE NATIONAL INDUSTRIAL RECOVERY ACT 45 (1935) (discussing the passing of the National Industrial Recovery Act of 1933); Hiba Hafiz, *Why a "Whole-of-Government" Approach Is the Solution to Antitrust's Current Labor Problem*, PROMARKET (Nov. 18, 2021) [hereinafter Hafiz, *Whole-of-Government*], https://promarket.org/2021/11/18/antitrust-monopsony-government-labor [https://perma.cc/Z8DJ-ZDZS] (tracing the history of labor boards after 1935).

103. *See* Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115, 1121–29 [hereinafter Hafiz, *Economic Analysis*] (describing how the now-defunct Division of Economic Research for the NLRB incorporated economic analysis and worked to improve labor's bargaining power). For a general account of the relationship between institutional economics and business as well as labor market regulation, see JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1918–1933, at 425–37 (1959). For more on the historical evolution of economic approaches toward competition policy and analysis, see generally Matthew T. Panhans & Reinhard Schumacher, *Theory in Closer Contact with Industrial Life: American Institutional Economists on Competition Theory and Policy*, 17 J. INSTITUTIONAL ECON. 781 (2021); William

When the Antitrust Division was first formed as a separate division of the Department of Justice in 1933, it primarily enforced NIRA's industry price-fixing codes, which were drafted by industry to control prices and production during the Depression.[104] Even though the Division was highly underresourced, by the late 1930s, it became the central hub of industry regulation, defending or enforcing orders of administrative agencies like the Interstate Commerce Commission, FTC, and Federal Communications Commission ("FCC"), and most importantly, labor regulations.[105] The Antitrust Division also enforced labor code violations under the NIRA to ensure that "competitive conditions" were maintained in labor markets.[106]

Early institutional economic approaches to antitrust remedies viewed their efficacy as highly context-dependent: equitable remedies were understood to have differential effects depending on broader regulation that shaped the industry, including the extent of labor market regulation and the existence of labor market and other institutions that could function as countervailing power against dominant firms. For example, Walton Hamilton, a leading institutional economist in the Antitrust Division who served as a Special Assistant to the Attorney General between 1938 and 1945,[107] viewed the Sherman Act as an "elementary ordinance" whose regulatory impact needed to be assessed within a larger "pattern of the public control of

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J. Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business*, 93 BUS. HIST. REV. 665 (2019); Malcolm Rutherford, *Walton H. Hamilton and the Public Control of Business*, 37 HIST. POL. ECON. 234 (2005); Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990).

104. *See* Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569, 571–72 (2004).

105. *Id.* at 573–74; *see also* HOMER CUMMINGS, SELECTED PAPERS OF HOMER CUMMINGS: ATTORNEY GENERAL OF THE UNITED STATES 1933-1939, at 17 (Carl Brent Swisher ed., 1972) (1939) (noting that most labor cases were referred to the Antitrust Division, in addition to orders from the Interstate Commerce Commission, the FTC, FCC, and others).

106. CUMMINGS, *supra* note 105, at 122. The Antitrust Division's labor market regulation took a dark turn, of course, when, primarily under the direction of Thurman Arnold in the late 1930s and early 1940s, it prosecuted labor unions for conspiring with manufacturers and contractors in the housing and construction markets. WALLER, *supra* note 70, at 103–05. This eventually motivated a second congressional rebuke immunizing labor unions from the antitrust laws with the passage of the Norris-LaGuardia Act (following the original statutory labor exemption in the Clayton Act of 1914). *See* Waller, *supra* note 104, at 600–03; 15 U.S.C. § 17; 29 U.S.C. § 52.

107. *See* Thurman Arnold, *Walton Hale Hamilton*, 68 YALE L.J. 399, 399 (1959); Waller, *supra* note 104, at 608; Malcolm Rutherford, *The Judicial Control of Business: Walton Hamilton, Antitrust, and Chicago*, 34 SEATTLE U. L. REV. 1385, 1395 (2011).

business."[108] Hamilton insisted on an interdisciplinary approach to antimonopoly law that situated it within broader legal institutions, forms of business control, and history:

> Competition, property, the price structure, the wage system, and like institutions refuse to retain a definite content. Not only are things happening to them, but changes are going on within them. A law, a court decision, . . . a change in popular habits of thought, and the content of property rights is affected. An increased demand for labor, a refusal of the nation to allow strikes, an enforced recognition of unionism, an establishment of wages upon living costs, and the wage system becomes different. Both by a change in its relation to other things and by subtle changes going on within, each of these institutions is in process of development. And, if this is true of particular institutions, it is likewise true of the complex of institutions which together make up the economic order. We need constantly to remember that in studying the organization of economic activity in general as well as in particular, we are dealing with a unified whole which is in process of development.[109]

Hamilton and other institutionalists were critical in developing the infrastructure for labor economic research that served administrative governance, establishing the National Bureau of Economic Research and the Brookings Institute of Economics, and actively working to improve the statistical work of government agencies, including the Bureau of Labor Statistics in the Department of Labor.[110]

Upon joining the Antitrust Division, Hamilton viewed antitrust policy as a means of stabilizing industry and serving the public interest, and understood that required significant coordination within the administrative state: "If industries are to become orderly, . . . if laborers are to enjoy steady employment and living wages, there must be a measure of central direction."[111] Hamilton even viewed processes of production within an industry (like the routinization of assembly line

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108. Walton Hamilton, *Common Right, Due Process and Antitrust*, 7 LAW & CONTEMP. PROBS. 24, 24 (1940).

109. Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309, 315 (1919); *see also* Edward A. Adler, *Labor, Capital, and Business at Common Law*, 29 HARV. L. REV. 241, 276 (1916) (underscoring "the fundamental principle of the common law that labor, capital, and business are all parts one of another").

110. *See* RUTHERFORD, *supra* note 67, at 178–80.

111. Walton H. Hamilton, *The Problem of Anti-Trust Reform*, 32 COLUM. L. REV. 173, 177 (1932).

production in auto manufacturing) as reducing labor's bargaining power, with concentration in the same industry giving manufacturers buyer power over auto dealers.[112] Thus, he believed that a successful competition policy would have to involve aggressive government regulation to "take up the shock of competition," including regulating work hours, labor conditions, and minimum wage laws, and regulating monopolistic industries with commissions to control prices.[113] And, ultimately, he believed industries could become self-regulating to the extent that stakeholders, like workers and consumers, were members of controlling bodies that governed industry production.[114]

Although Hamilton failed to implement this aggressive regulatory vision in the Antitrust Division, his views present an important precedent from early antitrust enforcement policy on how to integrate labor market effects into remedial design. Since this early period when competition and labor market regulation were understood as intertwined, regulating firm production and wage regulation migrated out of the Antitrust Division—along with all associated social scientific expertise—into a range of price and wage stabilization boards established to manage price regulation and macroeconomic growth from the 1940s to early 1980s.[115] But the Antitrust Division's early shared enforcement authority against dominant firms and in favor of labor market competition is a foundational reference point for both current enforcement and the breakup debates.

2. *Absence of Labor Market Analysis in Current Remedial Debates and Enforcement.* The breakup debates' current third phase favoring reinvigorated use of structural remedies leaves unaddressed

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112. WALTON H. HAMILTON, THE PATTERN OF COMPETITION 29–30 (1940).

113. Hamilton, *The Anti-Trust Laws*, *supra* note 67, at 11; Hamilton, *The Problem of Anti-Trust Reform*, *supra* note 111, at 177–78.

114. Hamilton, *The Anti-Trust Laws*, *supra* note 67, at 12.

115. These included the:

> National War Labor Board and the Office of Price Administration in the 1940s, the Price Stabilization and Wage Stabilization Boards in the 1950s, President John F. Kennedy's Council of Economic Advisors' wage-price "guideposts" in the 1960s, the Pay Board and Price Commission in the 1970s, and the Council on Wage and Price Stability and Pay Advisory Committee in the 1970s.

See Hafiz, *Whole-of-Government*, supra note 102. Until President Reagan folded the Council on Wage and Price Stability into the Office of Management and Budget in 1981, it, along with the Pay Advisory Committee, monitored and recommended voluntary wage-price restraints while evaluating inflation and other economic effects of government-wide agency regulation of output decisions. *See, e.g.*, *id.*

the ways in which those remedies themselves can have labor market effects. Nor do its proponents attempt to assess how structural remedies can best avoid adverse labor market effects that can impact workers' jobs, earnings, and benefits.

First, while pro-breakup advocates have been key in highlighting the harms of market concentration and firm dominance on workers' bargaining leverage, wage rates, and employment, they have neither studied nor detailed under what circumstances structural relief would likely benefit or harm workers.[116] Some allude to the beneficial effects of structural remedies for labor markets, simply assuming that breakups will be good for workers.[117] Presumably—given that the argument is never explicitly stated—they rely on the theoretical IO intuition that, because breakups split dominant firms into two or more firms that compete in their product lines, breakups will also create two or more employers to compete for increased competition on wage offers and benefits in the affected labor markets affected.[118] Yet, as Part II explains, this intuition is highly underdetermined and is sometimes wrong. Remedies imposed in product markets may or may not decrease *labor* market concentration, and labor market realities—and labor market institutions developed to establish countervailing leverage against employers—are highly complex, rarely tracking IO economists' theoretical assumptions.[119]

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116. *See, e.g.*, WU, *supra* note 1, at 132–33 (discussing the value of structural relief for competition without discussing its effects on labor markets); Mike Pesca, *Why Zephyr Teachout Wants To Break Up Big Tech*, SLATE (July 30, 2020, 8:00 AM), https://slate.com/technology/2020/07/zephyr-teachout-book-antitrust-monopolies-big-tech-facebook-amazon-google.html [https://perma.cc/32LM-RKZ3] (acknowledging how growing monopolization represses wages and assuming antitrust would improve worker welfare).

117. *See, e.g.*, WU, *supra* note 1, at 42 (describing favorably Brandeis's view that ideal economic policy means a government "commitment to the protection of workers, and an open economy composed of smaller firms—along with measures to break or limit the power of monopolies"); Andy Fitch, *Maximum Profits and Maximum Power: Talking to Zephyr Teachout*, L.A. REV. BOOKS (Aug. 7, 2020), https://blog.lareviewofbooks.org/interviews/maximum-profits-maximum-power-talking-zephyr-teachout [https://perma.cc/7VKA-LKQT] (quoting Teachout's argument for "structural responses," including "breaking up dominant firms," because "once you have today's kinds of power asymmetries (either in data or other workplace conditions), workers basically need to line up and hope at best for feudal relationships").

118. *See, e.g.*, CARLTON & PERLOFF, *supra* note 13, at 233–44 (describing how, as the number of firms in a market increases, equilibrium supply increases and equilibrium prices approach marginal cost through competition); WU, *supra* note 1, at 42.

119. For a rejoinder to the assumption that divestitures' effects on competition in product and labor markets are identical, see RANDY M. STUTZ, AM. ANTITRUST INST., THE EVOLVING ANTITRUST TREATMENT OF LABOR-MARKET RESTRAINTS: FROM THEORY TO PRACTICE 17–

The antitrust agencies have done no better. In fact, a comprehensive review of the remedies sought and imposed through consent decrees with dominant firms in the merger context between December 1992 and June 2021 shows a record of either utter indifference to labor market effects, or, even worse, remedial orders that harm labor market competition.[120] Agency statements and guidance in these contexts also make no mention of labor market effects in assessing merger remedies.[121] Further, the case dockets and competitive impact statements filed by the agencies along with their proposed consent decrees contain no mention of the labor market effects of those decrees in any labor market, even when many of the remedies themselves restricted employee movement between divesting and acquiring firms.[122]

Agencies primarily focused on ensuring that any structural relief requested (in most cases, divestitures) resulted in a viable competitor in the relevant *product* market in which the conduct or merger was challenged, securing the success of that competitor even at the expense of labor market competition.[123] For example, when agencies sought and achieved divestitures, they restricted worker movement between the

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18 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0.pdf [https://perma.cc/Q3U4-BK67].

120. *See infra* app. In the Tunney Act Docket Search Results Appendix, the author collected cases by performing a Bloomberg docket search of federal dockets for antitrust proceedings brought by the DOJ or FTC in which the term "Tunney Act" appeared between December 21, 1992, and June 1, 2021, which yielded 137 cases. The search was limited to this twenty-nine-year period due to earlier filings not being digitized for online searches.

121. *See generally* ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL (2020), https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/G66Q-7YNC] (discussing the duty "to protect competition and American consumers" but failing to consider labor market effects); BUREAU OF COMPETITION, FED. TRADE COMM'N, NEGOTIATING MERGER REMEDIES (2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf [https://perma.cc/L2C7-RRZY] (focusing on undoing or preventing "anticompetitive effects" but failing to consider labor market effects).

122. Under the Tunney Act, the DOJ and FTC must file before the district court and publish in the Federal Register "competitive impact statements" stating

> the nature and purpose of the [Tunney Act] proceeding; . . . a description of the practices or events giving rise to the alleged violation of the antitrust laws; . . . an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal . . . , relief to be obtained thereby, and the anticipated effects on competition of such relief; . . . the remedies available to potential private plaintiffs damaged by the alleged violation; . . . a description of the procedures available for modification of the proposal; and . . . a description and evaluation of alternatives to [the] proposal actually considered by the United States.

15 U.S.C. § 16(b).

123. *See infra* app.

divested and acquiring firms by establishing or lengthening noncompetes to lock in talent at the firm acquiring the divested assets or line of business.[124] A number of cases explicitly included worker mobility restrictions ranging from six months to two years following divestiture, but only a subset of those explicitly prohibited divesting firms from hiring interference.[125] But since 2017, three consent decrees added worker protections by requiring divesting firms to reduce employees' mobility costs to the acquiring firm.[126] Examples included vesting all unvested pension and other equity rights and providing any pay pro rata as well as all other compensation and benefits accrued by those employees or other benefits they would have been provided had they continued employment with the divesting firm (such as retention bonuses and payments).[127] However, no consent decrees or competitive impact statements analyze the broader worker bargaining leverage within the relevant labor markets impacted by the requested remedy.

Unions were listed as amicus or filed comments in Tunney Act proceedings in only six of 137 cases, each at the union's initiation.[128]

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124. *See infra* app.

125. United States v. Zen-Noh Grain Corp., No. 1:21-cv-01482 (D.D.C. June 1, 2021); United States v. Stone Canyon Indus. Holdings LLC, No. 1:21-cv-01067 (D.D.C. Aug. 10, 2021); United States v. Republic Servs. Inc., No. 1:21-cv-00883 (D.D.C. Jul. 1, 2021); United States v. Liberty Latin Am., Ltd., No. 1:20-cv-03064 (D.D.C. Feb. 3, 2021); United States v. Waste Mgmt., Inc., No. 1:20-cv-03063 (D.D.C. May 3, 2021); United States v. Olympus Growth Fund VI, L.P., No. 1:20-cv-00464 (D.D.C. Feb. 19, 2020); United States v. ZF Friedrichshafen A.G., No. 1:20-cv-00182 (D.D.C. Jan. 23, 2020); United States v. Springleaf Holdings, Inc., No. 1:15-cv-01992 (D.D.C. Nov. 13, 2015). The cases prohibiting divesting firms from hiring interference are: United States v. Intuit Inc., No. 1:20-cv-03441 (D.D.C. Aug. 2, 2021); United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. Jul. 1, 2019); United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. Sep. 4, 2019); United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. Feb. 8, 2019); United States v. Martin Marietta Materials, Inc., No. 1:18-cv-00973-RDM, (D.D.C. Apr. 25, 2018); United States v. Vulcan Materials Co., No. 17-cv-02761-APM, 2018 WL 2382601 (D.D.C. Apr. 6, 2018); United States v. TransDigm Grp. Inc., No. 1:17-cv-02735-ABJ, 2018 WL 2382602 (D.D.C. Apr. 4, 2018); United States v. Showa Denko K.K., 1:17-cv-01992-JEB (D.D.C. Sept. 27, 2017).

126. *See* United States v. Stone Canyon Indus. Holdings LLC, No. 1:21-cv-01067-TJK (D.D.C. filed Apr. 29, 2021); United States v. TransDigm Group Inc., No. 1:17-cv-02735-ABJ (D.D.C filed Apr. 4, 2018); United States v. Showa Denko K.K., No. 1:17-cv-01992 (D.D.C. filed Jan. 9, 2018) (the latter two each use the same template language as the original *Stone Canyon* consent decree.)

127. *See* Competitive Impact Statement at 16, United States v. Stone Canyon Indus. Holdings LLC, No. 1:21-cv-01067-TJK (D.D.C. filed Apr. 29, 2021), https://www.justice.gov/atr/case-document/file/1391181/download [https://perma.cc/44EX-WP3Q].

128. Those instances were: SEIU, Local 1107 Comments, United States v. UnitedHealth Grp. Inc., No. 1:08-cv-00322 (D.D.C. filed Feb. 25, 2008) [hereinafter SEIU Comments] (SEIU, Local 1107 filing Tunney Act comments, challenging UnitedHealth Group's acquisition of Sierra Health Services); Allied Pilots Ass'n, Ass'n of Professional Flight Attendants, Ass'n of Flight

Because most courts found that the Federal Rules of Civil Procedure barred unions' or workers' formal intervention in the merits proceedings, the unions lacked access to discovery to collect labor market data, labor costs, or deal estimates pertaining to the antitrust defendants' labor and employment policies (including on employee pay or downsizing).[129] As a result, unions could not strengthen their filings and objections or conduct their own analyses of the divestiture's effects on labor market competition by gaining access to proprietary and sensitive information shared with the government. Since such labor market data is nearly impossible to obtain from other sources, workers and unions have very limited ability to participate in actively shaping the agencies' and the courts' understandings of the labor market effects of proposed remedies.[130]

Attendants-CWA & Transportation Workers Union of America Amicus Brief in Support Defendant's Motion to Set Trial Date, United States v. US Airways Grp., Inc., No. 1:13-cv-01236-CKK (D.D.C. filed Aug. 23, 2013) [hereinafter Pilots' Amicus] (Allied Pilots Association, Association of Professional Flight Attendants, Association of Flight Attendants-CWA, and Transport Workers Union of America filing an amicus brief, challenging the US Airways/American Airlines merger); IAMAW, Local 1821 Comments, United States v. Verso Paper Corp., No. 1:14-cv-02216-TSC (D.D.C. filed May 18, 2015) [hereinafter IAMAW Comments] (International Association of Machinists and Aerospace Workers filing Tunney Act comments, challenging Verso Paper's acquisition of NewPage Holdings); Brief in Opposition to Entry of Proposed Final Judgment by Objectors IAMAW Local Lodge No. 1821 & Herbert R. Gilley, United States v. Verso Paper Corp., No. 1:14-cv-02216-TSC (D.D.C. filed May 20, 2015) (filing opposition briefs to final judgment, challenging the same); International Brotherhood of Teamsters Comments, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483-EGS (D.D.C. filed Jan. 13, 2017) [hereinafter IBT Comments] (International Brotherhood of Teamsters filing Tunney Act comments and amicus brief, challenging Anheuser-Busch's acquisition of SABMiller); Brief of the International Brotherhood of Teamsters as Amicus Curiae in Reply to Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483-EGS (D.D.C. filed Feb. 7, 2017); Communications Workers of America Comments, United States v. Deutsche Telekom AG, No.1:19-cv-02232-TJK (D.D.C. filed Oct. 10, 2019) [hereinafter CWA Comments] (AFL-CIO and Communications Workers of America filing Tunney Act comments, challenging Sprint/T-Mobile merger); American Federation of Teachers Comments, *In re* Abbvie Inc. & Allergan PLC, No. 191-0169 (FTC filed June 10, 2020) [hereinafter AFT Comments] (AFT, Iowa Federation of Labor, AFL-CIO, SEIU, UNITE HERE, AFSCME filing Tunney Act comments, challenging AbbVie/Allergan merger).

129. *See, e.g.*, United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 218 (D.D.C. 1982) (finding that the union lacked the right to intervene in Tunney Act proceedings under Federal Rule of Civil Procedure 24(b)).

130. For limited public availability of pay compensation data, see, for example, BENJAMIN HARRIS, HAMILTON PROJECT, INFORMATION IS POWER: FOSTERING LABOR MARKET COMPETITION THROUGH TRANSPARENT WAGES 7–9 (2018), https://www.brookings.edu/wp-content/uploads/2018/02/es_2272018_information_is_power_harris_pp.pdf [https://perma.cc/2ZS2-5DMH].

Most unions' objections to proposed consent decrees focused on the decrees' failure to restore product market competition,[131] with two exceptions: (1) unions' challenge to the parties' consent decree in a government challenge to the Sprint/T-Mobile merger, which imposed a partial divestiture to Dish Network; and (2) the Service Employee International Union ("SEIU") challenge to the acquisition of Sierra Health Services, an insurance company in Clark County, Nevada, by UnitedHealth Group. In *United States v. Deutsche Telekom AG*,[132] the *Sprint/T-Mobile* case, a coalition of unions and progressive organizations filed submissions, registering their assessments of the merger's labor market effects in the retail mobile wireless service market in filings before the district court.[133] In *United States v. UnitedHealth Group, Inc.*,[134] the SEIU teamed up with the American Medical Association and other physicians' groups to argue that the DOJ's failure to seek any relief in its consent decree for the merger's concentration effects in the market for the services of physicians, nurses, health-care workers, and public employees was inadequate and required denying the parties' proposed consent decree.[135]

While unions intervened to propose or challenge divestitures that would result in layoffs, they primarily justified their positions regarding the adequacy of the remedies based on product market competition effects. In *United States v. Anheuser-Busch InBEV SA/NV*,[136] the DOJ sought only behavioral remedies in its proposed consent decree. The union requested divestiture, justifying the divestiture in the product market as opposed to highlighting the merger's effects (layoffs and reduced labor market competition) in the labor market.[137] In *United*

131. *See supra* note 128 and accompanying text.

132. United States v. Deutsche Telekom AG, No.1:19-cv-02232-TJK (D.D.C. Apr. 14, 2020).

133. *See, e.g.*, CWA Comments, *supra* note 128; Mark Huffman, *T-Mobile/Sprint Merger Faces New Challenge*, CONSUMERAFFAIRS (Dec. 14, 2018), https://www.consumeraffairs.com/news/t-mobilesprint-merger-faces-new-challenge-121418.html [https://perma.cc/NS4W-QT2Q].

134. United States v. UnitedHealth Grp. Inc., No. 1:08-cv-00322 (D.D.C. Sept. 24, 2008).

135. *See* Comments of the American Medical Ass'n, Nevada State Medical Ass'n, & Clark County Medical Society at 1–2, United States v. UnitedHealth Grp. Inc., No. 1:08-cv-00322 (D.D.C. filed Feb. 25, 2008) [hereinafter AMA et al. Comments]; SEIU Comments, *supra* note 128, at 1–3.

136. United States v. Anheuser-Busch InBev SA/NV, No. 1:16-cv-01483-EGS (D.D.C. Oct. 22, 2018).

137. Proposed Brief of the International Brotherhood of Teamsters as Amici Curiae in Reply to Response of Plaintiff United States to Public Comments on the Proposed Final Judgment at 16–20, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483-EGS (D.D.C. filed Feb. 7,

States v. Verso Paper Corp.,[138] the DOJ sought divestitures of two paper mills but allowed the antitrust defendants to close a third, resulting in worker layoffs.[139] The union argued that the two divestitures were acquired by defendants' "dancing partner" and would facilitate collusion, and the closure of the third mill and its sale for scrap was intended to reduce capacity of a profitable and productive asset.[140] In these cases, the unions primarily intervened to highlight how plant or facility closures would reduce capacity and facilitate collusion, without mentioning any impacts of those closures on labor markets. In *In re AbbVie, Inc.*,[141] the union argued that the divestitures sought in the consent decree were insufficient to restore competition in the product market and required additional behavioral or conduct remedies.[142] Unions only directly supported merger consummation and the proposed remedies sought by the DOJ in one case: the US Airways/American Airlines merger.[143] In the five cases where unions objected to proposed consent decrees and requested alternative relief in Tunney Act proceedings, none were successful in modifying the consent decrees or achieving their requested relief.[144]

Across all cases, the courts never analyzed the labor market effects of remedies sought through consent decrees, nor did they deploy experts or special masters to analyze such effects or even solicit testimony from workers or unions affected by imposed breakups.

In sum, antitrust agencies and the courts are implementing divestitures in antitrust cases without considering the potential impacts on labor market competition. And commentators across the political

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2017); Proposed Final Judgment at 11-15, United States v. Anheuser-Busch InBev SA/NV, No. 1:16-cv-01483-EGS (D.D.C. filed July 20, 2016).

138. United States v. Verso Paper Corp., No. 1:14-cv-02216-TSC (D.D.C. Dec. 11, 2015).

139. IAMAW Comments, *supra* note 128, at 1, 3.

140. *Id.* at 1.

141. *In re* Abbvie Inc. & Allergan PLC, No. C-4713 (FTC Sept. 3, 2020).

142. *See, e.g.*, AFT Comments, *supra* note 128, at 2.

143. Pilots' Amicus, *supra* note 128, at 9. The strength of the unions and their involvement in American Airlines' Chapter 11 bankruptcy proceedings as creditors meant that the unions were actively involved in and were able to negotiate substantial demands from their merging employers. *See* app. The unions' long history with the airlines as well as access to key financials as creditors (American Airlines' business plan, projections, financial statements, reports, and other information) enabled them to do a fulsome analysis of the labor market effects of the merger to have a stronger negotiating position for collective bargaining. *See In re* AMR Corp., 477 B.R. 384, 439 (Bankr. S.D.N.Y. 2012).

144. *See, e.g.*, Order at 2–3, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483-EGS (D.D.C. filed Oct. 22, 2018); Order at 20, United States v. UnitedHealth Grp. Inc., No. 1:08-cv-00322 (D.D.C. filed Sept. 24, 2008).

spectrum are calling for additional breakups without analyzing how those divestitures may impact workers and labor markets. The following Part seeks to provide the analysis that the current breakup debates have ignored by assessing how structural relief can both benefit and harm workers. It establishes an overarching framework and set of metrics for agencies and courts to consider when evaluating remedial design questions, including analyzing firm structure, industry characteristics, union density within labor markets affected by the anticompetitive conduct, and the history of wage and benefit bargaining within the industry, among other considerations, to ensure that antitrust remedies do not strengthen employer buyer power or worsen workers' bargaining leverage in labor markets.

II. ANALYZING THE EFFECTS OF BREAKUPS ON WORKERS

From a basic IO perspective,[145] divestiture and other structural remedies would be expected to *decrease* a single employer's wage-setting power over workers in a relevant labor market. Theoretically, remedies would create two or more employers where there used to be one, which would increase competition for workers' labor services, allowing workers to play those employers off of each other to get better employment terms on wages, benefits, and other terms and conditions of work.[146] But it turns out that this story is not categorically true, and certainly was not true in the most prominent example of divestiture in modern antitrust history: the breakup of the Bell System. There, the breakup contributed to destroying the telecommunication workers' union and bargaining leverage where workers had once been able to bargain collectively for industry-wide wage premiums within a national market.

The Bell System breakup is not an isolated example of basic IO predictions failing to match labor market realities. As this Article documents for the first time, workers have intervened and commented on antitrust remedies to oppose the exclusive use of structural remedies for antitrust violations, suggesting that the basic IO predictions miss unique characteristics of labor markets. First, market

145. IO is the dominant economic perspective deployed by agencies and the courts to analyze employer buyer power over workers. *See, e.g.*, Naidu et al., *supra* note 101, at 584; Liran Einav & Jonathan Levin, *Empirical Industrial Organization: A Progress Report*, J. ECON. PERSPS. 145, 151–52 (2010); Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 112, 167 (1989).

146. *See* MANNING, *supra* note 2, at 29–52; Marinescu & Posner, *supra* note 101, at 1357.

concentration levels and other indicators of firm buyer power do not alone determine an employer's power to set wages. Employer power also faces labor market realities that reduce workers' leverage, like workers' search costs, mobility costs, and employer–worker preferences. Labor market institutions can also contribute to employer power, including where labor markets have low union density rates, the history of worker bargaining is either limited or disrupted by firm dissolution or breakups, and workers' status and protections under law are limited or underenforced. Finally, firm structure and internal labor market ("ILM") dynamics impact employers' wage-setting power in ways that can affect whether a breakup will harm or benefit workers.[147]

This Part draws from social scientific literature and presents novel analyses of case studies and court filings to develop analytical tools to assess how and when antitrust remedial design can benefit or harm workers and their ability to assert countervailing power against employers. Part II.A offers a case study of how the Bell System breakup impacted worker strength within the telecommunications industry, which was characterized by high union density and industry-wide bargaining. Part II.B then integrates that into a broader extrapolation from social scientific theory and empirical labor market analyses to develop a set of considerations for analyzing the effects of remedial design. Those considerations require assessing the buy-side of the wage bargain—the structure and characteristics of employers in the relevant labor market—and the sell-side of the wage bargain—the structure and characteristics of the labor market and worker power. Based on that overview, Part II.C explains the circumstances under which structural remedies can benefit workers and Part II.D explains when they can harm workers.

147. ILMs are a system of rules within a firm that govern and limit employer wage setting, and they include job ladders, employer control of "ports of entry," wage systems, job classifications, and rules regarding the deployment of labor and employment security. *See, e.g.*, PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 1–2 (1971); Paul Osterman, *Internal Labor Markets*, *in* LABOR ECONOMICS AND INDUSTRIAL RELATIONS 303, 306 (Clark Kerr & Paul D. Staudohar eds., 1994). ILM research has also highlighted how internal firm customs, norms, and politics—including historical wage differentials and perceptions of both horizontal and vertical wage equity—influence firm wage setting, a system that structural remedies eradicate. *See, e.g.*, Osterman, *supra*, at 322–24.

A. Case Study: The Breakup of the Bell System

While many antitrust scholars and commentators have pointed to the Bell System breakup as an example of how structural remedies can increase competition and encourage innovation, no one within the breakup debates has analyzed its effects on telecommunications *workers*.[148] In fact, postbreakup, telecommunications workers saw dramatic declines in worker bargaining leverage, with union density plummeting from 56 percent in 1983 to 24 percent in 2001.[149] This Section offers a case study of how the Bell breakup impacted workers' countervailing power and harmed workers in a highly regulated, high union-density industry where workers had achieved industry-wide bargaining. Although the conditions that led to the breakup's harm to

148. In an interview with Mike Pesca, Teachout observed,

> I think we're going to have more innovation after we break up these companies, not less. And when you look at history, there's a lot of evidence that's exactly what happens. Look at the breakup of AT&T and the incredible flowering that led to. We don't know what the flowering will be after we break up Amazon, but I promise you it's coming.

Pesca, *supra* note 116. For more praise for the successful Bell breakup, see, for example, Kovacic, *supra* note 39, at 1105–06; Van Loo, *supra* note 82, at 1974–76. For commentary on the Bell divestiture focusing on product rather than labor market effects, see generally ALVIN VON AUW, HERITAGE & DESTINY: REFLECTIONS ON THE BELL SYSTEM IN TRANSITION (1983); BREAKING UP BELL: ESSAYS ON INDUSTRIAL ORGANIZATION AND REGULATION (David S. Evans ed., 1983); STEVE COLL, THE DEAL OF THE CENTURY: THE BREAK-UP OF AT&T (1986); DISCONNECTING BELL: THE IMPACT OF THE AT&T DIVESTITURE (Harry M. Shooshan III ed., 1984); LEONARD A. SCHLESINGER, DAVIS DYER, THOMAS CLOUGH & DIANNE LANDAU, CHRONICLES OF CORPORATE CHANGE: MANAGEMENT LESSONS FROM AT&T (1987); FRED W. HENCK & BERNARD STRASSBURG, A SLIPPERY SLOPE: THE LONG ROAD TO THE BREAKUP OF AT&T (1988); ALAN STONE, WRONG NUMBER: THE BREAK-UP OF AT&T (1989); AFTER THE BREAKUP: ASSESSING THE NEW POST-AT&T DIVESTITURE ERA (Barry G. Cole ed., 1991); PETER TEMIN, THE FALL OF THE BELL SYSTEM (1989); Paul MacAvoy & Kenneth Robinson, *Losing by Judicial Policymaking: The First Year of the AT&T Divestiture*, 2 YALE J. ON REGUL. 225 (1985); Robert Crandall, *Surprises from Telephone Deregulation and the AT&T Divestiture*, 78 AM. ECON. REV. 323 (1988); Roger Noll & Bruce Owen, *The Anticompetitive Uses of Regulation*: United States v. AT&T, *in* THE ANTITRUST REVOLUTION 290 (John Kwoka & Lawrence White eds., 1989); Joseph Kearney, *From the Fall of the Bell System to the Telecommunications Act*, 50 HASTINGS L.J. 1395 (1999); Clement G. Krouse, Christos Cabolis, Kenneth L. Danger, Tanja D. Carter, Jon M. Riddle & Daniel J. Ryan, *The Bell System Divestiture/Deregulation and the Efficiency of the Operating Companies*, 42 J.L. & ECON. 61 (1999); Shelanski & Sidak, *supra* note 79; Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109 (2001); Richard A. Epstein, *The AT&T Consent Decree: In Praise of Interconnection Only*, 61 FED. COMM. L.J. 149 (2008); Christopher Yoo, *The Enduring Lessons of the Breakup of AT&T*, 61 FED. COMM. L.J. 1 (2008).

149. U.S. DEP'T OF COMM. & BUREAU OF THE CENSUS, *supra* note 5. Current union density among employees in the telecommunications industry is 14.3 percent. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPS) (2020).

workers are complex and multidirectional, the case study is a concrete example of how the dynamics that operate in labor markets following structural remedies can violate basic IO intuitions.[150]

1. *Telecommunication Workers: From a Nonunion Workforce to Pattern Bargaining.* The Bell System arose as a centrally organized network of firms—Bell regional corporations (providing local service), AT&T Long Lines (providing long-distance service), Western Electric (providing telephone equipment), and Bell Telephone Laboratories ("Bell Labs") (performing industrial and scientific research)—all coordinated by parent American Telephone and Telegraph Company, or AT&T.[151] Before the 1930s, the main international union organizing telecommunications workers, the International Brotherhood of Electrical Workers, did not seek to establish an industry-wide union, in part because it adopted a craft-approach to organizing workers that viewed workers "in every way . . . *except* as telephone workers working in an industry dominated by an industry-conscious employer—[AT&T]."[152] The push for a national federation and coordination among unionizing workers, independent unions, and employee organizations was motivated first in the 1930s by the need for pension and benefit plan uniformity and advocacy.[153] Beginning in the 1910s, AT&T had adopted a corporate welfarist approach to its workers, developing its Bell Employees' Benefit Plan alongside "employee representation plans" to manage employee relations in the wake of strike waves and violent worker suppression in the oil and coal industries that culminated in the 1914 Ludlow massacre.[154] AT&T's

150. As Part II.D explains, there are broader circumstances beyond those analogous to the Bell System divestiture that can cause structural remedies to harm workers.

151. *See* THOMAS R. BROOKS, COMMUNICATIONS WORKERS OF AMERICA: THE STORY OF A UNION 1–3 (1977); A HISTORY OF ENGINEERING AND SCIENCE IN THE BELL SYSTEM: THE EARLY YEARS (1875-1925), at 34–35 (M.D. Fagen ed., 1975).

152. JACK BARBASH, UNIONS AND TELEPHONES: THE STORY OF THE COMMUNICATIONS WORKERS OF AMERICA 17 (1952) (emphasis added).

153. *Id.* at 22, 27, 29–30.

154. BROOKS, *supra* note 151, at 20–21. In addition to AT&T's "corporate welfarist" approach to quelling worker strife, AT&T pioneered human resource management on the "shop floor." It commissioned the famous "Hawthorne experiments" in its Western Electric manufacturing plant. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1566–68 (1981). The study determined how lighting conditions, line speeds, active and passive supervision, and other mechanisms of incentivizing and punishing worker performance using "psychosocial interactions among workers and between superiors and subordinates" could better control worker productivity. Bruce Kaufman, *Human Resources and*

pension and benefit plans "demonstrated in a concrete way the oneness of the companies making up the Bell System[,] . . . managed and controlled by [AT&T]"; the "inability of the individual employee groups to deal decisively with the pension issue with their managements . . . was a potent motive in bringing together the . . . workers' groups in a national union."[155]

By 1938, the network of unionizing and unionized workers formed the National Federation of Telephone Workers ("NFTW"). While AT&T initially refused to recognize and collectively bargain with the NFTW, the union's aggressive involvement in securing itself a seat at the table in the National War Labor Board ("NWLB") during World War II unified and consolidated efforts to strengthen and nationalize the union, aided in displacing the dominance of "company unions,"[156] and solidified the union's role as an expert representative of worker interests both with AT&T and in the "inner councils of government."[157]

The NWLB itself was key in moving labor disputes and wage negotiations away from regional boards toward a national commission with jurisdiction to deal with labor issues on an industry-wide basis.[158] The Board adopted a national approach through a centralized board (as opposed to prior regional labor board systems established earlier in the war) to set competitive wage standards, as it was difficult to establish those standards by looking at local labor markets alone. AT&T and its subsidiaries had monopolies in their operating areas, so

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Industrial Relations: Commonalities and Differences, 11 HUM. RES. MGMT. REV. 339, 352 (2001); *see* BROOKS, *supra* note 151, at 29; *see also* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 43–44 (2003) (discussing the Hawthorne experiments and the rise of the human relations model of corporate welfare); Bruce E. Kaufman, *Human Resources and Industrial Relations: Commonalities and Differences*, 11 HUM. RES. MGMT. REV. 339, 352 (2001) (same).

155. BARBASH, *supra* note 152, at 29.

156. Both before and after the NLRA's prohibition of "company unions," employee associations paid for and directed by AT&T and its subsidiaries were prevalent within the industry from 1919 until World War II. *See* BROOKS, *supra* note 151, at 16 (stating that in 1919, AT&T "announced that an American Bell Association was to be organized among its employees"); BARBASH, *supra* note 152, at 37 (noting that in 1941, the NLRB ordered AT&T "to disestablish the Southern Association of Bell Telephone Employees on the ground that it was a successor organization to a company union"). Still, company unionism is credited with giving union leaders "a basic training course in the skills of running an organization" and a "consciousness of [the] industry," allowing the leaders to "recognize[] the economics and technology of the industry as the major element in their dealing with management." BARBASH, *supra* note 152, at 51.

157. BARBASH, *supra* note 152, at 30, 32–35; BROOKS, *supra* note 151, at 60.

158. BARBASH, *supra* note 152, at 35.

government regulators could not benchmark wage rates against comparable jobs in each local area.[159] The NWLB was thus uniquely effective in stabilizing industry-wide wages and labor peace as well as aligning intra-Bell wage differentials. It made possible a national policy within the telephone industry through its tripartite structure, which incorporated both management and labor representation.[160] It took government recognition of the NFTW, a tripartite board leveling the playing field between labor and management, aggressive intervention in AT&T's wage policies, and applying social scientific expertise to align wage schedules at the national scale to solidify workers' countervailing power industry-wide against AT&T's monopoly.

At the end of the war and the expiration of the NWLB mandate—as well as the no-strike pledge that it imposed—labor militancy among telecommunication workers exploded. Over four million workers struck in early 1946 to lift industry-wide wages.[161] The NFTW won its first set of general wage increases through direct collective bargaining with AT&T and its subsidiaries in 1946, and in 1947, it was able to establish second-round wage increases along with a ten-item agenda for national bargaining.[162] But without the tripartite NWLB, AT&T refused to accept pattern bargaining industry-wide, insisting that its associated companies were independent entities that made their own decisions.[163] AT&T successfully broke the workers' national effort after reaching settlements with union affiliates through its individual operating companies.[164]

AT&T breaking the strike as a single powerful and unified corporation dividing and conquering the loose association of over fifty affiliated and autonomous federation members strengthened the drive to establish a single national union, the Communications Workers of America ("CWA"). In 1947, CWA's jurisdiction extended to all

159. *See* LABOR DISPUTE SETTLEMENTS IN THE TELEPHONE INDUSTRY 1942–1945, at 15–16 (Pearce Davis & Henry J. Meyer eds., 1946).

160. BARBASH, *supra* note 152, at 36; BROOKS, *supra* note 151, at 83–84.

161. *See* BARBASH, *supra* note 152, at 54.

162. *Id.* at 62–64; *see also* BROOKS, *supra* note 151, at 107–08 (discussing the Beirne-Craig Memo that established a pattern for wage bargaining for the entire Bell System for the first time).

163. BARBASH, *supra* note 152, at 74; VENUS GREEN, RACE ON THE LINE: GENDER, LABOR, AND TECHNOLOGY IN THE BELL SYSTEM 156–57 (2001).

164. BARBASH, *supra* note 152, at 70–71.

telecommunications workers.[165] In 1949, CWA affiliated with the Congress of Industrial Organizations ("CIO").[166] But AT&T's monopoly position and divide and conquer strategy limited the CWA's ability to play off any competitive threats to AT&T to the union's advantage—much as, for example, the United Auto Workers did in the auto industry—which limited the CWA's leverage in the late 1940s.[167] AT&T insisted that all bargaining matters be handled at the local level by each operating company and its local union based on local wage conditions within the community.[168] And after the CWA affiliated with the CIO, all Bell companies instituted a "wave of recognition withdrawals," claiming that the CIO affiliation required the decertification of existing unions and new union certifications by local rank-and-file members.[169] Decertification strategies by employers tremendously burden unions by stripping them of their ability to represent former union members.[170] Moreover, decertification allows employers to require unions to go through the lengthy and costly process of petitioning the National Labor Relations Board ("NLRB") for certification, organizing for a majority vote, potentially relitigating bargaining unit and jurisdictional issues regarding which local or parent union represents the workers, and then renegotiating entirely new collective bargaining agreements, a process that employers can stall for years.[171]

But the CWA succeeded in significantly strengthening itself through internal reorganization—creating a two-level structure allowing the national union to set local union priorities directly—as

165. *Id.* at 89, 93; *see also* BROOKS, *supra* note 151, at 114–28, 142 (explaining the events that led up to a national union).

166. BARBASH, *supra* note 152, at 111.

167. *Id.* at 129–31.

168. BROOKS, *supra* note 151, at 115, 125.

169. *Id.* at 150.

170. *See* LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, ECON. POL'Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS 12 (2020), https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion [https://perma.cc/FR7F-5ALR].

171. *See id.* at 25–26; Ross Eisenbrey, *Employers Can Stall First Union Contract for Years*, ECON. POL'Y INST. (May 20, 2009), https://www.epi.org/publication/snapshot_20090520 [https://perma.cc/4Y7W-JMZG]. *See generally* William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. RELS. REV. 560 (1983) (finding that company actions can significantly impact certification elections).

well as worker militancy and innovative "hit-and-run" strikes coordinated across the country through a centralized CWA.[172]

Direct government intervention also played a critical role in strengthening the union. Congressional investigations and a 1951 Senate Labor and Public Welfare Committee Report on the Bell System's labor relations revealed that "workers had lost ground in wages since 1939."[173] Moreover, the Bell System functioned as "a closely integrated corporate system[,] completely and directly controlled by the [AT&T] management," which had "a direct effect upon the course of labor relations in the system."[174] The Bell System also had uniform wage policies and rules for determining wages based on job content and fluid job structures that cross-trained workers in composite skills so they could be moved more easily from one job to another (driven in part by the varying need for telephone service daily, seasonally, cyclically, and in emergencies).[175] And AT&T management established uniform financial and operating policies that centralized bargaining demands and strategies between management and workers throughout the Bell System, requiring central approval before its local affiliates' management could commit to binding agreements with workers.[176] The congressional report thus recommended national-level bargaining between the union and AT&T on national issues.[177] The

172. *See* BROOKS, *supra* note 151, at 164–65.

173. BARBASH, *supra* note 152, at 143; *see* S. COMM. ON LAB. & PUB. WELFARE, LABOR-MANAGEMENT RELATIONS IN THE BELL TELEPHONE SYSTEM, S. REP. NO. 82-139, at 26–30 (1951).

174. S. REP. NO. 82-139, at 3–4, 25 n.49. The Report grounded its finding of AT&T's centralized control in AT&T's "stock ownership of most of the associated companies, from license contracts which it has with all the operating associated companies in the system, and from the long, continued control which [AT&T] executives have exercised through the years over promotions and salary increases of administrative officers in the associated companies." *Id.* at 3. The FCC, which conducted its own investigation into AT&T's unlawful monopoly, came to the same conclusion about its unified structure and control of its operating companies in an earlier nine-hundred-page report. *See* FED. COMMC'NS COMM'N, INVESTIGATION OF THE TELEPHONE INDUSTRY IN THE UNITED STATES, H.R. DOC. 76-340, at 577 (1939).

175. BARBASH, *supra* note 152, at 164–65. Wage variation did exist between men and women, between white and non-white workers, and between localities based on a town classification system. *See id.* at 164; *see also* GREEN, *supra* note 163, at 58–112, 177, 254–55 ("A downward reclassification of male-dominated work also suppressed women's wages during World War II. . . . [M]anagers [would] change[] an insignificant detail of a job and assign[] it to women at a lower wage . . . .").

176. BARBASH, *supra* note 152, at 184.

177. The Senate report stated,

start of the Korean War became an impetus to regulate the telecommunications industry's prices and wages even further through the Wage Stabilization Board, significantly strengthening the union's involvement in setting the terms of the wage bargain in the context of relatively scarce manpower.[178]

Between 1950 and 1955, the CWA won significant wage increases for its workers, negotiating over eighty collective bargaining agreements and winning contractual rights for both telephone and non-telephone workers to respect legitimate CWA picket lines.[179] By 1958, the CWA had formally established the Collective Bargaining Policy Committee ("CBPC") to coordinate national bargaining strategies.[180] The CBPC successfully won wage increases, improvements to vacation policies and pension plans, and pattern settlements in company paid-for medical insurance and life insurance by 1960.[181] In the 1960s, the CWA successfully established a pattern out of its "cluster bargaining" by setting up a system of three separate contracts: (1) establishing union recognition, payroll deductions, and grievance procedures; (2) dealing with items identical through the Bell System, like pension plans, vacations, and progression schedules; and (3) addressing local concerns through local contracts synced with the termination dates of the national contracts.[182] The early pattern bargaining system enabled

> The subcommittee believes very definitely that [AT&T] cannot expect to contain collective bargaining within small segments throughout the system while it makes system-wide decisions for piecemeal application to those segments. . . . [I]n view of the closely integrated nature of the system itself and the controlling influence of [AT&T], the subcommittee believes that it is utterly unrealistic to expect the parent [AT&T] to relax the control which it has by the economic fact of stock ownership and by the political fact of the election of company boards of directors and the selection of company officers. The subcommittee strongly believes that [AT&T] should do the bargaining with the unions on national issues such as wages and pensions which extend beyond any departmental or associated company bargaining unit.

S. REP. NO. 82-139, at 32–33.

178. *See* BARBASH, *supra* note 152, at 148–49.

179. BROOKS, *supra* note 151, at 169–70, 188.

180. *Id.* at 206–08.

181. *Id.* Pattern settlements, or pattern bargaining, involves using a master agreement that a union would seek to apply industry- or sector-wide to establish uniform standards across divisions of a single firm or across firms within an industry. *See generally* Christopher L. Erickson, *A Re-Interpretation of Pattern Bargaining*, 49 INDUS. & LAB. RELS. REV. 615 (1996) (describing inter- and intra-industry pattern bargaining).

182. BROOKS, *supra* note 151, at 212.

the union to adapt to automation in the telecommunications industry[183] and complicated questions of geographic wage differentials across job titles by instituting a system of wage bargaining that could apply industry-wide. Specifically, the union used its resources to commission a five-hundred-page economists' study on "Geographical Wage Standards."[184] The study recommended that AT&T's community wage theory be replaced in favor of "a more equitable and rational pay system based on costs of living," reducing AT&T's over one hundred wage zones to six wage bands with no more than a four-dollar wage differential between each band.[185] The CBPC adopted the study's recommendations to anchor its future pattern bargaining.[186] While AT&T did not formally agree to pattern bargaining through the 1960s, the union's strength enabled successful wins reflecting wage increases, reductions in wage inequities, and improvements in benefits.[187]

The union's strength only grew in the 1970s prior to the Bell breakup. The CWA aggressively increased its total members to become the fourteenth largest union in the country, established stronger local organizing structures for community and political advocacy, integrated local unions more seamlessly into the national union, and in 1974, finally secured AT&T's agreement to national pattern bargaining over basic wages, pensions, health insurance, and contract length.[188] National bargaining was the product of three decades of union struggle, with such achievements evident at the termination of the first contract cycle following the first national agreement. With a strike vote alone, the CWA secured a nearly 36 percent increase in wage and benefit improvements, an estimated gain from collective bargaining of over $3.119 billion, "by far the largest labor settlement since the lifting of federal wage-price controls."[189]

Thus, although the union faced significant headwinds in establishing pattern bargaining for industry-wide wages, benefits, and working conditions due to AT&T's monopoly power in telephone services and equipment markets, it was able to succeed through a

183. *See id.* at 217–18 (describing how the CWA commissioned an expert report, the Diebold Report, to study the effects of automation on industry employment and then used the report in its bargaining strategies).

184. *Id.* at 214.

185. *Id.* at 214–15.

186. *Id.* at 215.

187. *See id.* at 227–29.

188. *See id.* at 226, 231, 234.

189. *Id.* at 234.

combination of direct government intervention in support of worker bargaining, internal reorganizations adaptive to product and service market conditions, industry expertise, aggressive organizing, and innovative strikes. In one stroke, the breakup of AT&T reversed many of these hard-fought gains across the entire Bell System, ultimately harming rather than benefiting workers.

2. *The Breakup of the Bell System: Agency and Court Inattention to Labor Market Effects.* In 1974, the DOJ filed an antitrust action under § 2 of the Sherman Act against AT&T, Western Electric, and Bell Labs. The complaint alleged that the companies had unlawfully monopolized the markets for local exchange services, long-distance services, and telephonic equipment under a "triple-bottleneck" theory: the defendants illegally refused to provide competitors with local interconnection services, furnished rivals with inferior maintenance services, and imposed requirements that thwarted the reach of competing local networks.[190] The Government requested divestiture of the Bell Operating Companies ("BOCs") from AT&T as well as, at various times, AT&T's divestiture of Western Electric and Bell Labs.[191] The trial began on January 15, 1981.[192]

Before the Government presented its rebuttal case, the parties filed a proposed consent decree. It allowed AT&T to retain ownership and control of its core business in the long-distance carrier services and equipment markets but required AT&T to divest ownership and control of the BOCs, creating seven independent regional "Baby Bells."[193] The consent decree also imposed line-of-business restrictions and "equal access" obligations on the independent BOCs, requiring that they provide unaffiliated long-distance carriers access to all local-

190. *See* United States v. AT&T, 524 F. Supp. 1336, 1342, 1346, 1348–50 (D.D.C. 1981). Specifically, the complaint alleged that AT&T (1) "used its control over its local monopoly to preclude competition in the intercity market"; (2) prohibited customers' attachment of competitors' equipment to the network except through discriminatory use of protective connecting arrangements; (3) used its control over local operating companies to force them to buy products from Western Electric (even though other manufacturers produced better products or products of identical quality at lower prices); and (4) substantially dominated the telecom industry. United States v. AT&T, 552 F. Supp. 131, 161–63 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

191. *AT&T*, 552 F. Supp. at 139.

192. *AT&T*, 524 F. Supp. at 1342.

193. *See AT&T*, 552 F. Supp. at 140–41, 201.

exchange carriers that was "equal in type, quality, and price" to that given to AT&T.[194]

The proposed divestiture was informed by an economic view described first by then-Assistant Attorney General of the Antitrust Division William Baxter called "Baxter's Law," and later, the "Bell Doctrine."[195] The Bell Doctrine posited, in regulated industries, regulators could not stop an integrated monopoly from engaging in predatory anticompetitive conduct in adjacent markets absent a structural remedy.[196] The Reagan administration viewed aggressive government regulation of AT&T as *itself* feeding AT&T's monopolistic conduct which, in turn, justified seeking an equally aggressive break-up remedy to restore free market conditions.[197]

The consent decree was subject to the district court's Tunney Act review, and the court received so many comments from "interested persons" that it established a separate docket for its public interest proceedings.[198] Following a two-day hearing, the court approved the

194. *Id.* at 142–43.

195. *See generally* William F. Baxter, *Conditions Creating Antitrust Concern with Vertical Integration by Regulated Industries—"For Whom the Bell Doctrine Tolls"*, 52 ANTITRUST L.J. 243 (1983) (explaining how the entry of monopolies into related markets impacts social costs and identifying several possible government intervention policies designed to mitigate the social costs).

196. *See, e.g.*, William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 2, 455–56 (2003). Baxter's Law posited that rate-regulated monopolists could extract monopoly profits from vertically integrated markets without running afoul of the "single monopoly profit theory," or the notion that monopolists could only extract one monopoly profit from tying two products at the point of sale. *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 399–400 (2009); *see also* Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 117 (2006) ("Baxter's law . . . suggests that regulated monopolists, unlike other monopolists, may rationally seek monopoly profits in vertical input industries."); Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies*, 17 HARV. J.L. & TECH. 85, 94–95 & n.40 (2003) (describing "Baxter's Law" rationale for use of structural remedy in regulated industry to limit anticompetitive conduct in adjacent markets); Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and their Network Industries*, 51 STAN. L. REV. 1249, 1249–50 (1999) ("The fundamental theory underpinning the . . . 'Bell Doctrine' by Professor Baxter[] is that regulated monopolies have the incentive and opportunity to monopolize related markets in which their monopolized service is an input . . . .").

197. Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 132–33 (2018).

198. United States v. AT&T, 552 F. Supp. 131, 135, 147 n.62. (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

consent decree's divestiture and conduct remedies[199] under a broad interpretation of its Tunney Act authority and the statute's public interest factors. To justify this broad interpretation, the court pointed to the Tunney Act's legislative history as "indicat[ing] that the listing of these factors was not meant to limit the court's inquiry," so the criteria "cannot be regarded as embodying *the* standard against which a proposed decree is to be measured," and "the Court may consider factors *other* than [the consent decree's] effect on competition."[200] Further, while the inquiry "must begin by defining the public interest in accordance with the antitrust laws," it was "clear from the cases that other factors" beyond "the issue of competition and the effects on competition . . . are not irrelevant," and "a court should impose the relief which impinges *least* upon *other public policies*."[201] In approving the structural remedy, the court emphasized that its loosening of AT&T's control over telecommunications would "transcend" benefits "which flow from the narrowest reading of the purpose of the antitrust laws," including the court's understanding that just as "[o]ur political system is designed so that the power of one group may be checked by the power of another," the "antitrust laws require the same approach in the economic sphere," "seek[ing] to diffuse economic power in order to promote the proper functioning of both our economic and political systems."[202]

But the court's analysis and remedial sensitivity to establishing checks on AT&T's economic power was directed only at avoiding harm to AT&T's product market competitors. It willfully ignored the effects of the divestiture in the labor markets in which AT&T operated, even though it acknowledged that the Bell System employed over one million people and was the largest private employer in the United States.[203] Specifically, the court focused on how the divestiture would impact AT&T's "ability to disadvantage *competitors* in the interexchange and equipment markets" through its control of local

199. *Id.* at 147, 225.

200. *Id.* at 149 n.77 (first citing S. REP. NO. 93-298, at 6 (1973); then citing 120 CONG. REC. 36344 (1974) (statement of Rep. Jordan); and then citing 119 CONG. REC. 24599 (1973) (statement of Sen. Tunney)); *id.* at 150 n.81 (emphasis added).

201. *Id.* at 149–51 (citing United States v. Am. Tobacco Co., 221 U.S 106, 185 (1945)) (emphasis added).

202. *Id.* at 164–65.

203. *Id.* at 152 n.85.

BOCs, rather than its impact on other constituencies, including workers.[204]

The court devoted a section of its Tunney Act opinion to the "interests of AT&T employees," and specifically to the CWA's request, motivated by its interest in preserving "continued national bargaining in telecommunications following the reorganization of AT&T," "that the proposed decree explicitly provide that nothing therein will preclude [national bargaining]."[205] But the court found "no need for such a modification."[206] It viewed "nothing in the proposed decree or in general principles of law" precluding or interfering with such bargaining, and thus "no reason whatever why, following entry of the decree and the reorganization, such bargaining cannot continue as in the past."[207] The court also found the CWA's comments and views about the effects of the consent decree irrelevant to the divestiture's purposes.[208] Specifically, the court understood the Clayton and Norris-LaGuardia Acts' statutory labor exemptions from the antitrust laws to mean that impacted employees were not considered in its Tunney Act review: "[T]he settlement of the lawsuits[] do not involve AT&T's labor relations and, more particularly, they have nothing to do with the [CWA] or its relationship with the Bell System."[209] Thus, the court did

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204. *Id.* at 165. The court also ignored potential adverse effects on *consumers* from the divestiture who could no longer rely on AT&T's long-distance rates cross-subsidizing lower rates for local services. The court admitted that the record evidence was contentious on the divestiture's effects on consumer prices, stating that the "divestiture . . . will not necessarily have an adverse effect upon the cost of local telephone service," but "since the trial was aborted by the settlement, no final decision was reached on the issue." *Id.* at 169 & n.160.

205. *Id.* at 209–10.

206. *Id.* at 210.

207. *Id.*

208. *Id.* at 209–10.

209. *Id.* (first citing 15 U.S.C. § 17; and then citing 29 U.S.C. § 52); *see also* Hafiz, *Interagency Merger Review*, *supra* note 57, at 49. The court acknowledged that the CWA represented "over 500,000 employees of the Bell System, or 51 percent of all the System's employees, in addition to over 70,000 employees in other telecommunications companies." *AT&T*, 552 F. Supp. at 209 n.330. Meanwhile, in anticipation of the divestiture into separate BOCs, the FCC had required that AT&T and the CWA enter a MOU specifying that the Bell System employees "who were transferred to separate AT&T subsidiaries or affiliates would be entitled to certain protections," namely,

> the preservation of wages and net credited service . . . for five years after the transfer; no reduction of pension, health, or other benefits as a result of the transfer; payment of reasonable travel and moving expenses . . . ; continued application of the collective bargaining agreement to these employees; preferential rehiring rights; advance notice to the union of any work group transfer; and continued recognition by the subsidiaries

not analyze how the divestiture—and its impact on pattern bargaining—might affect labor market competition or workers' ability to assert countervailing power against AT&T and the Baby Bells.

3. *The Impact of the Bell Breakup on Workers.* AT&T formally divested its local BOCs on January 1, 1984, pursuant to the district court's judgment approving the consent decree.[210] Commentators debate whether the divestiture benefited consumers, competition in the local and long-distance exchange markets, and innovation, and extensively discuss the costs and benefits of the court's oversight of the divestiture and twelve-year administration of the consent decree.[211] Aside from a single study, however, there has been no analysis of the breakup's effects on workers and labor market competition, including in the current breakup debates, except to note its labor cost savings to owners.[212]

Following the breakup, the regional BOCs took more than half a million Bell System employees with them and were among the largest employers in each of their seven regions.[213] A single labor economic study reviewed the effects of the breakup on workers two decades after the restructuring based on field research, review of union contracts and archival sources, aggregate data from government sources, and survey evidence.[214] It found that the breakup of the Bell System "undermined the union's power, in terms of both membership levels and bargaining leverage" and increased the "uncertainty facing the union."[215] Evidence from the U.S. Census Bureau documents that, after the Bell breakup, union density among all employees in the

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> or affiliates of the [CWA] as the exclusive bargaining representative of transferred employees.

Id. at 210 & nn. 331–32.

210. *See* Kearney, *supra* note 148, at 1396.

211. *See supra* note 148 and accompanying text (collecting divestiture commentary).

212. *See, e.g.*, Krouse et al., *supra* note 148, at 77. Labor cost savings are consistent with worker layoffs and reductions in worker pay resulting from declining union density rates and employer monopsony. The single labor economics study reviewing the effects of the divestiture on the CWA is Harry C. Katz, Rosemary Batt & Jeffrey H. Keefe, *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 INDUS. & LAB. RELS. REV. 573, 576 (2003).

213. *See* Richard H.K. Vietor, *AT&T and the Public Good: Regulation and Competition in Telecommunications*, *in* FUTURE COMPETITION IN TELECOMMUNICATIONS 27, 82 (Stephen P. Bradley & Jerry A. Hausman eds., 1989).

214. Katz et al., *supra* note 212, at 575.

215. *Id.* at 575–76.

telecommunications industry fell from 56 percent in 1983 to 24 percent in 2001.[216] Union rates fell among union-eligible network technicians from 82 percent in 1983 to about 57 percent in 2001; the rates among customer service and sales workers dropped from 66 percent to 26 percent.[217] The decline is primarily attributable to the BOCs' postbreakup downsizing in their traditional core union workforce, establishment of nonunion subsidiaries for their "growth businesses" (like wireless, information services, and data communications), and entry of nonunion companies.[218] The breakup impacted employment and earnings by race and gender in the telecommunications industry—non-Black minority men were the only underrepresented group to experience employment gains as managers and professionals postbreakup.[219]

Significantly, the union's loss of its bargaining leverage that derived from its national pattern bargaining led to the destabilization of union–management relationships.[220] Formal centralized bargaining had established a formal structure that produced system-wide agreement on wages, benefits, and employment security. But it also facilitated *internal* mobility for workers across the AT&T subsidiaries, so that workers received the same wage increases whether they worked for AT&T or for a local Bell company elsewhere.[221] After the breakup,

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216. U.S. DEP'T OF COMM. & BUREAU OF THE CENSUS, *supra* note 5.

217. Katz et al., *supra* note 212, at 576 (citing CPS, *supra* note 149).

218. *Id.* at 576.

219. Underrepresented groups studied with regard to employment and earnings impacts of the divestiture included non-Black minorities identified by Equal Employment Opportunity Reports. *See* James Peoples & Rhoda Robinson, *Market Structure and Racial and Gender Discrimination: Evidence from the Telecommunication Industry*, 55 AM. J. ECON. & SOCIO. 309, 309 (1996); *see also* Jeffrey Keefe & Karen Boroff, *Telecommunications Labor Management Relations After Divestiture*, *in* CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 303 *passim* (Paula B. Voos ed., 1994) (discussing how national bargaining predivestiture compressed the wage structure and increased relative wages of lower-paid, traditionally female jobs). Unions generally help reduce racial disparities in wages and raise women's wages. *Fact Sheet: Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL'Y INST. (Apr. 23, 2021), https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy [https://perma.cc/E2F8-3Y75].

220. Katz et al., *supra* note 212, at 576–77. Further,

> [A] key collective bargaining victory in the post-World War II period was to gain a centralized collective bargaining structure that matched the organizational structure of the national telephone industry. In doing so, the union adapted to changes that had occurred in the product market environment, and this adaptation improved its bargaining leverage.

Id.

221. *Id.* at 577.

the CWA sought to continue centralized bargaining, so it had to modify its bargaining structure to fit the new corporate environment. Most of the Baby Bells used the breakup to demand a return to bargaining at the local level, which created a fragmented structure that undermined union power and reversed the gains the CWA had previously achieved.[222]

The breakup thus decentralized the CWA's bargaining structure, and with the deregulation of the telecommunications industry, workers were confronted with significant corporate restructuring and downsizing, all while facing "a parade of new managers at the bargaining table and in line positions" that made the bargaining process and implementation of negotiated agreements more complex and uncertain.[223] The CWA further faced increased coordination costs in mobilizing its membership against new management and new wage policies in the context of AT&T and Bell affiliate cost cutting.[224]

The CWA's bargaining leverage continued to decline in the face of antitrust authorities' failure to assess labor market effects in its evolving merger policy. The antitrust agencies allowed subsequent increases in employers' market power without evaluating losses in telecommunications workers' bargaining leverage in fragmented, restructured, and increasingly nonunion workforces. The original seven regional BOCs merged to become four, which increased their power and resources as global entities.[225] Nonunion companies that were small new entrants in the 1980s became global nonunion giants, including WorldCom/MCI.[226]

The CWA recovered some ground through collective bargaining, political action, and organizing efforts.[227] It was eventually able to secure two-tiered collective bargaining with all the regional BOCs and negotiate wages and benefits to form a national pattern by the 1990s.[228]

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222. *Id.*

223. *Id.* at 576; Jeffrey H. Keefe & Rosemary Batt, *Restructuring Telecommunications Services in the United States*, *in* TELECOMMUNICATIONS: RESTRUCTURING OF WORK AND EMPLOYMENT RELATIONS WORLDWIDE 31 *passim* (Harry C. Katz ed., 1997).

224. Katz et al., *supra* note 212, at 576–77.

225. Celeste K. Carruthers, Twombly *and the Evolution of Telecom Regulation*, 53 ANTITRUST BULL. 1, 101 (2008).

226. Katz et al., *supra* note 212, at 577; JEFF KEEFE, ECON. POL'Y INST., MONOPOLY.COM: WILL THE WORLDCOM-MCI MERGER TANGLE THE WEB? 3 (1998).

227. Katz et al., *supra* note 212, at 577–79.

228. *Id.* at 577–78.

The CWA was able to maintain real union wage levels between 1983 and 1998, but real *nonunion* wage levels plummeted in the highly deregulated telecommunications industry.[229] In response to the breakup's negative impact on previously established union institutional security, the union prioritized growth through "wall-to-wall" representation organizing drives in the Bell companies and their nonunion subsidiaries.[230] But it took nearly a decade, well into the 1990s, for the CWA to win the institutional security clauses that it had prebreakup.[231] The union was best able to increase its union density among new members when it could establish security clauses guaranteeing employer neutrality and card check agreements.[232] But the companies only agreed to such guarantees in exchange for union deregulatory advocacy before state and federal legislators and agency officials to loosen state-level controls over the companies' operations in growth areas and to approve their merger activities.[233]

* * *

The breakup of the Bell System offers a number of lessons about the effects of structural remedies—and the accompanying agency and judicial failures—on workers. First, direct government intervention was necessary at each stage of the union's organizing, initially against AT&T as a monopolist, and then again against the regional BOCs before state commissions and the antitrust authorities. Heavy industry regulation let workers take advantage of political maneuvering with

229. *Id.* at 578; Rosemary Batt & Michael Strausser, *Labor Market Outcomes of Deregulation in Telecommunications Services*, PROC. 50TH ANN. MEETINGS IRRA 126, 131 (1998); *see also* JULIE MARTÍNEZ ORTEGA, AM. RTS. AT WORK, NO BARGAIN: COMCAST AND THE FUTURE OF WORKERS' RIGHTS IN TELECOMMUNICATIONS, at ii–iii, 1 (2004), https://vdocuments.site/no-bargain-comcast-and-the-future-of-workers-rights-in-telecommunication.html [https://perma.cc/C5Z4-VX8Y] (discussing Comcast's anti-union campaigns and growth in the cable sector at wage rates one-third lower than that of unionized telephone companies).

230. Katz et al., *supra* note 212, at 578, 583.

231. *Id.* at 578.

232. *Id.* at 579–80; Keefe & Boroff, *supra* note 219, at 341–59. Card check agreements generally require the employer to remain neutral during the union organizing drive and to recognize the union automatically if a certain number of signed authorization cards are collected from employees in a relevant bargaining unit. Katz et al., *supra* note 212, at 579.

233. Katz et al., *supra* note 212, at 580–81, 585–86; *see, e.g.*, Press Release, Communications Workers of America, Bell Atlantic-GTE Partnership Will Expand Competition, Access and Service, CWA Tells FCC (Nov. 22, 1998), https://cwa-union.org/news/entry/bell_atlantic-gte_partnership_will_expand_competition_access_and_service_cw [https://perma.cc/A5AR-47BV].

regulators. In unregulated industries postdivestiture, however, workers lack leverage with industry-level government institutions. Instead, they can rely only on the courts and antitrust agencies to remedy employer market power and the labor agencies to ensure labor and employment law compliance. Thus far, this reliance has proven to erode workers' countervailing power against dominant employers entirely and has provided limited, if any, support for industry-wide or multiemployer bargaining.[234]

Most importantly, the breakup exposes how structural remedies to antitrust violations can, contrary to basic IO intuitions, harm workers by decreasing their countervailing power, union density, and earnings by decentralizing and weakening collective bargaining relationships. Judicial review of negotiated remedies under the Tunney Act's public interest standard ignored labor market effects to the detriment of workers. But the union's recovery through employer neutrality, card check agreements, vertical organizing, and coalition building provides useful lessons for what agencies and courts could secure or enable in future cases.

B. Analyzing Labor Market Effects of Breakups

The Bell System breakup shows that breaking up dominant firms does not necessarily lessen employer monopsony, bargaining leverage, or ability to profitably reduce wages and benefits at workers' expense. Agencies and courts can avert those worker harms by better anticipating the labor market effects of corporate restructuring—specifically, by analyzing the potential adverse effects of remedies and designing tailored, labor market-sensitive injunctive relief. This Section draws from current social scientific literature on labor markets and worker bargaining to outline the basic contours of what such labor market effects analysis should consider to better design remedies. It introduces the analytical tools to assess how antitrust remedies can benefit and harm workers and the considerations for regulatory review of remedial impacts to the buy-side of the wage bargain (the structure and characteristics of employers in the relevant labor market) and the sell-side of the wage bargain (the structure and characteristics of the labor market and worker power).

234. *See generally* Hafiz, *Structural Labor Rights*, *supra* note 51 (arguing for a structural approach to labor law which "takes into account workers' bargaining power relative to employers in determining the scope of substantive labor rights").

1. *Social Scientific Metrics for Analyzing Remedial Effects in Labor Markets.* Given the pervasive integration of IO economics into antitrust analysis,[235] a first step in analyzing how antitrust remedies may impact labor markets and worker power would be to analyze how industry characteristics within the labor market (labor market concentration levels, barriers to entry, and so on) impact workers' countervailing power against those employers. Traditional IO economics, and its eventual inclusion of game theory and bargaining leverage models, has developed a range of microeconomic tools and empirical applications to address precisely these questions in identifying the sources of employer monopsony power.[236] For example, remedies that result in higher levels of employer concentration and barriers to entry in the labor market mean greater employer market power in the employment bargain. And where any antitrust remedy creates these conditions in any geographically specific labor market, it can adversely affect worker power relative to employers. Labor market concentration can be evaluated in one of two ways. First, economists can use HHI measures to evaluate concentration based on the number of firms and their respective market shares in a relevant labor

235. *See, e.g.*, Hafiz, *Economic Analysis*, *supra* note 103, at 1145–48; Hovenkamp, *supra* note 145, at 107–08.

236. *See generally* MANNING, *supra* note 2 (presenting partial equilibrium models of static and dynamic monopsony and alternatively a model of oligopsony); Thibaut Lamadon, Magne Mogstad & Bradley Setzler, *Imperfect Competition, Compensating Differentials and Rent Sharing in the U.S. Labor Market* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25954, 2019), https://www.nber.org/papers/w25954 [https://perma.cc./H9Y6-UX2X] (developing an equilibrium model of the labor market); Austan Goolsbee & Chad Syverson, *Monopsony Power in Higher Education: A Tale of Two Tracks* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26070, 2019), https://www.nber.org/paperes/w26060 [https://perma.cc/7V6S-69KM] (centering its test of monopsony power on estimation of the residual labor supply curve facing each institution); Card et al., *supra* note 2 (developing a model of imperfect labor market competition building on a static partial equilibrium monopsony framework); Douglas O. Staiger, Joanne Spetz & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LAB. ECON. 211 (2010) (using a change in wages at Department of Veterans Affairs hospitals to investigate monopsony in the nursing labor market); Boris Hirsch, Thorsten Schank & Claus Schnabel, *Differences in Labor Supply to Monopsonistic Firms and the Gender Pay Gap: An Empirical Analysis Using Linked Employer-Employee Data from Germany*, 28 J. LAB. ECON. 291 (2010) (investigating men and women's labor supply elasticity with a dynamic model of new monopsony); Michael R. Ransom & David P. Sims, *Estimating the Firm's Labor Supply Curve in a "New Monopsony" Framework: Schoolteachers in Missouri*, 28 J. LAB. ECON. 331 (2010) (adopting a dynamic model of labor market monopsony to examine labor supply elasticity for Missouri teachers in the 1980s); V. Bhaskar, Alan Manning & Ted To, *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 J. ECON. PERSPS. 155 (2002) (surveying areas in which oligopsony models have proved fruitful in explaining labor market phenomena).

market.[237] Second, economists can estimate employers' postremedial ability to exert downward wage pressure in the relevant labor market by estimating the tendency of workers who quit one merging or divested firm because of an incremental wage decrease to join the other merging or divesting firm as opposed to joining other firms or dropping out of the labor market.[238]

Integrating game theory and bargaining leverage analyses into an IO analysis of remedial effects, as the antitrust agencies and courts have recently done, can yield more accurate assessments of postremedial effects on labor markets.[239] Regulators and experts have used game theory modeling to investigate the properties and likely equilibria of bargaining solutions pre- and postmerger, and could apply those models to pre- and postremedial settings.[240] These economic models assume that parties' bargaining outcomes over the division of the surplus, or value, of reaching an agreement are influenced by the relative bargaining power of the parties—which impacts the *portion* of the surplus each party captures from the agreement—as well as the parties' bargaining leverage—which impacts the *magnitude* of the surplus and is sourced in each party's outside options, or "best alternatives to a negotiated agreement" ("BATNA").[241] More advanced models approximating actual, not theoretical, outcomes of bargaining have sought to incorporate parties' perceptions of fairness

237. *See, e.g.*, Marinescu & Hovenkamp, *supra* note 53, at 1037.

238. *See* Naidu et al., *supra* note 101, at 578–83.

239. Joshua D. Wright & John M. Yun, *Use and Abuse of Bargaining Models in Antitrust*, 68 KAN. L. REV. 1055, 1056, 1075–78 (2020). For recent examples, see *United States v. AT&T*, 310 F. Supp. 3d 161, 201, 215–26 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *FTC v. Qualcomm, Inc.*, No. 17-CV-00220-LHK, 2018 WL 5848999, at *1 (N.D. Cal. Nov. 6, 2018), *rev'd in part*, 969 F.3d 974 (9th Cir. 2020); *FTC v. Advocate Health Care*, No. 15-C-11473, 2017 WL 1022015, at *10 (N.D. Ill. Mar. 16, 2017); *Laumann v. Nat'l Hockey League*, 117 F. Supp. 3d 299, 322 (S.D.N.Y. 2015); see also U.S. DEP'T OF JUST. & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 13 (2006), http://www.justice.gov/atr/file/801216/download [https://perma.cc/9UPW-XGQ6] (discussing bargaining in the context of a proposed pharmacy merger).

240. For background on game theory, see generally HANS J.M. PETERS, AXIOMATIC BARGAINING GAME THEORY (1992) (examining axiomatic bargaining game theory); Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 ECONOMETRICA 97 (1982) (applying the strategic approach to a bargaining situation); Richard E. Kihlstrom, Alvin E. Roth & David Schmeidler, *Solutions to Nash's Bargaining Problem*, *in* GAME THEORY AND MATHEMATICAL ECONOMICS 65 (O. Moeschlin & D. Pallaschke eds., 1981) (considering the effect of an individual's utility function on solutions to the bargaining problem).

241. *See* Hemphill & Rose, *supra* note 53, at 2093–94, 2098 n.74; ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97 (1981).

and non-pecuniary considerations in games involving take-it-or-leave-it offers or multistep games.[242] Employers' pre- and postremedial bargaining leverage against workers can be economically assessed by evaluating whether the value to the employer in walking away from the employment bargain, or its BATNA, increases in the postremedial environment at the expense of workers.[243] Analysis of bargaining leverage would not be limited to an employers' ability to extract wage concessions but could extend to increased leverage to extract nonwage concessions as well. The DOJ and FCC have recognized that increased bargaining leverage can be used to disadvantage rival employers in labor markets or extract advantageous non-wage employment contract terms that can limit employment or worker output.[244]

Traditional IO and game theory models have certainly developed crucial tools for evaluating employers' market power and bargaining leverage relative to their workers. Broader economic and social scientific analyses of wage determination from labor economics, industrial relations, economic sociology, the sociology of labor, and other social scientific fields dramatically enrich the understanding of how market and institutional forces impact employers' and workers' relative bargaining power. Rather than assuming that labor markets function as perfectly competitive markets, postwar labor economists and social scientists made the actual operation of the labor market "the core subject of analysis in labor economics," focusing on institutional case studies and fact-specific analyses of the "mechanics of the market process itself."[245] For example, when seeking to assess industry-wide wages that neoclassical economics predicted would settle into uniform going rates, they instead found that wage rates ranged in unsystematic

242. *See generally* DAVID K. LEVINE & JIE ZHENG, *The Relationship Between Economic Theory and Experiments*, *in* HANDBOOK OF EXPERIMENTAL ECONOMIC METHODOLOGY (2015) (integrating methodologies from psychology and neuroscience into experimental economics, including bargaining theory); Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 J. ECON. PERSPS. 209 (1995) (discussing fairness and the ultimatum game); Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORGS. 367, 383–85 (1982) (providing an experimental analysis of easy and complicated ultimatum games).

243. *See* Hemphill & Rose, *supra* note 53, at 2094–105. For application of this kind of bargaining leverage analysis in the monopsony context, see, for example, *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 563 (6th Cir. 2014).

244. *See, e.g.*, Hemphill & Rose, *supra* note 53, at 2103–04; Complaint at 4, United States v. Charter Commc'ns, Inc., No. 1:16-cv-00759 (D.D.C. filed Apr. 25, 2016).

245. Bruce Kaufman, *The Postwar View of Labor Markets and Wage Determination*, *in* HOW LABOR MARKETS WORK 145, 147–48 (Bruce Kaufman ed., 1988).

ways for half or more employees.[246] This discrepancy between the theoretical economic prediction and empirical wage rates shaped their research agenda, and they placed more attention and weight on understanding labor market imperfections like rigid wages, persistent unemployment, and employer domination of local labor markets.[247]

Labor economists also focus on how the regulatory environment and existing law impacts workers' bargaining leverage and wage outcomes.[248] The field of "industrial relations" additionally takes an expansive approach to analyzing workers' bargaining power, drawing from social psychology, organizational behavior, sociology, behaviorally oriented theories of human behavior, and research on how work rules and group relations structure the organization of work and the distribution of workplace rewards.[249] Economic sociology and the sociology of work analyze how firm decisions about how to structure economic exchanges impact forms of social organization among workers, facilitating or obstructing their social interactions as well as their wage outcomes.[250]

Thus, a broader social scientific approach would analyze how structural remedies affect employers' and workers' relative bargaining leverage, including how corporate restructuring alters market and

246. *See, e.g.*, Richard A. Lester, *Wage Diversity and Its Theoretical Implications*, 28 REV. ECON. & STAT. 152, 152–54 (1946); Clark Kerr, *Labor Markets: Their Character and Consequences*, 40 AM. ECON. REV. 278, 278–79, 286 (1950).

247. Kaufman, *supra* note 245, at 148.

248. *See generally* LAWRENCE MISHEL & JOSH BIVENS, ECON. POL'Y INST., IDENTIFYING THE POLICY LEVERS GENERATING WAGE SUPPRESSION AND WAGE INEQUALITY (2021), https://files.epi.org/uploads/215903.pdf [https://perma.cc/MY23-VESR] (describing and quantifying the policy mechanisms that suppressed wage growth since the 1970s).

249. Kaufman, *supra* note 245, at 148.

250. *See generally* Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOCIO. REV. 213 (2018) (noting that market restructuring has moved workers to jobs dependent on sales to outside corporate buyers who have significant power over the wages and working conditions of the workers); John C. Dencker & Chichun Fang, *Rent Seeking and the Transformation of Employment Relationships: The Effect of Corporate Restructuring on Wage Patterns, Determinants, and Inequality*, 81 AM. SOCIO. REV. 467 (2016) (finding that corporate restructuring made employment relationships more market based, particularly among production worker contracts); Arne L. Kalleberg, Michael Wallace & Robert P. Althauser, *Economic Segmentation, Worker Power, and Income Inequality*, 87 AM. J. SOCIO. 651 (1981) (examining the structure of economic segmentation and the sources of worker power and examining the effects of these concepts on income); Charles Tolbert, Patrick M. Horan & E. M. Beck, *The Structure of Economic Segmentation: A Dual Economy Approach*, 85 AM. J. SOCIO. 1095 (1980) (using a dual economy approach to the relationship between economic organization and labor market structure to identify empirical indicators of the degree of oligopoly in industry).

institutional forces in the relevant industry, at the firm level, and in impacted labor markets.[251] More specifically, that approach would analyze the flux of supply and demand within the labor market ("external labor markets") as a whole, the existence of labor market institutions like unions and other forms of organized worker power ("labor market institutions"), and the internal dynamics and policies within firms that determine the parameters and scope of the terms of the labor bargain ("internal labor markets"), including the more human dimension and conceptions of fairness that impact wage bargaining. At the highest level, divestiture converts wage setting by a single employer to at least wage setting by two or more employers, but non-IO social scientists do not assume that the resulting competition between employers for workers necessarily increases workers' wages. Instead, they would view the structural remedy as converting one firm's internal labor market wages into two or more firms' wage-setting policies. These policies may involve internal labor market wage setting *or* external labor market wage setting, depending on whether the new employer hires workers directly or outsources or subcontracts labor, with firm restructuring eliminating protections against market competition that workers may have had in the preremedial environment as set by a dominant firm.

Ignoring these broader sources of employer monopsony power dramatically underestimates employer buyer power in labor markets in the remedial context and can lead to high error costs in enforcement.[252] For example, employers can accrue market power that decreases workers' bargaining leverage and countervailing power from natural labor market frictions. IO and game theory ignore such frictions, but they make it harder for workers to quit when they are underpaid or work in harmful or low-quality conditions. These labor market frictions include workers' heterogeneous preferences over non-wage job characteristics, job differentiation, mobility costs,[253] search costs, information asymmetries, employer-specific and divergent wage

251. *See, e.g.*, Melvin W. Reder, *On Labor's Bargaining Disadvantage*, *in* LABOR ECONOMICS AND INDUSTRIAL RELATIONS: MARKETS AND INSTITUTIONS 243, 249–50 (Clark Kerr & Paul Staudohar eds., 1994).

252. *See* Naidu & Posner, *supra* note 101, at 4–5.

253. *See, e.g.*, Ian M. Schmutte, *Free To Move? A Network Analytic Approach for Learning the Limits to Job Mobility*, 29 LABOUR ECON. 49, 49 (2014).

policies, downward wage rigidity, "job structure,"[254] and legal rules that can rig employers' relative bargaining power within the wage bargain like employment at-will defaults or worker exemptions from work law protections. Further, theoretical bargaining models alone, without fact-specific evidence, can do a poor job of empirically estimating the effects of bargaining, particularly "when equilibria are not robust, the environment is complex, or when circumstances are unfamiliar."[255]

Failing to estimate properly how remedial design can decrease bargaining leverage not only frustrates antitrust policy that seeks labor market competition, but also frustrates broader labor and macroeconomic policy that seeks equal bargaining power between workers and employers, mass purchasing power, employment and access to economic opportunity, and decreased inequality.[256] And failure to ensure labor market competition, unlike failure to ensure product market competition, has a multiplier effect on the economy, making regulatory accuracy more urgent.[257]

2. *Considering Buy-Side Labor Market Effects.* In analyzing the effects of remedies on employer monopsony power, the antitrust agencies and the courts can initially apply the same IO economic models and analyses they would apply in determining employers' market power before and after a merger. This analysis is useful because it provides an administrable proxy for the level of competition workers can expect for employment and wage offers in the postremedial environment. This analysis would involve:

254. "Job structure" is the set of employee-provided skills and functions for which wages must be assigned within a firm as well as their organizational relationship to each other horizontally and vertically. *See*, *e.g.*, E. Robert Livernash, *The Internal Wage Structure*, *in* NEW CONCEPTS IN WAGE DETERMINATION 140, 142–43 (George W. Tayler & Frank C. Pierson eds., 1957).

255. Drew Fudenberg & David K. Levine, *Whither Game Theory? Towards a Theory of Learning in Games*, 30 J. ECON. PERSPS. 151, 153 (2016); Wright & Yun, *supra* note 239, at 1094–96.

256. *See* Hafiz, *Structural Labor Rights*, *supra* note 51, at 690–703; Naidu & Posner, *supra* note 101, at 10 (discussing the differing approaches by labor and macroeconomics relative to IO in analyzing employer monopsony).

257. *See generally* JOSH BIVENS, ECON. POL'Y INST., UPDATED EMPLOYMENT MULTIPLIERS FOR THE U.S. ECONOMY (Jan. 23, 2019), https://files.epi.org/pdf/160282.pdf [https://perma.cc/X8MN-FG72] (calculating employment multipliers by industry).

1. Measuring employer concentration levels in the relevant labor market pre- and postremedy, using HHI or downward wage pressure modeling;[258]
2. Measuring employers' relative market share in the relevant labor market;
3. Measuring the unilateral effects of the remedy, or employers' wage-setting power, directly or indirectly;
4. Measuring the coordinated effects of the remedy, or the impact of the remedy on the ability of employers to collude on wages and benefits; and
5. Evaluating barriers to entry in the relevant labor market.[259]

In addition to assessing employers' market power in labor markets in the postremedial environment, regulators and courts should also consider whether any labor market restructuring is impacted by imposed product market restructuring. As the Bell System breakup illustrates, absent a legal infrastructure mandating sectoral bargaining or industry-wide wage regulation, ordered divestitures in product markets may disrupt or make more challenging the centralized labor bargaining that matches the firm's organizational structure from the perspective of its outputs, which decreases strike threat credibility and strike potency.

While assessing the level of horizontal competition for labor services *between* employers is useful for estimating their wage-setting ability—their ability to profitably reduce employment, suppress wages and benefits, or sustain lower quality workplace environments—employers' market power must also be assessed *vertically* in relation to their employment contracts with workers as labor inputs. To evaluate the vertical effects of remedies, regulators can assess an employer's ability to foreclose other employers or raise their costs in the postremedial environment by, for example, locking in workers with exclusive or anticompetitive employment contract terms (like noncompete agreements or long-term exclusivity provisions).[260] Remedies can also enable employers to foreclose labor inputs to

258. *See supra* notes 237–238 and accompanying text.

259. These metrics and stages of analysis are adapted from the HORIZONTAL MERGER GUIDELINES, *supra* note 53, §§ 5–7, 9.

260. *See, e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES § 4 (2020) [hereinafter VERTICAL MERGER GUIDELINES].

competitor employers by increasing their bargaining leverage to negotiate lower wages with workers, and most especially, new hires, independent contractors, or other subcontracted or outsourced workers not already employed by acquiring firms.[261] Additional effects may include evading regulation or long-term private contracts or collective bargaining agreements, whether because the divestiture allows employers to shift production to nonunion facilities and phase out union contracts or because the divestiture better facilitates outsourcing or subcontracting.[262] Attention should also be paid to whether the structural remedy allows employers to evade seniority provisions in collective bargaining agreements or salary commitments to more senior workers, as well as whether it enables employer avoidance or decreases employer commitments to longer term benefits, like retirement benefits and vested rights won in preremedial employment bargains.

But traditional assumptions of IO economics operate on the model of competitive labor markets, assuming that, on the buy-side, any firm paying less than a "going wage rate" will lose workers to its competitors, and thus all noncompensating wage differentials will be competed away and labor will be most efficiently employed. Once a divestiture remedy restores competition, wage rates will go up as employers compete for workers, and labor markets will operate more efficiently. Labor economists have studied and documented the degree to which labor markets deviate from this competitive ideal, showing empirically that "there are substantial difference[s] in labor cost per efficiency unit and even larger differences in job attractiveness . . . [without] much reason to think that these differences tend to diminish over the long run."[263] Labor markets are rife with frictions, heterogeneous company wage policies, and labor market segmentation. There are also human and behavioral factors that impact wage bargains and perceived fairness in firm profit-sharing

261. For discussion of input foreclosure in negotiation markets, see Steven C. Salop, *A Suggested Revision of the 2020 Vertical Merger Guidelines*, SCHOLARLY COMMONS, July 7, 2021, at 1, 12.

262. For discussion of evasion of regulation or long-term private contracts, see *id.* at 15.

263. LLOYD G. REYNOLDS, THE STRUCTURE OF LABOR MARKETS: WAGES AND LABOR MOBILITY IN THEORY AND PRACTICE 234 (1951).

arrangements,[264] all of which contribute to "a marked dispersion in wage rates in the labor market,"[265] even in unconcentrated labor markets. Thus, to assess the buy-side effects of divestiture, it is critical to incorporate metrics and analyses from labor economics, industrial relations, and other social scientific methods. For example, where remedies would increase the incidence of labor market failures by increasing search costs, information asymmetries (particularly with regard to wage transparency and benefits), worker mobility costs between employers, or job differentiation, they can reduce labor market competition and employment outcomes for workers.[266]

Broader social scientific approaches would also assess how the internal structure of the firm—how it organizes production and manages inputs and outputs—and the dynamics that emerge from that structure impact or constrain employer wage setting.[267] Workers' wage-and-benefit outcomes are also impacted by firm organization, company and plant size, and internal labor markets that regulate the employment relationship through firm policies, administrative rules, and procedures that do not apply to arm's-length employment contracting. Firm breakups, voluntary or imposed, fracture internal labor market wage-setting rules regardless of whether they create separate horizontal competitors or vertically disintegrate production lines. In other words, just as in the "fissured workplace" of outsourced, subcontracted, franchised, or gig work, breakups can result in workers suffering wage penalties relative to wage rates offered in vertically integrated firms.[268]

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264. *See* Bruce E. Kaufman, *The Evolution of Thought on the Competitive Nature of Labor Markets*, *in* LABOR ECONOMICS AND INDUSTRIAL RELATIONS: MARKETS AND INSTITUTIONS 140, 164–65 (Clark Kerr & Paul Staudohar eds., 1993).

265. Kaufman, *supra* note 245, at 155.

266. *See, e.g.*, Naidu & Posner, *supra* note 101, at 30–32.

267. *See, e.g.*, R. H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 713 (1992).

268. *See generally* WEIL, *supra* note 6, at 76–92 (describing how fissuring can push wages downward); Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LAB. RELS. REV. 287, 287 (2010) (finding that outsourcing reduced labor market rents for workers); Matthew Dey, Susan N. Houseman & Anne E. Polivka, *What Do We Know About Contracting Out in the United States? Evidence from Household and Establishment Surveys*, *in* LABOR IN THE NEW ECONOMY 267, 267 (Katharine G. Abraham, James R. Spletzer & Michael J. Harper eds., 2010) (summarizing domestic outsourcing in the United States and recommending ways to improve data in that area). For monopsony in franchising, see MinWoong Ji & David Weil, *Does Ownership Structure Influence Regulatory Behavior? The Impact of Franchising on Labor Standards Compliance*,

Breaking apart a firm's preremedial internal organization, whether geographically, by production lines, or along lines of previously merged entities, can also either fortify or maintain local employer monopsony and/or result in reduced wages because of losing the "large-firm premium." The large-firm premium is the positive relationship between wages paid and fringe benefit expenditures and the size of the company or plant.[269] Also, larger firms can use high-profit production areas to cross-subsidize workers' wages in less profitable subsidiaries, facilities, or plants.[270] For example, Amazon leverages its profits from its successful Amazon Web Services ("AWS"), its cloud computing business, to subsidize its retail business, and, in particular, its logistics and distribution business, which still runs at a loss.[271] Thus, severing Amazon's logistics arm from AWS, as one

INDUS. & LAB. RELS. REV. 977, 998–1005 (2015); Annette Bernhardt, Michael W. Spiller & Nik Theodore, *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 66 INDUS. & LAB. RELS. REV. 808, 828 (2013).

269. Explanations for the large-firm wage premium include: selection effects (workers at large vs. small firms differ by skill, education, age, gender, etc. because larger firms hire higher quality workers); firm characteristics (large and small firms differ by industry characteristics, geographical regions of operation, etc.); larger firms earn higher rents they can share with workers; and larger firms have higher monitoring costs, so they incentivize productivity over shirking through higher wages. *See, e.g.*, CHARLES BROWN, JAMES HAMILTON & JAMES MEDOFF, EMPLOYERS LARGE AND SMALL 29–42 (1990); Matt Bruenig, *Small Businesses Are Overrated*, JACOBIN (Jan. 16, 2018), https://jacobinmag.com/2018/01/small-businesses-workers-wages [https://perma.cc/G5SU-UPYT]; John M. Abowd, Francis Kramarz & David N. Margolis, *High Wage Workers and High Wage Firms*, 67 ECONOMETRICA 251, 308 (1999); Walter Y. Oi & Todd L. Idson, *Firm Size and Wages*, *in* 3 HANDBOOK OF LABOR ECONOMICS 2165, 2166 (Orley C. Ashenfelter & David Card eds., 1999); Alan B. Krueger & Lawrence H. Summers, *Efficiency Wages and the Inter-Industry Wage Structure*, 56 ECONOMETRICA 259, 260, 277–78 (1988) (hypothesizing that large firms pay efficiency wages); Richard Lester, *Pay Differentials by Size of Establishment*, 7 INDUS. RELS. 57, 66–67 (1967). While recent studies indicate that the large firm premium has declined since the 1980s, the current premium—defined as the gap between the average wage earnings of employees in large (over ten thousand employees) versus small (one hundred employees) firms—is 20 percent. *See* Jae Song, David J. Price, Fatih Guvenen, Nicholas Bloom & Till von Wachter, *Firming Up Inequality*, 134 Q.J. ECON. 1, 7–8 (2019); Nicholas Bloom, Fatih Guvenen, Benjamin S. Smith, Jae Song & Till von Wachter, *Is the Large Firm Wage Premium Dead or Merely Resting?*, 108 AEA PAPERS & PROC. 317, 317 (2018); J. Adam Cobb & Ken-Hou Lin, *Growing Apart: The Changing Firm-Size Wage Premium and Its Inequality Consequences*, 28 ORG. SCI. 429, 429 (2017).

270. *See, e.g.*, Henrik Dellestrand, Philip Kappen & Olof Lindahl, *Headquarter Resource Allocation Strategies and Subsidiary Competitive or Cooperative Behavior: Achieving a Fit for Value Creation*, 9 J. ORG. DESIGN 5, 10–11 (2020); Zhijun Chen & Patrick Rey, *Competitive Cross-Subsidization*, 50 RAND J. ECON. 645, 645 (2019).

271. *See* Greg Bensinger, *Cloud Unit Pushes Amazon To Record Profit*, WALL ST. J. (Apr. 28, 2016, 7:31 PM), https://www.wsj.com/articles/amazon-reports-surge-in-profit-1461874333 [https://perma.cc/V5S8-LYY9]; *Amazon's Profits, AWS, and Advertising*, BENEDICT EVANS

current House bill has proposed and as regulators may demand as a remedy in current monopolization cases against Amazon, may further collapse worker earnings in Amazon warehouses and distribution facilities.[272] As of yet, Congress, state attorneys general, and federal antitrust regulators have not addressed potential labor market effects of such a divestiture. Finally, structural remedies may more easily allow divesting and acquiring firms to suppress wages or engage in wage discrimination between older and newer postremedial hires or contract workers. This is because the broken-up firms are free from preremedial internal labor market constraints that limited employer wage setting, both because of downward wage rigidity (wage stickiness that prevents employers from reducing workers' wages despite higher unemployment), and because of horizontal and vertical pay equity, or fairness norms, that operated to equalize and reduce wage differentials between workers in the same jobs as well as the highest and lowest paid workers.[273]

(Sept. 6, 2020), https://www.ben-evans.com/benedictevans/2020/9/6/amazons-profits [https://perma.cc/C7V4-B2X7].

272. For the House Bill, see Rebecca Kern & Spencer Soper, *Amazon Could Be Forced To Sell Logistics Business Under Bill*, WASH. POST (June 22, 2021, 10:55 PM), https://www.washingtonpost.com/business/on-small-business/amazon-could-be-forced-to-sell-logistics-business-under-bill/2021/06/22/1cf917ae-d35e-11eb-b39f-05a2d776b1f4_story.html [https://perma.cc/8GNM-PG57]. For current litigation and investigations into Amazon, see Press Release, Office of the Attorney General for the District of Columbia, AG Racine Files Antitrust Lawsuit Against Amazon To End its Illegal Control of Prices Across Online Retail Market (May 25, 2021), https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon [https://perma.cc/VH7Y-UA23]; Tyler Sonnemaker, *Amazon Is Reportedly Facing a New Antitrust Investigation into Its Online Marketplace Led by the FTC and Attorneys General in New York and California*, BUS. INSIDER (Aug. 3, 2020, 3:53 PM), https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8 [https://perma.cc/NN9M-Z65P]; Karen Weise & David McCabe, *Amazon Said To Be Under Scrutiny in 2 States for Abuse of Power*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/technology/state-inquiry-antitrust-amazon.html [https://perma.cc/WL5T-3W5K].

273. *See, e.g.*, TRUMAN F. BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION 1–19, 29–30 (1999); COLIN F. CAMERER, BEHAVIORAL GAME THEORY 43–59 (2003); WEIL, *supra* note 6, at 83–86; Ernst Fehr, Lorenz Goette & Christian Zehnder, *A Behavioral Account of the Labor Market: The Role of Fairness Concerns*, 1 ANN. REV. ECON. 355, 355 (2009); Armin Falk, Ernst Fehr & Christian Zehnder, *Fairness Perceptions and Reservation Wages—The Behavioral Effects of Minimum Wage Laws*, 121 Q.J. ECON. 1347, 1347 (2006); Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 728–29 (1986); Richard B. Freeman, *Does the New Generation of Labor Economists Know More than the Old Generation?*, *in* HOW LABOR MARKETS WORK 205, 205–32 (Bruce E. Kaufman ed., 1988); Kaufman, *supra* note 245, at 149–62; Alan B. Krueger & Lawrence H. Summers, *Reflections on the Inter-Industry Wage Structure*, *in* UNEMPLOYMENT AND THE STRUCTURE OF LABOR MARKETS 17, 17–47 (Kevin Lang & Jonathan S. Leonard eds., 1987).

3. *Consideration of Sell-Side Labor Market Effects.* The impacts of antitrust remedies should also be assessed based on how they will impact workers' countervailing power and bargaining leverage relative to employers in the postremedial environment.[274] Depending on how labor markets are organized and regulated, antitrust remedies can have dramatically different effects on strengthening or weakening workers' relative bargaining power. Regulators and courts should evaluate the structure and conditions of labor market institutions (union density, the state of organizing drives, workers' union eligibility under law, and other legal protections that enhance or diminish worker leverage), employment bargaining history within the relevant markets, workers' postremedial coordination costs, and broader labor market conditions (the size of the labor market, who is able to compete, and how the exchange process is organized).

a. Structure and Conditions of Labor Market Institutions. Labor market institutions are the set of organizations and legal rules that impact wage and employment determinations. They can increase workers' bargaining power relative to employers by protecting sources of worker leverage such as strikes and strike threats. But they can also impact workers' mobility costs. When unions, worker organizations, or government interventions facilitate hiring and worker movement

274. Evaluating workers' relative bargaining power and leverage against employers is not only consistent with antitrust law's efficiency goals in ensuring labor market competition, but is also consistent with the NLRA's federal labor policy of ensuring equal bargaining power between workers and employers. *See* 29 U.S.C. § 151 (promoting collective bargaining practices to eliminate and mitigate the inequality of bargaining power between employers and employees); Hafiz, *Structural Labor Rights*, *supra* note 51, at 664–73 (discussing the origins of the NLRA's goal of equal bargaining power). Moreover, it reduces labor market frictions and has broader distributional and macroeconomic effects in alleviating inequality. *See generally* HARRY C. KATZ, THOMAS A. KOCHAN & ALEXANDER J.S. COLVIN, AN INTRODUCTION TO COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 88–89 (4th ed. 1999) ("[The NLRA and state statutes] exert sizable effects on the process and outcomes of collective bargaining through their regulation of the actions by workers, unions, and employers in the course of collective bargaining."); Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2020, at 1, 30 n.46 (explaining that monopolistic rents may be an innate feature of particular product markets, uncorrectable by antitrust policy); Hafiz, *Structural Labor Rights*, *supra* note 51 (proposing ways to apply social scientific tools to areas of the NLRB's adjudication); Benjamin Bental & Dominique Demougin, *Declining Labor Shares and Bargaining Power: An Institutional Explanation*, 32 J. MACROECONOMICS 443, 443 (2010) (modeling the design of labor market institutions and analyzing how the environmental setting impacts bargaining power).

between employers, they can expand workers' exit options and reduce mobility costs. But those same institutions can increase mobility costs to the extent they incentivize and limit the portability of employer-specific benefits and seniority-based benefits, and permit certain mobility restrictions like noncompete agreements. Labor market institutions also structure information available to workers to aid in their bargaining leverage: collective bargaining agreements or legal rules can mandate worker access to the firm's financials, broader pay structures and pay transparency within the firm and industry-wide (to the extent pattern or multi-employer bargaining exists), notice of wage differentials in the industry (interpersonal, interfirm, interarea, interoccupational, and interindustry), thereby increasing employers' ability to hold up or advantage their position in the wage bargain based on imperfect information.[275]

As the Bell System breakup illustrates, structural remedies in industries with higher rates of unionization can adversely impact union density and disrupt long-standing bargaining relationships between workers and management. Labor law does grant union-eligible workers the right to strike and allows them some flexibility in choosing their lawfully protected concerted activity.[276] But workers' strike potency depends on a number of factors, including the durability and uniqueness of the struck production (perishable goods or services versus durable goods), their degree of skill and specialization (supply in the labor market), government intervention or support of workers versus employers, union density within the industry, downstream demand for struck production and employer profitability, and downstream support through consumer or buyer boycotts.[277] Where divestiture or structural remedies recalibrate any of these aspects of a strike threat, they can decrease workers' bargaining power. Further, to the extent that pattern bargaining is fissured by divestitures or other structural remedies, unionized facilities or plants are closed in favor of nonunionized facilities or plants, and unions lack security provisions

275. *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 149–50 (1956); Stella D'Oro Biscuit Co., 355 N.L.R.B. No. 158 (2010); JAKE ROSENFELD, YOU'RE PAID WHAT YOU'RE WORTH AND OTHER MYTHS OF THE MODERN ECONOMY 243–44 (2021); HARRIS, *supra* note 130, at 8; Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 547–48 (2020).

276. 29 U.S.C. § 157. *But see* James Gray Pope, *How American Workers Lost the Right To Strike, and Other Tales*, 103 MICH. L. REV. 518, 527–34 (2004) (discussing how American workers lost the right to strike).

277. ALBERT REES, THE ECONOMICS OF TRADE UNIONS 31–35 (3d ed. 1989).

like neutrality, card check, or successor agreements with divesting or acquiring firms, their bargaining power is reduced postremedy.

Applying structural remedies in nonunion labor markets requires different considerations. Where employment bargains are primarily handled through arm's-length transactions in a postremedial environment, workers are particularly vulnerable to employer buyer power. "[L]imitations placed on worker mobility by factors such as fringe benefits, seniority rights, and specific training . . . give firms some monopsony power over their employees, particularly over those that are 'inframarginal,'" so firms have "a certain degree of market power over wage rates in a nonunion labor market, both because of the willingness of unemployed workers to accept less than the competitive rate and because of the relative immobility of the employed work force."[278] Under nonunion conditions, wage structures among firms in a local labor market are primarily shaped by demand-side factors, and the "supply situation is such that each firm, instead of being faced with a market wage rate, is faced with a considerable range of possible wage levels."[279] In nonunion labor markets, the exchange of labor for compensation does not function like a bourse with buyers and sellers trading a homogenous good with transparent bids and offers. Instead, it functions as a market where a limited number of buyers offer fixed prices to a much larger number of sellers as take-it-or-leave-it offers. Labor markets are segmented with wage setting being driven by whether the wages are set as internal or external labor market rates; without unions operating to set broader standards and lift wage premiums industry-wide, corporate personnel policies and contracting practices can more easily create winners and losers through wage discrimination and employers' unilateral discretion to contract for labor outside the firm.

b. Employment Bargaining History and Workers' Postremedial Coordination Costs. The Bell System breakup reveals the significance of assessing bargaining history in designing remedies to counter employer monopsony in the postremedial environment. The CWA's long-fought achievement of pattern bargaining devolved into single-enterprise bargaining, dramatically limiting the union's bargaining leverage, which, in turn, eroded the union's negotiating position when

278. Kaufman, *supra* note 245, at 154.

279. REYNOLDS, *supra* note 263, at 35; Kaufman, *supra* note 245, at 156.

it came to industry expansion into new sectors and outsourcing to nonunionized workers.[280] The breakup also fragmented the workforce and disrupted relationships of trust and compromise that had evolved between the union and central management.[281] This fragmentation required the union to bear the costs of uncertainty and bridge building with a newly empowered set of employers while also having to coordinate union bargaining strategy across employers in new and challenging ways with decentralized information and higher information asymmetries.[282] To assess structural remedies' impact on employment bargaining in the postremedial environment, it is critical to analyze whether the preremedial environment was dominated by single-stage or repeated games (say, take-it-or-leave-it employment offers versus cycles of collective bargaining) with higher or fewer numbers of players (individual workers versus a single union versus multiple unions) at lower and higher levels of cooperation.

c. Other Labor Market Conditions. Finally, regulators and courts should consider the size of the labor market, who is able to compete and their skills, and how the exchange process is organized. The degree of market-orientation of jobs within the relevant labor market can impact workers' relative bargaining leverage, including whether employers in the postremedial environment can achieve the same product market output from arm's-length transactions with workers that have general skills (in relatively higher supply) or whether firm-specific or specialized skills are required (in relatively lower supply). Where structural remedies are imposed in labor markets where jobs are less market-oriented and require firm-specific or specialized skills, worker mobility is restrained because outside options, or other employers, will have lower demand for specific skills, and structural remedies may displace workers from their most productive uses.

Labor market conditions can also be impacted by product markets and firm profitability. Organization theory predicts that organizations like unions will adapt their *internal* organizational structure to fit the external environment, including how firms' production lines and labor

280. *See* Katz et al., *supra* note 212.

281. *Id.*

282. *Id.*

markets, respectively, are organized.[283] And organizations like unions depend on external organizations' resources for their survival, and so they develop strategies and structures to lessen their dependence and improve their power and leverage vis-à-vis those organizations. In the case of unions, those organizations are the firms that employ them or, in the case of firms, worker organizations.[284] Those strategies include political action, growth strategies to expand business volume and market share, diversification strategies, and inter-organizational linkages (like mergers, strategic alliances, or closer relationships with suppliers or customers) to reduce resource dependence, enhance bargaining power, and advance organizational goals. Also, more profitable firms tend to pay workers more depending on product market developments and/or unionization rates.[285] Pressures in the product market, "not excess supplies of labor as envisioned in the competitive model . . . are the dominant force in causing wage changes, particularly in a downward direction."[286]

Thus, when imposing remedies to anticompetitive conduct in product markets, regulators and courts must consider the adverse labor market effects of those remedies because they are impacted by postremedial product market competition. Further, whether the employer competes in local or national product markets matters. When the product market is local (like in building trades or service industries), having strong local unions with more bargaining independence reduces workers' coordination costs. But when the product market is national, having a *national* union set the economic terms of bargaining with local unions and focus on work rules and agreement administration can strengthen the union and workers' countervailing power.[287]

Assessments of the effects of structural remedies on labor market competition and on workers can include both static, or short-term,

283. *See, e.g.*, PAUL R. LAWRENCE & JAY W. LORSCH, ORGANIZATION AND ENVIRONMENT 84–108 (1969); LEX DONALDSON, THE CONTINGENCY THEORY OF ORGANIZATIONS 31–33 (2001).

284. *See generally* JEFFREY PFEFFER & GERALD R. SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE (1978) (explaining how an organizational environment constrains organizations and detailing how organizations respond to those external constraints).

285. JOHN T. DUNLOP, WAGE DETERMINATION UNDER TRADE UNIONS 146–48 (2d ed. 1966).

286. Kaufman, *supra* note 245, at 156.

287. *See* REES, *supra* note 277, at 23.

effects, as well as dynamic, or long-term, effects, including the relative costs and benefits of firm restructuring as compared to mandating conduct and any administrative costs in monitoring compliance and market competition effects.[288]

C. When Breakups Can Benefit Workers

Firm dominance and anticompetitive conduct in labor markets allow employers to artificially suppress wages and benefits and/or reduce hiring. Merger activity can also result in employers' increased bargaining power over workers, worker layoffs, and lower wages within the industry.[289] Thus, it stands to reason that effective antitrust remedies creating more competition for workers' services through competing offers for better wages and benefits would either reduce or eliminate these adverse labor market effects on workers, at least in certain circumstances. This Section analyzes the conditions under which structural remedies may benefit workers as a theoretical and empirical matter.

1. *Economic Theory.* Economic theory predicts that monopsonistic employers' conduct and mergers adversely impact

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288. *See, e.g.*, Shelanski & Sidak, *supra* note 79, at 5.

289. *See, e.g.*, Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* 2–3 (Wash. Ctr. for Equitable Growth, Working Paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391889 [https://perma.cc/H8MT-MM3J]; Valérie Moatti, Charlotte R. Ren, Jaideep Anand & Pierre Dussauge, *Disentangling the Performance Effects of Efficiency and Bargaining Power in Horizontal Growth Strategies*, 36 STRAT. MGMT. J. 745, 746 (2015); Richard Harris, Donald S. Siegel & Mike Wright, *Assessing the Impact of Management Buyouts on Economic Efficiency: Plant-Level Evidence from the United Kingdom*, 87 REV. ECON. & STAT. 148, 148, 153 (2005); Janet Currie, Medhi Farsi & W. Bentley MacLeod, *Cut to the Bone?: Hospital Takeovers and Nurse Employment Contracts*, 58 INDUS. & LAB. RELS. REV. 471, 471 (2005) (finding evidence of increased monopsony power after hospital mergers). Displaced workers from layoffs suffer long-term earnings losses relative to nondisplaced workers. *See, e.g.*, Marta Lachowska, Alexandre Mas & Stephen A. Woodbury, *Sources of Displaced Workers' Long-Term Earnings Losses* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24217, 2018), https://www.nber.org/system/files/working_papers/w24217/revisions/w24217.rev0.pdf [https://perma.cc/S7HT-NCCM]; Till Von Wachter, Jae Song & Joyce Manchester, Long-Term Earnings Losses Due to Mass Layoffs During the 1982 Recession 1 (2009) (unpublished manuscript) (on file with author); Louis S. Jacobson, Robert J. LaLonde & Daniel G. Sullivan, *Earnings Losses of Displaced Workers*, AM. ECON. REV. 685, 685 (1993); Han Ma, Is There a Dark Side to Mergers and Acquisitions? Evidence from Local Labor Market Spillovers (Aug. 21, 2020) (Ph.D. dissertation, Georgia State University), https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1038&context=finance_diss [https://perma.cc/HWK7-GFM2]; Hema A. Krishnan & Daewoo Park, *The Impact of Work Force Reduction on Subsequent Performance in Major Mergers and Acquisitions*, 55 J. BUS. RSCH. 285, 289–90 (2002).

workers through a number of mechanisms: (1) maintaining or increasing labor market concentration that lowers competition for workers and reduces wages and employment; (2) increasing firms' product market power and incentivizing firms to reduce quantities, which results in lower demand for workers and falling employment (with underdetermined impacts on wages); and (3) reducing or altering production processes in ways that may increase or decrease worker productivity, which can increase or decrease wages for workers or make some jobs redundant.[290] Empirical studies support these predictions, finding that employer monopsony lowers wages and decreases employment.[291] Worker earnings can fall by over 2 percent when mergers increase local labor market concentration, with the largest effects in already concentrated markets.[292] Earnings effects in concentrated markets generate negative spillovers on *other* firms in the same labor market, depressing wages by 4 to 5 percent relative to a fully competitive benchmark.[293] That the earnings effects are similar in tradable industries—or industries where goods can be sold in other locations beyond the location of production—suggests that they are "not driven by changes in product market power" resulting from mergers and acquisitions.[294] Additionally, during the conglomerate merger movement, commentators recognized that conglomerate

290. *See* David Arnold, Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes 1 (Apr. 2, 2021) (unpublished manuscript), https://darnold199.github.io/jmp.pdf [https://perma.cc/7NJN-Y5RX].

291. *See, e.g.*, *id.* at 2; *supra* notes 2, 15 and accompanying text; Alex Xi He & Daniel le Maire, Mergers and Managers: Manager-Specific Wage Premiums and Rent Extraction in M&As 2 (Dec. 28, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481262 [https://perma.cc/DGD9-HG4L]; Prager & Schmitt, *supra* note 289; Benmelech et al., *supra* note 16, at 18; Donald S. Siegel & Kenneth L. Simons, *Assessing the Effects of Mergers and Acquisitions on Firm Performance, Plant Productivity, and Workers*, 31 STRATEGIC MGMT. J. 903, 904 (2010); Currie et al., *supra* note 289; James M. MacDonald, Michael E. Ollinger, Kenneth E. Nelson & Charles R. Handy, *Consolidation in U.S. Meatpacking* 1 (Food & Rural Econ. Div., Econ. Rsch Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 785, 2000), https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=4824.9 [https://perma.cc/EC4N-YRU5]; Charles Brown & James L. Medoff, *The Impact of Firm Acquisitions on Labor*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 9, 11 (1988). There is some empirical evidence that, at least in certain industries like hospital service provision, merger-related reductions in wage growth are attenuated where strong labor unions are present or when mergers occur out of market, leaving local employer concentration unchanged. *See* Prager & Schmitt, *supra* note 289, at 26–31.

292. Arnold, *supra* note 290.

293. *Id.*

294. *Id.* at 2.

mergers "shifted tactical collective bargaining power in favor of management"[295] through a number of mechanisms, including through decentralizing "local unit bargaining . . . vulnerable to divide-and-conquer strategies."[296] Conglomerate mergers also increased management's ability to cross-subsidize between industries and plants and "whipsaw the different unions at its various facilities, supported by staying power in both product and labor markets."[297]

Under standard IO theoretical models operating on the "competitive model" as the "standard frame of reference" for employer wage setting,[298] divestiture of dominant or merged firms that produce these adverse labor market effects can increase competition for labor inputs by creating two or more firms where there had only been one competing over worker hires and driving up wage rates. Structural remedies can thus be a clean way to disrupt a firm's wage-setting power, or its unilateral ability to pay infracompetitive wages and benefits for labor services.

From the sell-side perspective, workers' bargaining power is, at least theoretically, also impacted by firm structure and the number of firms within the relevant labor market. Workers' leverage against employers turns not only on the level of union density within their industry, but also on the *bases* of their aggregation of collective power. For example, aggregating worker power through worker organizations structured by occupation, craft, or group of related crafts (say, telephone operators versus service technicians within the Bell System) can create more leverage against employers in certain industries, whereas organizing all wage earners in a given industry or group of related industries regardless of occupation or skill (say, organizing all telecommunications industry workers) can create more leverage in others.[299]

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295. Kenneth O. Alexander, *Conglomerate Mergers and Collective Bargaining*, 24 INDUS. & LAB. RELS. REV. 354, 362 (1971).

296. George H. Hildebrand, *Coordinated Bargaining: An Economist's Point of View*, 19 LAB. L.J. 524, 526 (1968).

297. Alexander, *supra* note 295, at 354; *see also* Charles Craypo, *Collective Bargaining in the Conglomerate, Multinational Firm: Littons's Shutdown of Royal Typewriter*, 29 INDUS. & LAB. RELS. REV. 3, 3–4 (1975) (arguing that conglomerate mergers put organized labor at a severe bargaining disadvantage).

298. Kaufman, *supra* note 245, at 146.

299. REES, *supra* note 277, at 22. Professor Bruce Kaufman observes, "Once admitted [to a craft union], a worker can move from firm to firm in an essentially horizontal direction." Kaufman, *supra* note 245, at 159.

U.S. labor law is organized around an enterprise, or worksite-level, bargaining system. The default counterparty to labor bargaining is presumed to be a single enterprise, division, facility, or plant,[300] so workers' bargaining leverage will depend on how that enterprise is structured, whether by production line, relative degrees of vertical integration or disintegration, and how thinly or thickly concentrated its product and labor markets are. Because structural remedies go to the heart of how enterprises are structured, they directly impact workers' bargaining leverage. Structural remedies may impact workers' countervailing power differently depending on how they have structured their own organizations (whether along craft or industry lines), the robustness of local union relationships with national or international unions, and how small or large their bargaining units might be for collective bargaining with the employer.

Structural remedies will only benefit workers where they either keep workers' organizational strength and collective bargaining leverage intact or even enhance that leverage by restructuring firms in ways that end up expanding union density or reducing workers' coordination costs in their organizing campaigns. They may also benefit workers who are members of strong national unions that coordinate major policy, conduct and finance strikes, coordinate collective bargaining, and negotiate collective bargaining agreements themselves, or that exercise veto power over contracts reached by constituent local unions that have overcome coordination costs and can ensure industry-level standards that avoid employers' divide-and-conquer strategies.

There are also theoretical reasons to think that divestitures could benefit workers under game theory or bargaining theory models to the extent that diffusing or decentralizing bargaining improves workers' bargaining power and bargaining leverage. Divestitures can increase workers' bargaining power and bargaining leverage where they increase workers' BATNA. Workers' BATNA with regard to employment bargains can improve where they can use outside options—more wage offers from the divesting or divested firm, say—to negotiate better wage offers. Workers' credibility in negotiating

300. For enterprise bargaining, see, for example, Hafiz, *Structural Labor Rights*, *supra* note 51, at 656, 677–79, 687–88; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 31–32 (2016); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WIS. L. REV. 1, 1; Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1395–97 (1971).

better offers will turn on whether they have general or firm-specific skills, and whether there are lock-in effects and mobility costs because of seniority, vested rights, noncompete agreements, heterogeneous preferences, or other restraints on their ability to change employers easily for higher pay. Employers may be better able to gauge whether workers would credibly accept alternative offers based on whether employers are operating with more or less perfect information. Workers who engage in single-stage or single-shot negotiations with employers as new hires or as contractors in arm's-length transactions may benefit from employers' postremedial inability to restrict their movement or accurately assess the credibility of their employment preferences. But if the postremedial labor market is still concentrated and employers may share or easily gain information about competitors' labor costs, workers will be disadvantaged. Where structural remedies impact high-skilled labor markets, workers in more scarce supply and workers with industry- rather than firm-specific knowledge are most likely to be advantaged by structural remedies because they can most credibly change employers based on better offers. Theoretical bargaining models, however, assume that there are no differences in bargaining skill between individuals or among unions. So to the extent that assumption does not hold true in a postremedial environment,[301] theoretical models must be supplemented by broader social scientific and fact-specific analysis.

2. *Legal and Social Scientific Analysis.* Analyzing the effects of structural remedies based on both broader social scientific studies of how industry and firm structure impact worker power as well as workers' and unions' own qualitative assessments in legal cases is critical to fully understanding the circumstances under which such remedies can benefit workers. This Subsection draws from both sources to extract that deeper understanding.

a. Social Scientific Analyses. Although there are theoretical reasons to believe that structural remedies could benefit workers, there is very limited, if any, empirical data supporting the theory. Empirical IO economics relies "on large survey data sets and the statistical tools of econometrics."[302] While there has been a new wave of empirical IO

301. MARTIN J. OSBORNE & ARIEL RUBINSTEIN, BARGAINING AND MARKETS 2 (1990).

302. Kaufman, *supra* note 245, at 146.

studies analyzing the prevalence and effects of employer monopsony power, there has been very little work either demonstrating that firm restructuring benefits workers or analyzing the circumstances under which that may be the case.[303] Likewise, social scientists who analyze wage setting in real working environments have produced very limited studies showing that divestiture benefits workers.[304] But history before the National Labor Relations Act ("NLRA") suggests that in certain industries like mining, transport, shipping, and clothing and textile production, employer decentralization had two "key advantages" to unions. First, in more decentralized industries, "unions could play employers off each other, isolating and punishing anti-union bosses with selective strikes and boycotts," and second, those markets "allowed unions to play a governance role, positioning themselves as the stabilizing and regulating force in their industries."[305] Those union advantages have not proven robust through the transformation of industry, regulation, and labor law limitations on workers' protected right to engage in strikes and boycotts in decentralized, fissured workplaces, however.[306]

b. Worker Voices on Structural Remedies. Worker or union support of divestitures is useful in revealing workers' own view of divestiture's benefits. This Article is the first to document worker intervention in legal proceedings regarding remedies. It focuses on two contexts of intervention in government antitrust enforcement actions: (1) filings in

303. Quite the contrary—as the next Subsection discusses, the studies that do exist cut the other way, showing that firm restructuring results in labor reductions and lower wages. *See infra* note 332 and accompanying text.

304. The author found a single study on the Bell System breakup showing that divestiture benefited minority workers by reducing earnings differentials "of black men and nonblack minority women with white men" while increasing the relative employment probabilities of "nonblack minority men [in the telecommunications industry] . . . with white men." *See* Peoples & Robinson, *supra* note 219, at 322.

305. Brian Callaci, *It's Time for Labor To Embrace Antimonopoly*, FORGE (Apr. 13, 2021) (emphasis added), https://forgeorganizing.org/article/its-time-labor-embrace-antimonopoly [https://perma.cc/AKX2-GK8X]; *see also* Brian Callaci, Labor Unions and the Problem of Monopoly: Collective Bargaining and Market Governance 1890–Present, at 2–3, 11–14 (Jan. 21, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4014661 [https://perma.cc/F4F5-BZQP] (describing unions' role in market governance).

306. *See, e.g.*, WEIL, *supra* note 6, 184–203; MARK BARENBERG, ROOSEVELT INST., WIDENING THE SCOPE OF WORKER ORGANIZING 11–13 (2015), https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf [https://perma.cc/WD93-YCM9].

ongoing enforcement actions, almost exclusively in § 7 merger cases; and (2) filings as comments or amicus briefs in Tunney Act review of consent decrees reached by the government and defendants in those actions.[307]

Since 1992, unions only intervened to support structural remedies in two merger challenges: the UnitedHealth/Sierra Health Services merger and the Anheuser-Busch/SABMiller merger.[308] In the UnitedHealth merger, the DOJ had approved UnitedHealth's acquisition of Sierra Health Services, but conditioned its approval on a partial divestiture of UnitedHealth's Medicare Advantage business in the commercial insurance market, additional conduct remedies to facilitate the divestiture sale, and certain restrictions on the merged firm's intellectual property use.[309] The American Medical Association, a consortium of medical associations, and an SEIU local filed comments in the Tunney Act proceedings reviewing the parties' consent decree. They argued that the partial divestiture was insufficient to prevent the acquisition's anticompetitive effects in the commercial insurance and physician and nurse services markets.[310] With respect to the labor market effects, they argued that "combining two of the three largest buyers of physician services in Clark County," Nevada, posed "a significant threat of reducing physicians' compensation and leading to an overall decrease of the level of service provided to patients."[311] Noting that the DOJ had required divestiture based on monopsony concerns in approving another health insurance company merger, United/PacifiCare, they recommended, among other things, "divestiture of all of United's business" and permanently enjoining "United's use of all products clauses and most favored nations provisions."[312] The comments do not explain how the proposed divestiture would avert the threat to physician and nurse compensation levels, but suggest that, where insurance companies can reduce

307. *See infra* app. The author found no worker or union filings in enforcement actions brought against their employers under § 1 or § 2 of the Sherman Act.

308. *See infra* app.

309. Final Judgment at 6–8, United States v. UnitedHealth Grp. Inc., No. 1:08-cv-00322 (D.D.C. Sept. 24, 2008), https://www.justice.gov/atr/case-document/file/514021/download [https://perma.cc/5MBR-TUQB].

310. *See* AMA et al. Comments, *supra* note 135, at 5, 12; SEIU Comments, *supra* note 128, at 3.

311. AMA et al. Comments, *supra* note 135, at 5

312. *Id.* at 5, 14.

reimbursement rates to hospitals due to their monopsony power, hospitals "will look to recoup their losses by cutting costs in the most logical place," their labor costs,[313] suggesting that with less monopsony power and more competition among insurers, hospitals reimbursement rates would be higher.

In the Anheuser-Busch/SABMiller merger, the International Brotherhood of Teamsters ("Teamsters") also argued for stronger structural remedies in opposition to the DOJ and defendants' proposed consent decree, but on different grounds.[314] The DOJ had conditioned approval only on behavioral remedies rather than divestitures, and the Teamsters argued that behavioral remedies were insufficient given the high concentration levels and barriers to entry in the beer industry that would enable the merged firm to reduce capacity profitably and to engage in tacit collusion and price coordination postmerger.[315] The union made no arguments regarding the consent decree's labor market effects but instead advocated for divestiture of a single brewery, the Eden Brewery in North Carolina, to "allow independent brewers to have significant expansion capability, which would make such brewers more effective competitors."[316]

The union's divestiture request had a back story: the Eden Brewery had been a Teamster-unionized production facility[317] employing over five hundred workers in a city of around fifteen thousand residents.[318] The merging firms announced Eden Brewery's closure days before their merger talks became public, and the union accused SABMiller of using the merger to shutter the facility in favor of shifting production to a nonunionized facility and reducing capacity and output in the beer industry.[319] The union sought to remedy the

313. SEIU Comments, *supra* note 128, at 4–5.

314. *See* IBT Comments, *supra* note 128, at 24.

315. IBT Comment, *supra* note 314, at 2, 10–11, 19–20, 23.

316. *Id.* at 2, 23–24.

317. Seawell v. Miller Brewing Co., 576 F. Supp. 424, 426 (M.D.N.C. 1983).

318. Alicia Wallace, *Teamsters Picket Molson Coors' Shareholder Meeting in Denver*, DENVER POST (May 25, 2016, 5:28 PM), https://www.denverpost.com/2016/05/25/teamsters-picket-molson-coors-shareholder-meeting-in-denver [https://perma.cc/Y9CD-P7XG].

319. *Id.* The union also pointed to SABMiller's termination of a purportedly profitable production contract with Pabst Blue Ribbon at the Eden Brewery as evidence of their intent to reduce capacity and labor costs through transferring production to a nonunionized facility. *See* Proposed Brief of the International Brotherhood of Teamsters as Amicus Curiae in Reply to Response of Plaintiff United States to Public Comments on the Proposed Final Judgment at 18–20, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483-EGS (D.D.C. filed Feb. 7, 2017).

production transfer as discriminatory under labor law, but employers are not required to collectively bargain with workers about total plant closures or decisions to relocate production, so the NLRB found the closure lawful.[320] To the extent the closure violated antitrust law, the Board stated that "any [such] alleged impropriety . . . does not translate to finding that the Employer's actions were unlawful under the National Labor Relations Act."[321] So the Teamsters turned to the DOJ and the courts to request divestiture and sale to an acquiring party as an antitrust remedy to preserve continued production—and thus, continued unionized employment—at the facility.

The request focused on product market effects in light of the limited precedent securing remedial modifications based on alleged anticompetitive labor market effects of § 7 remedies.[322] Neither the DOJ nor the reviewing court were convinced. The DOJ refused to alter its consent decree to seek a structural remedy, and the court summarily ruled that the consent decree was "in the public interest" after reviewing the materials submitted by the parties and by the union.[323]

Thus, workers have sought divestiture either to ensure against a merged firm's increased buyer power over their compensation, or to try to keep their jobs and prevent merger-related layoffs by requesting that courts mandate the sale of facilities to competitors when faced with the alternative of a plant or facility closure.

* * *

To summarize, divestitures may benefit workers, but only under certain circumstances that must be ascertained through applying a broad set of social scientific tools to assess the specific labor market conditions at issue based on the pre- and postremedial environment. Factors that may favor imposing structural remedies that benefit workers include whether the remedy would

320. *See* General Counsel Denial Letter, Case 10-CA-167896 (N.L.R.B. May 13, 2016) [hereinafter, Denial Letter]; First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 677 (1981); Dubuque Packing, 303 N.L.R.B. 386 (1991).

321. Denial Letter, *supra* note 320.

322. For lack of precedent and judicial confusion regarding cognizable labor market effects challenges in the § 7 context, see, for example, Marinescu & Posner, *supra* note 101, at 1373–74.

323. Order, United States v. Anheuser-Busch InBev SA/NV, No. 1:16-cv-01483 (D.D.C. filed Oct. 22, 2018).

1. Decrease labor market concentration in the relevant geographic markets at issue;

2. Decrease the defendants' ability to unilaterally reduce hiring, wages, benefits, or the quality of working conditions *and/or* ability to coordinate or collude with other employers in a relevant labor market regarding labor costs;

3. Impact only workers with general, industry-specific skills (rather than workers with firm-specific skills that make them less competitive to employers industry-wide);

4. Maintain or improve workers' postremedial bargaining leverage, or BATNA, in negotiating employment bargains with acquiring firms relative to the preremedial environment with the divesting firm (for example, by increasing the number of employers competing over wage offers);

5. Maintain or improve workers' level of organization relative to employers' firm structure, ensuring that workers' countervailing power or union density matches the employers' level of organization (for example, maintaining a single, enterprise-wide bargaining unit to collectively bargain with a single enterprise rather than creating two enterprises with one unionized and one nonunionized workforce or fragmenting bargaining units between two employers);

6. Apply to product markets that are local versus national in a manner that decreases workers' coordination costs;

7. Apply to product markets that are national versus local where workers are represented by a strong national union that can easily coordinate major policy across firms and relevant locals or bargaining units through pattern bargaining;

8. Ensure no or low lock-in effects or mobility costs in workers switching firms in the postremedial environment;

9. Ensure no or low information asymmetries between employers and workers regarding wages and employment conditions in the postremedial environment; and

10. Preserve continued employment in the divesting or acquiring firms or otherwise enable hiring at the same wage and benefit scale and entitlements that workers enjoyed in the preremedial environment.

D. When Breakups Can Harm Workers

The Bell System breakup illustrates that structural remedies can harm workers by decreasing union density and workers' wages and benefits. In fact, since the 1980s, breaking up companies has been associated with reducing worker power both in the popular imagination and in the economic scholarship because breakups were viewed as driven by firm efforts to bust unions, reduce labor costs, and minimize "redundancies" through layoffs in the name of creating shareholder value.[324] This Section seeks to integrate those earlier discussions with more recent social scientific analyses into current breakup debates to better understand when structural remedies can harm workers.

1. *Economic Theory.* As a theoretical matter, even under traditional IO economics, structural remedies alone may not significantly increase labor market competition or lift wages. First, the structural remedy may increase competition in a relevant product market by selling off a production line or division to a competitor. But, it may not impact labor markets at all, and it may even leave them more highly concentrated, either as defined based on job classifications, geographic location, or both. For example, imagine Firm A and Firm B operate in a national market and seek to merge. The DOJ proposes, and a court approves, divestiture of a particular division of Firm A to Firm C as a condition for approving the merger. If that division only employs high-skill tech workers in California and Firm C is the only other employer of such high-skill tech workers in California, the labor market for those high-skill workers would become more highly concentrated as a result of the divestiture even if the product market with respect to outputs may become more competitive nationally. Additionally, divestitures can result in less cross-subsidization between more and less profitable divisions of a single firm that had once elevated workers' wages. Where the broken-up firms operate in less profitable industries or markets, divestiture would lower workers'

324. *See, e.g.*, WALL STREET (Twentieth Century Fox 1987); Van Loo, *supra* note 82, at 1982–83, 1989; Donald Bergh, *Restructuring and Divestitures*, *in* OXFORD RESEARCH ENCYCLOPEDIA, BUSINESS AND MANAGEMENT 1–29 (2017). *See generally* Caterina Moschieri & Johanna Mair, *Research on Corporate Divestitures: A Synthesis*, 14 J. MGMT. & ORG. 399 (2008) (collecting literature on agency theory justifications for divestitures, including "pursu[ing] an efficient corporate internal labor market" and reducing costs by transacting for labor inputs in the external labor market).

wages relative to the preremedial outcome. Breakups may also lower the effects of the large-firm premium so that workers end up receiving lower wages following a divestiture if the postremedial firms earn lower revenues to share with workers.[325]

Additionally, divestitures can result in layoffs to reduce production costs in product markets or avoid redundancies in the acquiring firm. And they can also be used to offload or shift production from unionized to nonunionized facilities or divisions, gain concessions with unions under threat of layoffs, or disrupt existing long-term or collective bargaining agreements that had limited employer discretion in reducing wages. Certain workers may be particularly disadvantaged from divestitures. For example, divestitures can place older workers in the unfortunate position of having to overcome high transaction costs with little leverage in negotiating seniority-based pay and benefits or retirement packages, and that disadvantage would not likely be alleviated with more competition in the postremedial environment.

Further, where structural remedies occur in highly concentrated industries and the remedy merely creates a duopoly from a monopoly in a relevant labor market, or where firms have oligopsonistic power in a relevant labor market postremedy and can easily engage in tacit collusion on wages and benefits, a divestiture may not significantly impact labor market competition.[326] This is especially true in highly localized labor markets. Workers face mobility costs between employers that often operate in distinct geographic markets, and workers' labor services are highly differentiated and often involve firm-specific skills.[327]

Viewed through bargaining theory, divestiture decentralizes bargaining relative to the preremedial environment where NLRA-

325. *See supra* note 269 and accompanying text; Wilmers, *supra* note 250, at 215; Card et al., *supra* note 2, at S17; Patrick Kline, Neviana Petkova, Heidi Williams & Owen Zidar, *Who Profits from Patents? Rent-Sharing at Innovative Firms* 27 (Inst. for Rsch. on Lab. & Empl., Working Paper No. 107-17, 2017), https://irle.berkeley.edu/files/2017/Who-Profits-from-Patents.pdf [https://perma.cc/TGE5-FV95]; Dencker & Fang, *supra* note 250; Kalleberg et al., *supra* note 250, at 652; Tolbert et al., *supra* note 250, at 1098.

326. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 53, § 7 (discussing coordinated effects); Yongmin Chen & Michael H. Riordan, *Price-Increasing Competition*, 39 RAND J. ECON. 1042, 1042–43 (2008). For the likelihood of tacit collusion in concentrated industries, see, for example, Edward J. Green, Robert C. Marshall & Leslie M. Marx, *Tacit Collusion in Oligopoly*, *in* 2 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 464 (Roger D. Blair & Daniel D. Sokol eds., 2014).

327. *See, e.g.*, Naidu & Posner, *supra* note 101, at 14, 18, 29, 34, 57.

protected workers can, theoretically at least, negotiate with a single employer as a unified workforce. The vertical disintegration of firms and workplace fissuring in the late 1970s and 1980s is a historical example of how corporate restructuring disrupted pattern bargaining across industries and weakened workers' bargaining leverage, resulting in wage and benefit losses.[328] Structural remedies may increase transaction costs between the parties (which can reduce the size of the pie), create more vetoes and potential delay in the employment bargaining relationship, increase coordination costs between workers, and divide union resources.[329] Where divestiture enables firms to engage in single-shot wage offers with workers, or make take-it-or-leave-it offers outside of repeated games or long-term contracting (for example, because they can rely on arm's-length contracting with independent contractors, temporary workers, or subcontracted workers with short-term employment contracts), workers after the divestiture may be disadvantaged or suffer wage penalties relative to their preremedial ILM wage.

Nonunionized low-wage or low-skill workers may also be at a bargaining disadvantage following a divestiture because employment contracts are incomplete contracts operating against default at-will employment. That default places workers in more competitive labor markets with excess labor supply or unemployment at a significant disadvantage, particularly when they are risk averse to job loss or adverse employment actions, or face discrimination or retaliation as minorities or for demanding higher wages or union recognition.[330] Take-it-or-leave-it offers are common with larger firm employers or employers that post wages or rigid list prices because they lower the

328. *See* Callaci, *supra* note 305; Brandon Magner, *Labor Law and Corporate Concentration*, LAB. L. LITE (Nov. 22, 2020), https://brandonmagner.substack.com/p/labor-law-and-corporate-concentration [https://perma.cc/U8PC-2W2Z]; Wilmers, *supra* note 250 and accompanying text; Brian Callaci, The Historical and Legal Creation of a Fissured Workplace: The Case of Franchising 26, 47 (Oct. 2019) (Ph.D. dissertation, University of Massachusetts, Amherst), https://scholarworks.umass.edu/dissertations_2/1696 [https://perma.cc/TC9E-S54S].

329. *See* Kenneth Glenn Dau-Schmidt, *A Bargaining Analysis of American Labor Law*, 91 MICH. L. REV. 419, 469 n.6 (1992) (noting the relative ease of union organizing against a single dominant employer and collecting historical examples of unions preferring to organize one employer at a time).

330. Reder, *supra* note 251, at 244–46. *See generally* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777–95 (1972) (theorizing the employment contract as involving incompletely specified employee effort and potential shirking and related employer counterefforts).

employer's transaction costs resulting from separate negotiations with the same worker over time or with other employees.[331] Take-it-or-leave it offers enable employers' future flexibility, secrecy, and wage discrimination or exceptions in individual employment contracts.

2. *Legal and Social Scientific Analysis.* In addition to theoretical predictions, social scientific analyses and union filings in antitrust cases reveal how structural remedies can adversely affect workers in practice.

a. Social Scientific Analyses. There is significant evidence that divestitures result in labor reductions and reduced labor costs when firms voluntarily divest for business reasons absent any antitrust enforcement, whether in regulated and unregulated industries.[332] Cost savings postdivestiture are generated through "layoffs, early retirements, hiring freezes, wage reductions, reductions in future pension benefits, and other cuts in compensation," including reversions of excess pension assets and wage reductions of union employees by

331. Reder, *supra* note 251, at 247.

332. *See, e.g.*, RESIZING THE ORGANIZATION: MANAGING LAYOFFS, DIVESTITURES, AND CLOSINGS 369–85 (Kenneth P. De Meuse & Mitchell Lee Marks eds., 2003); U.S. SEC'Y OF LAB.'S TASK FORCE ON ECON. ADJUSTMENT & WORKER DISLOCATION, ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY 38 (1986), https://files.eric.ed.gov/fulltext/ED279871.pdf [https://perma.cc/UEJ5-YFCG]; Andrew Gunnoe, *The Financialization of the US Forest Products Industry: Socio-Economic Relations, Shareholder Value, and the Restructuring of an Industry*, 94 SOC. FORCES 1075, 1081–82 (2016) (describing transformation of the U.S. forest products industry since the 1980s that resulted from "a large-scale merger movement, and a series of restructuring programs that included the divestiture of millions of acres of timberland and the loss of employment for hundreds of thousands of workers"); Lucas W. Davis & Catherine Wolfram, *Deregulation, Consolidation, and Efficiency: Evidence from US Nuclear Power*, 4 AM. ECON. J. 194, 220–21 (2012) (finding labor reductions postdivestiture in nuclear power-fired plants); JENNIFER K. SHANEFELTER, DEP'T OF JUST. ANTITRUST DIV., RESTRUCTURING, OWNERSHIP, AND EFFICIENCY: THE CASE OF LABOR IN ELECTRICITY GENERATION 24 (2008), https://www.justice.gov/atr/public/eag/240245.pdf [https://perma.cc/L23K-KAZV] (finding labor reductions after divestiture at fossil fuel-fired plants); Sanjai Bhagat, Andrei Shleifer & Robert W. Vishny, *Hostile Takeovers in the 1980s: The Return to Corporate Specialization*, 21 BROOKINGS PAPERS ON ECON. ACTIVITY 1, 6–10 (1990) (collecting sources); Frank R. Lichtenberg & Donald Siegel, *The Effect of Ownership Changes on the Employment and Wages of Central Office and Other Personnel*, 33 J.L. & ECON. 383, 383, 385 (1990); Brown & Medoff, *supra* note 291; Gordon J. Alexander, P. George Benson & Joan M. Kampmeyer, *Investigating the Valuation Effects of Announcements of Voluntary Corporate Selloffs*, 39 J. FIN. 503, 504, 507 (1984); Katherine Schipper & Abbie Smith, *Effects of Recontracting on Shareholder Wealth: The Case of Voluntary Spinoffs*, 12 J. FIN. ECON. 437, 451–52 (1983).

scrapping prior collective bargaining agreements.[333] The Bell System breakup illustrates that divestiture can slow wage growth, make wage negotiation outcomes increasingly responsive to regional rather than national conditions, and increase wage differentials between unionized and nonunionized workers.[334]

b. Worker Voices on Structural Remedies. Since at least 1970, unions have opposed divestiture remedies in § 7 cases, primarily because the divestiture involved the sale of divisions or facilities that would either impact union members' job security or result in layoffs. For example, in *United States v. Simmonds Precision Products, Inc.*,[335] a local machinists' union opposed a firm's acquisition of their employer's manufacturing plant in Long Island City that produced fuel gauging systems for aircrafts.[336] The union expressed its interest in intervening in the case to protect job security and preserve their employer's "position as an independent competitor in the manufacture and sale of fuel gauging systems."[337] The union sought to "prevent either a piecemeal sale or removal of the work done" at their local manufacturing plant to the acquirer's out-of-state plant.[338] The court denied the union's motion to intervene; citing the higher labor costs of the Long Island City facility, it approved the parties' proposed consent decree requiring divestiture by immediate sale of the plant as an entity or piecemeal within a four-year period.[339]

Similarly, in *United States v. Stroh Brewery Co.*,[340] the Teamsters and two local affiliates sought to intervene in the merger of Stroh Brewery and Joseph Schlitz Brewing, which the DOJ had approved on the condition that Stroh Brewery sell one of Joseph Schlitz Brewing's two breweries once they merged.[341] The unions intervened "to protect their members' collective bargaining rights and job security," arguing

333. Bhagat et al., *supra* note 332, at 6–8 (collecting studies).

334. *See* James H. Peoples, Jr., *Wage Outcomes Following the Divestiture of AT&T*, 4 INFO. ECON. & POL'Y 105, 114–15 (1989).

335. United States v. Simmonds Precision Prods., Inc., 319 F. Supp. 620 (S.D.N.Y. 1970).

336. *Id.* at 620–21.

337. *Id.* at 621.

338. *Id.*

339. *Id.* at 621–23.

340. United States v. Stroh Brewery Co., No. 82-1059, 1982 U.S. Dist. LEXIS 13033 (D.D.C. June 8, 1982).

341. *Id.* at *1–2.

that the proposed consent decree made "no provision for the protection of employment and collective bargaining rights of the employees" at either of the plants.[342] But the court denied the unions' motion to intervene, finding that even though the sale was a condition of the merger, the unions' "speculated injury to employment arises [neither] directly from the merger" nor "directly from the prospective entry of the proposed final judgment itself."[343]

A local machinists' union challenged the Verso/NewPage merger on similar grounds, arguing that the merger resulted in capacity reductions in one paper mill that cost the union fifty-eight jobs.[344] The consent decree permitted the merger without conditioning approval on the sale of the mill, allowing the merged firm to shut it down and sell it for scrap.[345] The court refused to order the divestiture at the union's request, noting that the closed mill had been operating at a loss and was "simply one of many closures in a declining industry."[346]

A slightly different example of worker involvement in merger proceedings are union filings to approve mergers without any imposed structural remedies, like in the pilots', flight attendants', and transport workers' unions' filings in support of the US Airways/American Airlines merger.[347] The unions had access to American Airlines' financial data as creditors in its Chapter 11 bankruptcy proceedings, and thus were able to provide a fulsome analysis of the labor market effects of the merger, which they presented to the court.[348] The unions sought to intervene to support the court's "expeditious resolution" of the merger approval process and to explain to the court the costs to and impact "on employees of delaying . . . . or disallowing the merger."[349] That included less certain job outlooks, more furloughs, and because of American Airlines' potential bankruptcy, losses to

342. *Id.* at *2.

343. *Id.* at *2, *5; *see also* Motion to Dismiss at 9, United States v. Imetal, No. 00-5158 (D.C. Cir. filed June 5, 2000); Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974).

344. Darren Fishell, *Union Wants Court To Challenge Bucksport Mill Sale*, SUN J. (Mar. 16, 2015), https://www.sunjournal.com/2015/03/16/union-wants-court-challenge-bucksport-mill-sale/ [https://perma.cc/UVG5-YQ6N].

345. IAMAW Comments, *supra* note 128, at 1 n.1.

346. United States v. NewPage Holdings, Inc., No. 14-cv-2216, 2015 WL 9982691, at *7 (D.D.C. Dec. 11, 2015).

347. *See, e.g.*, Pilots' Amicus, *supra* note 128.

348. *See id.* at 3–10.

349. *Id.* at 3, 6.

pilots and flight attendants who benefited from "industry-wide seniority rules"[350] and could suffer significant losses if the "long-term survival and competitiveness of American" were threatened by the merger's disapproval.[351] The unions also pointed to American Airlines' loss of market share because of prior mergers creating Delta and United in their current forms, which in turn reduced jobs; they estimated that the flight attendant workforce alone was 36 percent smaller than it was prior to those mergers.[352]

* * *

To assess whether structural remedies may harm workers, agencies and courts may draw from the existing social scientific literature to consider whether the remedy would

1. Increase labor market concentration in labor markets, especially in local labor markets, under an HHI or downward wage pressure analysis, or otherwise increases employers' wage-setting power;
2. Increase employers' market share in a relevant labor market;
3. Have coordinated effects in any relevant labor market enabling employer collusion;
4. Increase barriers to entry in any relevant labor market;
5. Enable employer foreclosure of other employers or raise employers' costs;
6. Subject workers to layoffs or redundancies with limited or no outside options;
7. Increase the incidence of labor market failures by increasing search costs, information asymmetries (particularly for wage transparency and benefits), worker mobility costs between employers (particularly for workers with firm-specific skills), or job differentiation;
8. Increase employers' BATNA in the employment bargain relative to the preremedial environment;

350. They "tend to stay with one carrier for their entire careers" that span eighteen to twenty years. *Id.* at 6.

351. *Id.* at 5.

352. *Id.* at 6–7.

9. Displace unions with an established history of bargaining with a single employer, and/or are expert representatives of worker interests with employers and government actors, or that have honed their internal structures to set top-down national policy with agility to local unions, especially when that bargaining history has resulted in industry-wide or pattern bargaining, and postdivestiture results in decentralized, fragmented structures that undermine union power;

10. Increase regulation over employers that favor consumer over worker welfare effects;

11. Increase firms' ability to wage discriminate between workers performing the same functions, including by disrupting ILM wages in favor of external labor market wage setting and increasing racial or gender wage disparities;

12. Disrupt national bargaining in industries with national product markets or otherwise disrupts workers' strike threats because of restructured product lines;

13. Enable employers to avoid regulation or long-term private contracts, collective bargaining agreements, or seniority provisions and longer-term benefits commitments;

14. Reduce any large-firm premium or cross-subsidization of wages between profitable subsidiaries, divisions, facilities, or plants;

15. Increase worker coordination costs between firms and across the industry, particularly in evolving industries that have a number of growth areas in new, nonunionized sectors of the economy; and

16. Have the effect of decentralizing collective bargaining in a manner that would increase workers' transaction costs, delay bargaining, and/or divide union resources.

III. BEYOND BREAKUPS: TOWARD ANTITRUST REMEDIES THAT BENEFIT WORKERS

To ensure that antitrust law not only encourages competition and innovation, but also strong labor markets and high wage growth, it is critical that the tools for remedying abuses of dominance and anticompetitive conduct incorporate an analysis of labor market effects and further federal labor policy. Just as "the architects of Roosevelt's

Second New Deal . . . saw antitrust enforcement and collective bargaining as complementary policies,"[353] so should government enforcement and regulation of competition policy work in tandem with strengthening worker power. As Part II illustrates, active government intervention and support of workers facing dominant employers is critical for countering employer monopsony power.[354]

This Part provides a roadmap and set of policy solutions to secure evidence-based and informed remedial design measures to firm dominance and anticompetitive mergers. First, it proposes a suite of reforms and best practices that the antitrust agencies could implement in both their merger reviews and consent decrees to ensure that structural and behavioral remedies do not adversely impact labor markets and worker power. It also advocates for better utilization of the Tunney Act's infrastructure for judicial review of parties' consent decrees under the "public interest standard" and outlines metrics for ideal remedial design in judicial remedies of antitrust violations found on the merits. Second, it recommends improvements to the antitrust agencies' expertise in remedial design through government administration, and specifically, interagency collaboration, co-administration of consent decree compliance, data collection, and retrospective analyses of the labor market effects of antitrust remedies.

A. Breakups "Plus": Considering Labor Market Effects

Because structural remedies can have real and underacknowledged impacts on labor markets, both agencies and the courts should develop guidance, metrics, and practices for analyzing those impacts when designing consent decrees and remedies. This Section first proposes a set of agency-level reforms and best practices for incorporating labor market effects analysis into remedial design and administration. It then offers a number of recommendations for how courts could better solicit, incorporate, and consider workers'

353. Callaci, *supra* note 305.

354. As economist Brian Callaci observes,

> Unions were thus eventually able to unionize monopolists, but only with a level of wartime-dependent state support not seen before or since. When new mega-corporations like Walmart, FedEx, and Intel, arose in the second half of the 20th century, unions were unable to rely on state support, and failed to organize or establish pattern bargaining relationships with the new corporate giants.

Id.

interests in their public interest assessments of consent decrees and remedies for antitrust violations under their existing authority.

1. *Merger Reviews and Designing Consent Decrees.* While scholars have put forward a number of proposals for reviewing mergers for their anticompetitive labor market effects, no scholarship has yet focused on how to integrate labor market effects analysis in agencies' remedial design when negotiating and proposing consent decrees for judicial approval.[355] But agencies could deploy similar metrics and methods of analysis to their assessments of their proposed divestitures and other remedies as they would when evaluating the anticompetitive effects of the merger itself.

Just as with their reevaluation of their substantive merger reviews, the antitrust agencies should reevaluate and amend their guidance on remedies to incorporate labor market effects analysis.[356] Even absent formal revisions to any remedies guidelines, however, the agencies could conduct simulations to evaluate whether a proposed divestiture may result in highly or moderately concentrated labor markets in any relevant, geographically designated labor market affected by the remedy.[357] Alternatively, the agencies could measure remedial effects of a divestiture through a downward wage pressure approach. The approach calculates the tendency of workers who quit the merging firm as a result of an incremental decrease in wages to join the acquiring firm (as opposed to joining other firms in the labor market or dropping out of the labor market), or by calculating the amount by which

355. For scholarly proposals regarding merger reviews in labor markets, see generally Hafiz, *Interagency Merger Review*, *supra* note 57; Marinescu & Hovenkamp, *supra* note 101; Naidu et al., *supra* note 101.

356. For current remedies guidelines, *see supra* note 122. By integrating labor market effects analysis in the agencies' Merger Guidelines and substantive merger reviews, the agencies could simplify any labor market effects analysis in the remedial phase by addressing it at the front end: assessing such effects as part of their "theory of the case" under § 7 of the Clayton Act and integrating labor market competition metrics and demands in their earliest negotiations with merging or acquiring parties. While the agencies have demonstrated their intent to incorporate labor market effects analysis in potential revisions to their Merger Guidelines, they have not yet done so as of this writing. *See, e.g.*, Press Release, Federal Trade Commission, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers [https://perma.cc/L5VF-8V6Y]. I thank Harry First for these suggestions.

357. *See, e.g.*, Marinescu & Hovenkamp, *supra* note 101, at 1039–51. The agencies could impose the same thresholds for HHI effects for remedies as they do for screening the mergers themselves.

workers' wages are below those workers' marginal revenue product of labor before the divestiture.[358] Agencies should also assess local monopsony power resulting from the divestiture based on market share within commuting distance of the divesting or acquiring firm for workers within the same Standard Occupational Classification as the affected workers.[359] In assessing labor market power from market share, the agencies should apply lower market share thresholds than they would apply in product markets because "buyer power can and does arise at lower levels of market concentration and can involve larger numbers of competitors than would raise concerns on the selling side of the market."[360]

As Part II discusses, IO-based economic analysis is underinclusive in predicting how a divestiture affects worker power. Labor economists in the Economic Analysis Group of the Antitrust Division and Bureau of Economics at the FTC should also assess how any structural remedies may have adverse labor market effects due to existing labor market institutions, lack of union density, the parties' history of labor and employment law compliance, the history and structure of bargaining over employment terms and wage offers within the industry, and labor market segmentation and reliance on arm's-length contracting in the industry. Economists should also assess whether, but for the remedy imposed, labor markets would be more competitive, workers' outside employment options or alternatives in the relevant geographic market would be impacted, and the sources of workers' countervailing power or holdout ability would decrease.[361] The agencies have hired economic experts to testify and to assess possible

358. Naidu et al., *supra* note 101, at 548–49.

359. *See, e.g.*, Reed v. Advocate Health Care, 268 F.R.D. 573, 590 (N.D. Ill. 2009); Marinescu & Hovenkamp, *supra* note 101, at 1048; Naidu et al., *supra* note 101, at 563. The Standard Occupational Classification System is a federal statistical standard developed by the Bureau of Labor Statistics to classify workers into 867 occupational categories based on job duties, skills, education, and/or training. *See Standard Occupational Classification*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/soc [https://perma.cc/UMM9-YUCQ].

360. *See* Peter Carstensen, *Buyer Power and the Horizontal Merger Guidelines*, 14 U. PA. J. BUS. L. 775, 782, 813–16 (2012); John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1516–18 (2012); Peter Carstensen, *Buyer Cartels Versus Buying Groups*, 1 WM. & MARY BUS. L. REV. 1, 35–36 (2010).

361. For example, economists could review whether job protections under existing collective bargaining agreements, union resources and strike funds, existing state or local "just cause" requirements for termination absent high union density, and other sources of countervailing power or holdout ability would be impacted.

remedies.[362] But they can also solicit expert analyses from external industrial relations experts and union economists to perform fact-specific assessments of a structural remedy's likely effects on labor markets and to advise on any additional conduct remedies needed.[363]

Where the agencies find that structural remedies would increase employer buyer power in any relevant labor market or decrease workers' bargaining leverage, that remedy should either be abandoned or additional structural or behavioral remedies should be imposed to prevent any anticompetitive labor market effects, unless the union(s) representing the affected workers approve the consent decree's terms.[364] Absent union approval, the agencies could incorporate any or all of a range of structural or behavioral remedies. First, and least controversially, the agencies could standardize the relatively rare use of employee-specific conduct requirements imposed in consent decrees that include structural remedies.[365] These include reducing the divesting firm employees' mobility costs and the mobility restrictions between employers by requiring that the divesting firm waive noncompete and nondisclosure agreements. Consent decrees have also mandated that acquiring firms pay employees their current and accrued compensation and benefits, including their most recent bonuses paid, aggregate annual compensation, and current target or guaranteed bonus as well as fulfill any retention agreement or incentives, and any other payments due, compensation or benefit

362. *See* U.S. DEP'T OF JUST. ANTITRUST DIV., ANTITRUST DIVISION MANUAL III-15 (5th ed.), https://www.justice.gov/atr/file/761166/download [https://perma.cc/3HDG-X6F6] ("As the investigation develops, staff should [decide] whether to hire technical or economic experts."); 15 U.S.C. § 42 (authorizing FTC hiring of "special experts"); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202(h)(1), 88 Stat. 2138, (1975) (authorizing the FTC to hire expert witnesses in trade regulation rulemaking proceedings).

363. The DOJ and FTC can share Civil Investigative Demand ("CID") materials with each other without the consent of the producing parties and may share those materials with third parties only with the producing party's consent. 15 U.S.C. § 1313(c)(2)–(3), (d)(2). However, the agencies can solicit expert guidance without disclosing confidential CID materials to the extent they are seeking analysis of general labor market conditions based on publicly available data. *See supra* note 362. Further, the agencies can invite union economists to submit analyses of labor market effects without disclosing confidential information.

364. As discussed *supra* Part I.C, where the agencies find that a merger may substantially lessen competition or tend to create a monopoly in a labor market, they should move to block the merger. 15 U.S.C. § 18; Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h); *supra* note 43 and accompanying text. Similarly, where any negotiated remedies would do the same, agencies should move to block the merger.

365. The DOJ has used these remedies only three times since 2017. *See infra* app.

accrued, or promised to personnel.[366] They have additionally required acquiring firms to vest the divested firm's employees' unvested pensions and other equity rights, provide any pro rata pay and other fully or partially accrued compensation and benefits, and provide all other benefits that those employees would have obtained had they continued their employment with the divesting firm.[367] Additionally, the DOJ has mandated that divesting firms require or facilitate acquiring firm hiring of divesting firm employees by requiring the divesting firm to provide the acquiring firm with personnel information,[368] "promptly make" personnel available for private interviews, and prohibiting divesting firm interference in hiring negotiations with the acquiring firm.[369] The agencies could go further and ban employers from including noncompete or other mobility-restricting agreements in their employment contracts.[370]

But the antitrust agencies could go further still to prevent adverse labor market effects by drawing from the tools of federal labor policy and empirical analyses of on-the-ground conditions required for successfully building worker power. First, the agencies could require as a condition of merger approval that defendants sign card check neutrality agreements[371] with an existing union or a union seeking to represent the impacted workers. Alternatively, the neutrality agreement could be coupled with a rapid election following divestiture using confidential phone or internet voting or continuous early voting. The neutrality agreement could also require union access to the employer's premises, access to the names and contact information of impacted workers, and prohibition of captive audience meetings. Using

366. *See, e.g.*, Asset Preservation and Hold Separate Stipulation and Order at 8, United States v. Stone Canyon Indus. Holdings LLC, No. 1:21-cv-01067, 2021 WL 4304760 (D.D.C. Aug. 10, 2021).

367. *See, e.g.*, *id.*

368. Names, job titles, reporting relationships, past experience, responsibilities, training and educational histories, relevant certifications, and contact information. *Stone Canyon Indus. Holdings LLC*, 2021 WL 4304760, at *4.

369. *Id.*

370. *See* Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,992 § 5(g) (July 9, 2021); *see* Eric Posner, *The Antitrust Challenge to Covenants Not To Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 166 (2020).

371. These agreements promise employer neutrality in the union's organizing drive and can offer automatic recognition of the union if a certain number of signed union authorization cards are collected. *See, e.g.*, James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 821 (2005).

neutrality and card check agreements in organizing campaigns substantially increases union recognition rates and reduces unlawful management tactics.[372] The agencies could further require extension or rapid resolution of successor agreements between the acquiring firm and any unions representing transferred personnel from the divesting firm.[373] Finally, the agencies could also require that employers give them notice of any plant or facility closing or layoffs that make up at least 33 percent of the employer's active workforce, which the Worker Adjustment and Retraining Notification ("WARN") Act already requires firms with over one hundred employees to provide to affected workers, their union representatives, Department of Labor dislocated worker units, and the appropriate local government unit.[374]

In highly or moderately concentrated industries or labor markets, to remedy anticipated labor market harms tied to the harm caused by the merger, or where the employers have a demonstrated history of labor and employment law violations, agencies may consider more aggressive voluntary measures, like requiring the defendants and acquiring party to engage in pattern bargaining as a condition for

372. *See, e.g.*, Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 657 (2010) (stating that card checks allow employees to spur unionization efforts without management); Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 169 (2009) (finding that card check procedures reduce the obstacles to unionizing typically posed from management); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 42 (2001) (finding that card check agreements reduced illegal tactics from management in relation to unionizing, and neutrality provisions have led to card check agreements).

373. For an overview of current successorship doctrine, see generally Kenneth A. Jenero, *The NLRB's Successorship Doctrine, Perfectly Clear Successors, Executive Order 13495, and Worker Retention Laws: What the Trump Administration Has Inherited*, 32 ABA J. LAB. & EMP. L. 353 (2017). A successor employer must lawfully bargain with the union over unilateral layoffs, so a successor agreement is essential to secure continuity of collective bargaining terms between the divesting and acquiring firms and to ensure against the unilateral exercise of the acquiring firm's buyer power through employment reductions. *See* Tramont Mfg., 369 N.L.R.B. 136 (2020).

374. *See* Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101, 2102. Merging parties that meet the "minimum size of transaction" or "size-of-person" thresholds triggering reporting requirements to the antitrust agencies for their merger review under the Hart-Scott-Rodino Act are already likely subject to WARN Act obligations, so this recommendation only requires additional notice of closures or layoffs to the antitrust agencies as well. *See* PREMERGER NOTIFICATION OFF. STAFF, FED. TRADE COMM'N, HSR THRESHOLD ADJUSTMENTS AND REPORTABILITY FOR 2021 (2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/02/hsr-threshold-adjustments-reportability-2021 [https://perma.cc/7LYQ-ER4F] ("The most significant threshold in determining reportability is the minimum size of transaction threshold.").

merger approval. Recent administrations have established precedents in conditioning federal contracts on contractors' commitment to entering a collective bargaining agreement with at least one union in order to solidify employment terms for the length of a federal contract, and federal law does not preempt them.[375] And the NLRB may impose bargaining orders requiring an employer and a union to collectively bargain if an employer engages in a "campaign" of unfair labor practices that causes a union election loss or makes "the holding of a fair election unlikely,"[376] so such a requirement in a consent decree would be consistent with federal labor policy.[377]

Finally, to ensure adequate representation of stakeholders with regard to the adequacy of remedies, the agencies could expand their use of "monitoring trustees"[378] that supervise consent decree compliance to include workers' representatives in order to ensure that any firm restructuring or reorganization protects workers' interests.[379] Currently, the DOJ requires monitoring trustees "when technical expertise unavailable within the Division is critical to an effective divestiture" or "when there is an unusually high burden associated with

375. *See* Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 231–32 (1993) ("In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."); Ben Penn & Ian Kullgren, *Punching In: White House Mulling Order on Contract Labor Pacts*, BLOOMBERG L. (June 28, 2021, 6:20 AM), https://news.bloomberglaw.com/daily-labor-report/punching-in-white-house-mulling-order-on-contract-labor-pacts [https://perma.cc/ELJ4-G9R2] (discussing the Biden administration's interest in bolstering an Obama administration executive order which "encouraged federal agencies to voluntarily consider requiring project labor agreements when awarding contracts of at least $25 million").

376. *See* NLRB v. Gissel Packing, 395 U.S. 575, 610–16 (1969). *But see, e.g.*, Michael M. Oswalt, *Liminal Labor Law*, 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 25) (on file with author) (discussing the rare use of *Gissel* bargaining orders).

377. For the importance of countervailing power in federal labor policy, see Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power*, 130 YALE L.J. 546, 576–77 (2021); Hafiz, *Structural Labor*, *supra* note 51.

378. *See, e.g.*, U.S. DEP'T OF JUST., 2020 MERGER REMEDIES MANUAL 30 (2020) [hereinafter MERGER REMEDIES MANUAL], https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/9ZF4-J7CA].

379. While other scholars have advocated for more "collaborative governance" in designing divestiture remedies "co-administered with the private sector . . . to leverage business sector expertise to compensation for administrative agency sophistication shortfalls and information asymmetries," including "involving independent third-party M&A consultants," those proposals have not contemplated a role for stakeholders affected by the firm reorganization, including, most importantly, the firm's employees and unions. *See* Van Loo, *supra* note 82, at 1960–61, 1990–95.

monitoring compliance with a decree . . . and that burden is more appropriately borne by the parties than the taxpayers."[380] But in the context of the DOJ's monitoring of consent decrees reached in civil rights enforcement actions against police departments, the agency has required civilian oversight through civilian review board task forces and established independent monitors chosen jointly by the parties.[381] These oversight boards and monitors must be "highly qualified in policing, civil rights, monitoring, and related areas."[382] They are tasked with reporting whether the consent decree "is resulting in constitutional and otherwise lawful policing and administration of justice, and increased community trust between the public," the police department, and the court.[383] Where the agencies anticipate that the imposition of structural remedies would adversely impact labor markets or worker power, establishing a "Divestiture Review Task Force" with worker representation could offer workers the opportunity to object to the consent decree formally in writing before Tunney Act proceedings, hence developing a record for the district court's public interest review. Such a Task Force could also ensure adequate monitoring and compliance with any structural and behavioral requirements pertaining to worker protections and labor market competition following entry of judgment.

2. *Tunney Act Proceedings and Judicial Remedies.* Additionally, while courts have significant discretion in conducting their public interest review of consent decrees reached in antitrust enforcement actions, they have yet to use their full authority to analyze the labor effects of any structural and/or behavioral remedies incorporated into those decrees. Courts have been judicious in their review of worker or union comments under their § 16(e) authority. They should go further and require defendants and the government to present evidence of labor market effects of proposed consent decrees, especially when unions file comments, amicus briefs, or seek to intervene.[384] And while they have not yet done so, courts should use their authority under § 16(f) of the Tunney Act to "take testimony of Government officials

380. MERGER REMEDIES MANUAL, *supra* note 378, at 30.

381. *See, e.g.*, Consent Decree at 99–105, United States v. City of Ferguson, No. 4:16-cv-000180 (E.D. Mo. filed Mar. 17, 2016).

382. *Id.* at 103.

383. *Id.* at 130.

384. 15 U.S.C. § 16(e); *see infra* app.

or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate," to solicit information and analysis of labor market effects.[385] Courts should also

> appoint a special master and such outside consultants or expert witnesses as [they] may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate.[386]

More specifically, courts could seek the advice and analysis of IO economists, labor economists, industrial relations experts, union or industry experts in labor relations, worker representatives or individual workers, and Department of Labor and NLRB officials regarding the adequacy of the remedies and any potential modifications to the consent decree that would guard against adverse labor market effects or reduced worker bargaining leverage.

Soliciting advice and adequately reviewing labor market effects in the context of effectuating competition policy, while rare in the Article III courts, is not at all rare in agencies and commissions. Other federal agencies tasked with reviewing industry-specific mergers under a range of shared authorities with the DOJ and FTC rigorously review labor market effects as part of their analysis of a merger's effects.[387] For example, the FCC has a "double veto" with the DOJ over mergers in the telecommunications industry and reviews such mergers under a public interest standard.[388] The Surface Transportation Board has exclusive jurisdiction to review railroad mergers, also under a public interest standard. And other agencies serve advisory roles with the DOJ and FTC regarding the merger's compliance with broader federal policy under their respective regulatory mandates.[389]

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385. 15 U.S.C. § 16(f)(1)–(2).

386. *Id.*

387. *See generally* Hafiz, *Interagency Merger Review*, *supra* note 57, at 51–60 (detailing federal agencies' respective merger review authority and coordination with the DOJ and FTC regarding public interest-based reviews).

388. *See* Communications Act of 1934, 47 U.S.C. § 214(a) (requiring an FCC certificate before undertaking relevant projects); *id.* § 310(d) (requiring FCC permission to transfer relevant licenses). For a discussion of the FCC's "public interest" review of mergers, *see* Hafiz, *Interagency Merger Review*, *supra* note 57, at 54–56.

389. *Supra* note 387 and accompanying text.

State commissions and other regulators also subject regulated and merging parties to extensive justifications for their mergers and other conduct, explicitly inquiring into and reviewing the effects of their mergers and rate setting on employment and wages. For example, when the California Public Utilities Commission reviewed Sprint/T-Mobile's joint application for approval of transfer of control and merger under § 854(a) of California's Public Utilities Code, it used its staff to analyze the economists' estimates of labor market effects thoroughly. The Commission applied a public interest standard in its very searching review—much more searching than the federal district court—into how the merger would affect the quantity of labor inputs, the labor economists' modeling of labor market effects, quantitative assessments of the defendants' promised "transaction-specific 'job-years' in the 5 years post-transaction," and evidence of job gains generated from network-related commitments by the merged firm.[390] The Commission ultimately approved the merger and denied the union's request to prohibit employee firings, require T-Mobile to commit to returning overseas customer call center jobs to the United States, and commit to complete neutrality in allowing their employees to unionize free of interference.[391] But it did so only after analyzing the explanatory variables in the union economists' models and finding that the economists' labor market definition was too narrow and failed to include broader sources of employment in retail outside of wireless electronics sales.[392] After doing a deep dive into the economists' modeling and resulting analysis, the Commission ultimately found that, while "some job losses are possible, . . . the potential resulting efficiencies and overall consumer welfare benefits would be likely to outweigh harm to specific employees from the elimination of some jobs."[393] There was insufficient evidence "that ties the loss of jobs to a potential output reduction—to intervene in the market by stipulating the number of jobs that New T-Mobile must retain," so it was "not in

390. *See* Joint Application of Sprint Communications Co. & T-Mobile USA, Inc., for Approval of Transfer of Control of Sprint Communications Co. Pursuant to California Public Utilities Code § 854(a), 18-07-011 (Cal. Pub. Utils. Comm'n Apr. 16, 2020) [hereinafter CPUC Order]. The federal district court conducted no real analysis of labor market effects of the Sprint/T-Mobile merger. *See* Proposed Final Judgment, United States v. Deutsche Telekom AG, No. 19-2232 (D.D.C. Nov. 8, 2019), ECF No. 44-2.

391. Sprint Commc'ns Co. L.P., 2020 CAL. PUC LEXIS 529, at *1, *406–10 (Apr. 16, 2020).

392. *Id.* at *408–10.

393. *Id.* at *410.

the public interest to impose job-related conditions in the current instance."[394] The Commission's analysis is not unique—countless energy rate regulators, telecommunications commissions, and other specialized agencies do rigorous analyses of labor market effects when reviewing proposed rates and approving mergers and acquisitions, setting a standard for Article III courts on how to conduct their Tunney Act "public interest" reviews.[395]

Finally, while it is very rare in contemporary antitrust enforcement for courts to impose posttrial divestiture remedies in § 2 or § 7 cases, where courts *do* impose remedies on defendants after determining that they have violated antitrust law, they should take a permissive approach to allowing stakeholder interventions, particularly when it comes to worker representative or union filings. As Part I discusses, courts have wide discretion under their equitable authority to design remedies that restore competition. That discretion includes imposing remedies that would not further or enable defendants' anticompetitive conduct in labor markets. Unless courts allow unions to intervene in the remedial phase of their proceedings, workers will have limited alternative access to discovery to gather the data and documents they need to present the court with their assessment of the effects of structural remedies on labor market competition and worker power. And courts should take any submitted analyses into account when deciding which remedies are appropriate along the same lines that the agencies and a Tunney Act court would.

B. Improving Remedial Design Through Government Administration

Antitrust remedial enforcement could also benefit from broader government expertise in labor market regulation and more coherent alignment with enforcement and administration of federal labor policy. President Joe Biden's Executive Order on Promoting Competition in the American Economy explicitly recognized that a "whole-of-government approach" was needed to counter "[c]onsolidation [that]

394. *Id.* The Commission focused only on IO economists' analysis in the case, however. *Id.* at *408–10. Had the Commission sought or reviewed broader evidence of the merged firm's monopsony power from a labor economist's perspective—by assessing workers' search and mobility costs, potential lost compensation from firm-specific skills postmerger, and so on—it may have reached a different conclusion.

395. *See, e.g.*, CPUC Order, *supra* note 390, at 4. For the history of applying "just price" analyses in public utility regulation, see generally William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REGUL. 721 (2018).

has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better working conditions."[396] The Order also formed the White House Competition Council to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy."[397] It placed significant responsibility with the Office of Information and Regulatory Affairs to oversee this "whole-of-government approach" and "incorporate into its recommendations for modernizing and improving regulatory review . . . consideration of whether the effects on competition and the potential for creation of barriers to entry should be included in regulatory impact analyses."[398] The antitrust and labor agencies should draw on these mechanisms for coordination and review to ensure that any structural remedies are informed by analysis of their labor market effects.

The labor agencies have developed a robust network of interagency collaboration through memoranda of understanding ("MOUs"), joint policy making, enforcement and investigation, information sharing, and even interagency compliance reviews and personnel training programs; no such networks have been developed between the labor and antitrust agencies.[399] The antitrust agencies have also developed networks of coordination between each other and other competition enforcement agencies like the FCC.[400] Thus, at the very least, the labor and antitrust agencies could extend best practices of interagency coordination that they have developed with other agencies to each other, establishing through MOUs interagency institutions and procedures to jointly develop and implement policy, enforcement, investigations, information sharing, and referrals regarding regulating

396. Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,987 §§ 1–2 (July 9, 2021).

397. *Id.* § 4(b).

398. *Id.* §§ 2(g), 5(u).

399. *See* Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 ADMIN. L. REV. ACCORD 199, 223, 225–26 (2021) [hereinafter Hafiz, *Interagency Coordination*]; Memorandum of Understanding Between the U.S. Department of Labor, Wage and Hour Division and the National Labor Relations Board (Dec. 8, 2021), https://www.dol.gov/sites/dolgov/files/WHD/MOU/MOU_NLRB.pdf [https://perma.cc/6CQZ-H63P].

400. *See* Hafiz, *Interagency Coordination*, *supra* note 399, app. A at 240–56 (listing interagency agreements between the DOJ and FTC); Hafiz, *Interagency Merger Review*, *supra* note 57, at 51–60 (describing antitrust agency coordination with federal agencies in merger reviews).

monopsonist employers to ensure labor market competition, higher employment, and higher worker earning potential.

For example, the antitrust agencies, the NLRB, and DOL could coordinate on merger reviews, evaluating the potential labor market effects of proposed consent decrees, and administering compliance with structural or behavioral requirements that impact labor market competition and worker power.[401] This collaboration could occur through an interagency office that would perform a full, independent analysis of labor market effects and solicit feedback from both labor economists and other experts within the antitrust and labor agencies as well as solicit feedback from external industrial relations experts, relevant unions, workers' advocates, and any other interested parties. The office could also be involved in administering consent decrees as a member of the Divestiture Review Task Force established as a condition for approving the settlement of an antitrust enforcement action. Ideally regional, state, or local NLRB and DOL officials could monitor compliance with any behavioral requirements pertaining to defendants' conduct in labor markets, including compliance with neutrality and card check agreements, expedited elections, fair labor practices in negotiating collective bargaining agreements or successor agreements, and gathering evidence and testimony for potential NLRB review of bargaining unit determinations in contracts with new employers that ensure workers' countervailing power. An interagency office between the labor and antitrust agencies could also coordinate annual reviews and retrospectives of the labor market effects (including on wages, job cuts, and the local economy) of imposed structural and behavioral remedies, and monitor WARN Act filings both to ensure compliance and gather data on best practices for future remedial design and enforcement.[402]

C. Coordinating Labor Market Remedies With Consumer Welfare

Supporters of applying a narrow consumer welfare standard to antitrust remedies may object that remedies favoring worker welfare

401. *See* Hafiz, *Interagency Merger Review*, *supra* note 57, at 60–65.

402. Current draft bills in Congress would require antitrust agency implementation of annual reviews of big mergers, analyzing not just whether the mergers led to higher or lower prices, but also their effects on job cuts, wages, and the local economy. *See, e.g.*, Liz Crampton, *House Democrats Take Issue with Big Mergers*, BLOOMBERG L. (Dec. 6, 2017, 12:20 PM), https://news.bloomberglaw.com/business-and-practice/house-democrats-take-issue-with-big-mergers [https://perma.cc/Z8JT-8ZLJ] (describing Representative Keith Ellison's proposed legislation on merger review retrospectives).

or preventing harms to labor market competition contravene the consumer welfare standard and accordingly should be avoided. Imagine that breaking up a merged firm would reduce product market concentration and further competition to consumers' benefit in the form of lower prices, but the firm acquiring the divesting firm's assets or facilities would gain market power over workers in a local labor market. Here, objectors would argue that antitrust policy requires ignoring worker harm in favor of the consumer benefits of the divestiture. Objectors may further claim that requiring courts to balance worker and consumer welfare harms in the remedial setting adds administrative and error costs that should be avoided.

It exceeds the scope of this Article to defend prioritizing a worker welfare standard over a consumer welfare standard when evaluating antitrust remedies, but such a defense is not required here. First, worker welfare will only rarely conflict with consumer welfare in remedial settings, if at all. As I and others have argued, anticompetitive conduct that only affects input markets like labor markets violate antitrust law and are alone sufficient to warrant remediation. It is also the case that any adverse labor market effects from imposed remedies will most often create adverse product market effects: employer monopsony power allows employers to reduce labor inputs profitably, which in turn reduces the quantity or quality of its output to consumers, therefore raising consumer prices.[403] Thus, in most cases, agencies and courts will not have to balance any worker welfare harms from imposing remedies against any consumer welfare benefits.

Second, in the rare circumstances where worker welfare conflicts with consumer welfare, remedial design can resolve the conflict. For example, an imposed remedy may harm workers but benefit consumers if employers can wage discriminate between employees, avoiding reductions in labor inputs that could reduce the quantity or quality of its output to consumers.[404] Or if the divestiture does create both input and output reductions but occurs in a highly competitive product market, any cutbacks in output may be offset by increases in competitor production and output.[405] But even under these circumstances, courts and agencies could proceed with a structural

403. *See, e.g.*, Hafiz, *supra* note 55, at 391; Naidu et al., *supra* note 101, at 559; Hemphill & Rose, *supra* note 53, at 2087–92.

404. Hafiz, *supra* note 55, at 391–92.

405. *See, e.g.*, Naidu et al., *supra* note 101, at 559 n.93; Hafiz, *supra* note 55, at 391; Hemphill & Rose, *supra* note 53, at 2087–88.

remedy to the extent it improves competition outcomes to consumers, while ameliorating any labor market harms through imposing the types of conduct remedies they impose on the divesting and acquiring firms. For example, the agencies or the court could approve a divestiture, but on the condition that procedures are established to secure rapid union certification through card check agreements and the signing of a first collective bargaining agreement between the union and management by a specified deadline.[406] Agencies' and courts' wide discretion in designing remedies, coupled with worker participation in remedial design, allows for significant flexibility and creative solutions for securing postremedial firm conduct that benefits consumers *and* workers.

Importantly, antitrust law does not sanction imposing anticompetitive harms in *any* market by courts or agencies, including in labor markets through remedial design. This principle of "do no harm" appears on the face of the Clayton Act, which prohibits lost competition "in any line of commerce."[407] And, it follows from antitrust remedial jurisprudence requiring that courts exercise their equitable powers to further the policies of the antitrust laws and avoid conflict with other federal law and policy.[408]

But to avoid any potential conflict or ambiguity between consumer and worker welfare, Congress could explicitly clarify in pending reform legislation that any imposed antitrust remedy may not reduce labor market competition in a manner that reduces hiring, wages, or the quality of working conditions in relevant labor markets affected by a defendant or defendants' targeted unlawful conduct. This will be particularly critical with regard to current legislation and litigation challenging Big Tech firms where, as in the case of Google and Amazon, breakups have been recommended despite a history of those firms' cross-subsidization of wages and benefits across different divisions.[409]

406. *See supra* Part III.A.1.

407. 15 U.S.C. § 18.

408. *See supra* Part I.C.

409. For discussion of proposed legislation targeting Big Tech firms for breakups, see Tim De Chant, *Five New Bills Aim To Break Up Big Tech Platforms, Force Them To Play Nice*, ARSTECHNICA (June 14, 2021, 12:57 PM), https://arstechnica.com/tech-policy/2021/06/five-new-bills-aim-to-break-up-big-tech-platforms-force-them-to-play-nice [https://perma.cc/9HV8-G3G6]. For cross-subsidization, see *supra* note 269 and accompanying text.

CONCLUSION

Taking on the challenges of corporate concentration and firm dominance in our current economy will require not only new guardrails on firm conduct, but also novel approaches to ensuring compliance. How courts and enforcers remedy competition harms—and the tools they bring to bear—can make the difference between who wins and who loses in our broader economic policy. But past disregard of the labor market effects of antitrust remedies placed competition enforcement at odds with competition policy goals of preventing, rather than ignoring, employers' exercise of market power to the detriment of worker earnings and job quality.

As the role of antitrust regulation grows to take on the challenges of economic inequality and ensure robust economic self-determination against powerful corporate employers, agencies and the courts must also expand their expertise and analyses of the impacts of their antitrust enforcement on labor markets and on workers. That begins with understanding the effects of big firm breakups on worker power. Adopting a broader historical and social scientific approach to understanding how firm restructuring through remedial design impacts workers and integrating well-resourced government administration with robust worker participation to ensure workers' countervailing power against strong employers are a critical first step.

APPENDIX: TUNNEY ACT DOCKET SEARCH RESULTS (1992 – PRESENT)

1	*United States v. Zen-Noh Grain Corp.*, Docket No. 1:21-cv-01482 (D.D.C. June 1, 2021)
2	*United States v. Stone Canyon Industries Holdings*, Docket No. 1:21-cv-01067 (D.D.C. Apr. 19, 2021)
3	*United States v. Republic Services, Inc.*, Docket No. 1:21-cv-00883 (D.D.C. Mar. 31, 2021)
4	*United States v. Intuit Inc.*, Docket No. 1:20-cv-03441 (D.D.C. Nov. 25, 2020)
5	*United States v. National Ass'n of Realtors*, Docket No. 1:20-cv-03356 (D.D.C. Nov. 19, 2020)

6	*United States v. Liberty Latin America Ltd.*, Docket No. 1:20-cv-03064 (D.D.C. Oct. 23, 2020)
7	*United States v. Waste Management Inc.*, Docket No. 1:20-cv-03063 (D.D.C. Oct. 23, 2020)
8	*United States v. Odyssey Investment Partners Fund*, Docket No. 1:20-cv-01416 (D.D.C. May 28, 2020)
9	*United States v. United Technologies Corp*., Docket No. 1:20-cv-00824 (D.D.C. Mar. 26, 2020)
10	*United States v. Olympus Growth Fund VI, L.P.*, Docket No. 1:20-cv-00464 (D.D.C. Feb. 19, 2020)
11	*United States v. ZF Friedrichshafen A.G.*, Docket No. 1:20-cv-00182 (D.D.C. Jan. 23, 2020)
12	*United States v. National Ass'n for College Admission Counseling*, Docket No. 1:19-cv-03706 (D.D.C. Dec. 12, 2019)
13	*United States v. Symrise AG*, Docket No. 1:19-cv-03263 (D.D.C. Oct. 30, 2019)
14	*United States v. Nexstar Media Group, Inc.*, Docket No. 1:19-cv-02295 (D.D.C. July 31, 2019)
15	*United States v. Deutsche Telekom AG*, Docket No. 1:19-cv-02232 (D.D.C. July 26, 2019)
16	*United States v. Harris Corp.*, Docket No. 1:19-cv-01809 (D.D.C. June 20, 2019)
17	*United States v. Canon Inc.* , Docket No. 1:19-cv-01680 (D.D.C. June 10, 2019)
18	*United States v. Amcor Ltd.*, Docket No. 1:19-cv-01592 (D.D.C. May 30, 2019)
19	*United States v. Thales S.A.*, Docket No. 1:19-cv-00569 (D.D.C. Feb. 28, 2019)
20	*United States v. Learfield Communications, LLC*, Docket No. 1:19-cv-00389 (D.D.C. Feb. 14, 2019)
21	*United States v. Gray Television, Inc.*, Docket No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018)
22	*United States v. Sinclair Broadcast Group, Inc.*, Docket No. 1:18-cv-02609 (D.D.C. Nov. 13, 2018)
23	*United States v. CVS Health Corp.*, Docket No. 1:18-cv-02340 (D.D.C. Oct. 10, 2018)

24	*United States v. United Technologies Corp.*, Docket No. 1:18-cv-02279 (D.D.C. Oct. 1, 2018)
25	*United States v. CRH PLC et al.,* Docket No. 1:18-cv-01473 (D.D.C. June 22, 2018)
26	*United States v. Bayer AG et al.,* Docket No. 1:18-cv-01241 (D.D.C. May 29, 2018)
27	*United States v. Martin Marietta Materials et al.,* Docket No. 1:18-cv-00973 (D.D.C. Apr. 25, 2018)
28	*United States v. Knorr-Bremse AG et al.*, Docket No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018)
29	*United States v. Vulcan Materials Company et al.*, Docket No. 1:17-cv-02761 (D.D.C. Dec. 22, 2017)
30	*United States v. TransDigm Group Incorporated*, Docket No. 1:17-cv-02735 (D.D.C. Dec. 21, 2017)
31	*United States v. Entercom Communications Corp. et al.*, Docket No. 1:17-cv-02268 (D.D.C. Nov. 1, 2017)
32	*United States v. Centurylink, Inc. et al.,* Docket No. 1:17-cv-02028 (D.D.C. Oct. 2, 2017)
33	*United States v. Showa Denko K.K. et al.*, Docket No. 1:17-cv-01992 (D.D.C. Sept. 27, 2017)
34	*United States v. Dow Chemical Company et al.*, Docket No. 1:17-cv-01176 (D.D.C. June 15, 2017)
35	*United States v. General Electric Company et al.*, Docket No. 1:17-cv-01146 (D.D.C. June 12, 2017)
36	*United States v. Danone S.A. et al.*, Docket No. 1:17-cv-00592 (D.D.C. Apr. 3, 2017)
37	*United States v. Smiths Group PLC et al.*, Docket No. 1:17-cv-00580 (D.D.C. Mar. 30, 2017)
38	*United States v. Clear Channel Outdoor Holdings et al.*, Docket No. 1:16-cv-02497 (D.D.C. Dec. 22, 2016)
39	*United States v. AMC Entnm't Holdings, Inc. et al.*, Docket No. 1:16-cv-02475 (D.D.C. Dec. 20, 2016)
40	*United States v. Alaska Air Group, Inc.*, Docket No. 1:16-cv-02377 (D.D.C. Dec. 6, 2016)
41	*United States v. Westinghouse Air Brake Technologies Corp.*, Docket No. 1:16-cv-02147 (D.D.C. Oct. 26, 2016)

42	*United States v. Nexstar Broadcasting Group, Inc.*, Docket No. 1:16-cv-01772 (D.D.C. Sept. 2, 2016)
43	*United States v. Anheuser-Busch InBev SA/NV*, Docket No. 1:16-cv-01483 (D.D.C. July 20, 2016)
44	*United States v. GTCR Fund XIA AIV LP*, Docket No. 1:16-cv-01091 (D.D.C. June 10, 2016)
45	*United States v. Charter Communications, Inc.*, Docket No. 1:16-cv-00759 (D.D.C. Apr. 25, 2016)
46	*United States v. Iron Mountain Inc.*, Docket No. 1:16-cv-00595 (D.D.C. Mar. 31, 2016)
47	*United States v. BBA Aviation PLC*, Docket No. 1:16-cv-00174 (D.D.C. Feb. 3, 2016)
48	*United States v. Gray Television, Inc.*, Docket No. 1:15-cv-02232 (D.D.C. Dec. 22, 2015)
49	*United States v. AMC Entnm't Holdings*, Docket No. 1:15-cv-02181 (D.D.C. Dec. 15, 2015)
50	*United States v. Springleaf Holdings, Inc.*, Docket No. 1:15-cv-01992 (D.D.C. Nov. 13, 2015)
51	*United States v. Cox Enterprises, Inc.*, Docket No. 1:15-cv-01583 (D.D.C. Sept. 29, 2015)
52	*United States v. General Electric Co.*, Docket No. 1:15-cv-01460 (D.D.C. Sept. 8, 2015)
53	*United States v. Third Point Offshore Fund, Ltd.*, Docket No. 1:15-cv-01366 (D.D.C. Aug. 24, 2015)
54	*United States v. Entercom Communications Corp.*, Docket No. 1:15-cv-01119 (D.D.C. July 14, 2015)
55	*United States v. Waste Management, Inc.*, Docket No. 1:15-cv-00366 (D.D.C. Mar. 13, 2015)
56	*United States v. Verso Paper Corp.*, Docket No. 1:14-cv-02216 (D.D.C. Dec. 31, 2014)
57	*United States v. Continental AG*, Docket No. 1:14-cv-02087 (D.D.C. Dec. 11, 2014)
58	*United States v. Nexstar Broadcasting Group*, Docket No. 1:14-cv-02007 (D.D.C. Nov. 26, 2014)
59	*United States v. Media General Inc.*, Docket No. 1:14-cv-01823 (D.D.C. Oct. 30, 2014)

60	*United States v. Tyson Foods, Inc.*, Docket No. 1:14-cv-01474 (D.D.C. Aug. 27, 2014)
61	*United States v. LM U.S. Corp. Acquisition Inc.*, Docket No. 1:14-cv-01291 (D.D.C. July 30, 2014)
62	*United States v. Sinclair Broadcast Group, Inc.*, Docket No. 1:14-cv-01186 (D.D.C. July 15, 2014)
63	*United States v. Martin Marietta Materials*, Docket No. 1:14-cv-01079 (D.D.C. June 26, 2014)
64	*United States v. Conagra Foods, Inc.*, Docket No. 1:14-cv-00823 (D.D.C. May 20, 2014)
65	*United States v. Heraeus Electro-Nite Co.*, Docket No. 1:14-cv-00005 (D.D.C. Jan. 2, 2014)
66	*United States v. Gannett Co., Inc.*, Docket No. 1:13-cv-01984 (D.D.C. Dec. 16, 2013)
67	*United States v. US Airways Group Inc.*, Docket No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013)
68	*United States v. Cinemark Holdings, Inc.*, Docket No. 1:13-cv-00727 (D.D.C. May 20, 2013)
69	*United States v. Ecolab Inc.*, Docket No. 1:13-cv-00444 (D.D.C. Apr. 8, 2013)
70	*United States v. Anheuser-Busch InBev SA/NV*, Docket No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013)
71	*United States v. Star Atlantic Waste Holdings*, Docket No. 1:12-cv-01847 (D.D.C. Nov. 15, 2012)
72	*United States v. Standard Parking Corp.*, Docket No. 1:12-cv-01598 (D.D.C. Sept. 26, 2012)
73	*United States v. Verizon Communications, Inc.*, Docket No. 1:12-cv-01354 (D.D.C. Aug. 16, 2012)
74	*United States v. United Technologies Corp.*, Docket No. 1:12-cv-01230 (D.D.C. July 26, 2012)
75	*United States v. Humana, Inc.*, Docket No. 1:12-cv-00464 (D.D.C. Mar. 27, 2012)
76	*United States v. International Paper Co.*, Docket No. 1:12-cv-00227 (D.D.C. Feb. 10, 2012)
77	*United States v. Deutsche Borse AG*, Docket No. 1:11-cv-02280 (D.D.C. Dec. 22, 2011)

78	*United States v. Exelon Corp.*, Docket No. 1:11-cv-02276 (D.D.C. Dec. 21, 2011)
79	*United States v. Grupo Bimbo, S.A.B. de C.V.*, Docket No. 1:11-cv-01857 (D.D.C. Oct. 21, 2011)
80	*United States v. General Electric Co.*, Docket No. 1:11-cv-01549 (D.D.C. Aug. 29, 2011)
81	*United States v. Regal Beloit Corp.*, Docket No. 1:11-cv-01487 (D.D.C. Aug. 17, 2011)
82	*United States v. Verifone Systems, Inc.*, Docket No. 1:11-cv-00887 (D.D.C. May 12, 2011)
83	*United States v. Unilever N.V.*, Docket No. 1:11-cv-00858 (D.D.C. May 6, 2011)
84	*United States v. Google Inc.*, Docket No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011)
85	*United States v. Comcast Corp.*, Docket No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011)
86	*United States v. Lucasfilm Ltd.*, Docket No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010)
87	*United States v. L.B. Foster Co.*, Docket No. 1:10-cv-02115 (D.D.C. Dec. 14, 2010)
88	*United States v. Graftech International Ltd.*, Docket No. 1:10-cv-02039 (D.D.C. Nov. 29, 2010)
89	*United States v. Adobe Systems, Inc.*, Docket No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010)
90	*United States v. Amcor Ltd.*, Docket No. 1:10-cv-00973 (D.D.C. June 10, 2010)
91	*United States v. AMC Entertainment Holdings, Inc.*, Docket No. 1:10-cv-00846 (D.D.C. May 21, 2010)
92	*United States v. Baker Hughes Inc.*, Docket No. 1:10-cv-00659 (D.D.C. Apr. 27, 2010)
93	*United States v. Election Systems and Software, Inc.*, Docket No. 1:10-cv-00380 (D.D.C. Mar. 8, 2010)
94	*United States v. Ticketmaster Entertainment, Inc.*, Docket No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010)
95	*United States v. AT&T Inc.*, Docket No. 1:09-cv-01932 (D.D.C. Oct. 13, 2009)

96	*United States v. Sapa Holding AB*, Docket No. 1:09-cv-01424 (D.D.C. July 30, 2009)
97	*United States v. Republic Services, Inc.*, Docket No. 1:08-cv-02076 (D.D.C. Dec. 3, 2008)
98	*United States v. Inbev N.V./S.A.*, Docket No. 1:08-cv-01965 (D.D.C. Nov. 14, 2008)
99	*United States v. Verizon Communications Inc.*, Docket No. 1:08-cv-01878 (D.D.C. Oct. 30, 2008)
100	*United States v. Raycom Media, Inc.*, Docket No. 1:08-cv-01510 (D.D.C. Aug. 28, 2008)
101	*United States v. Signature Flight Support Corp.*, Docket No. 1:08-cv-01164 (D.D.C. July 3, 2008)
102	*United States v. Verizon Communications Inc.*, Docket No. 1:08-cv-00993 (D.D.C. June 10, 2008)
103	*United States v. Cengage Learning Holdings I, LP*, Docket No. 1:08-cv-00899 (D.D.C. May 28, 2008)
104	*United States v. Regal Cinemas, Inc.*, Docket No. 1:08-cv-00746 (D.D.C. Apr. 29, 2008)
105	*United States v. Altivity Packaging LLC*, Docket No. 1:08-cv-00400 (D.D.C. Mar. 5, 2008)
106	*United States v. UnitedHealth Group Inc.*, Docket No. 1:08-cv-00322 (D.D.C. Feb. 25, 2008)
107	*United States v. Thomson Corp.*, Docket No. 1:08-cv-00262 (D.D.C. Feb. 19, 2008)
108	*United States v. Bain Capital, LLC*, Docket No. 1:08-cv-00245 (D.D.C. Feb. 13, 2008)
109	*United States v. Pearson PLC*, Docket No. 1:08-cv-00143 (D.D.C. Jan. 24, 2008)
110	*United States v. Commscope, Inc.*, Docket No. 1:07-cv-02200 (D.D.C. Dec. 6, 2007)
111	*United States v. Vulcan Materials Co.*, Docket No. 1:07-cv-02044 (D.D.C. Nov. 13, 2007)
112	*United States v. AT&T, Inc.*, Docket No. 1:07-cv-01952 (D.D.C. Oct. 30, 2007)
113	*United States v. Abitibi-Consolidated Inc.*, Docket No. 1:07-cv-01912 (D.D.C. Oct. 23, 2007)

114	*United States v. Monsanto Co.*, Docket No. 1:07-cv-00992 (D.D.C. May 31, 2007)
115	*United States v. Cemex, S.A.B. de C.V.*, Docket No. 1:07-cv-00640 (D.D.C. Apr. 4, 2007)
116	*United States v. Inco Ltd.*, Docket No. 1:06-cv-01151 (D.D.C. June 23, 2006)
117	*United States v. Exelon Corp.*, Docket No. 1:06-cv-01138 (D.D.C. June 22, 2006)
118	*United States v. UnitedHealth Group Inc.*, Docket No. 1:05-cv-02436 (D.D.C. Dec. 20, 2005)
119	*United States v. SBC Communications Inc.*, Docket No. 1:05-cv-02102 (D.D.C. Oct. 27, 2005)
120	*United States v. Verizon Communications Inc.*, Docket No. 1:05-cv-02103 (D.D.C. Oct. 27, 2005)
121	*United States v. Cal Dive International, Inc.*, Docket No. 1:05-cv-02041 (D.D.C. Oct. 18, 2005)
122	*United States v. Cingular Wireless Corp.*, Docket No. 1:04-cv-01850 (D.D.C. Oct. 25, 2004)
123	*United States v. Connors Bros. Income Fund*, Docket No. 1:04-cv-01494 (D.D.C. Aug. 31, 2004)
124	*United States v. First Data Corp.*, Docket No. 1:03-cv-02169 (D.D.C. Oct. 23, 2003)
125	*United States v. Univision Communications Inc.*, Docket No. 1:03-cv-00758 (D.D.C. Mar. 26, 2003)
126	*United States v. Gemstar-Tvguide International, Inc.*, Docket No. 1:03-cv-00198 (D.D.C. Feb. 6, 2003)
127	*United States v. Computer Associates*, Docket No. 1:01-cv-02062 (D.D.C. Sept. 28, 2001)
128	*United States v. Signature Flight*, Docket No. 1:01-cv-01365 (D.D.C. June 20, 2001)
129	*United States v. Clear Channel Communications*, Docket No. 1:00-cv-02063 (D.D.C. Aug. 29, 2000)
130	*United States v. Bell Atlantic Corp.*, Docket No. 1:99-cv-01119 (D.D.C. May 7, 1999)
131	*United States v. Capstar Broadcasting*, Docket No. 1:99-cv-00993 (D.D.C. Apr. 21, 1999)
132	*United States v. Chancellor Media*, Docket No. 1:98-cv-02875 (D.D.C. Nov. 25, 1998)

133	*United States v. Microsoft Corp.*, Docket No. 1:98-cv-01232 (D.D.C. May 18, 1998)
134	*United States v. Enova Corp.*, Docket No. 1:98-cv-00583 (D.D.C. Mar. 9, 1998)
135	*United States v. AT&T*, Docket No. 1:94-cv-01555 (D.D.C. July 15, 1994)
136	*United States v. MCI Communications*, Docket No. 1:94-cv-01317 (D.D.C. June 15, 1994)
137	*United States v. Airline Tariff Publishing Co.*, Docket No. 1:92-cv-02854 (D.D.C. Dec. 21, 1992)