

Antitrust and the Decline of America's Independent Businesses

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Small businesses have declined sharply in both numbers and market share across many sectors of the economy. There is evidence that this decline is owed in part to anticompetitive behavior by dominant firms, which have used their market power to disadvantage smaller competitors and exclude new entrants. These abuses have gone unchecked because of changes in the ideological framework guiding antitrust enforcement. About thirty-five years ago, policymakers came to view maximizing efficiency, rather than maintaining fair and open markets for all competitors, as the paramount goal of antitrust. There are at least three reasons to bring a commitment to small businesses and fair markets back into antitrust policy: small businesses deliver distinct consumer benefits; they contribute to a more equitable distribution of income and opportunity; and they safeguard democracy.

KEY WORDS: *small business, concentration, entrepreneurship, platforms, public policy, banking, pharmacy, retail, innovation, efficiency, political economy, democracy*

I. A TALE OF PHARMACY COMPETITION: HOW ONE STATE IS NOT LIKE THE OTHERS

Nathan Schlecht knows almost everyone who comes through the doors of his pharmacy in Forman, North Dakota. He's been the pharmacist serving this remote community since 1998, when he and his wife bought Forman Drug from the town's retiring pharmacist. Forman is a tiny settlement, with just 509 residents, situated in North Dakota's sparsely populated southeast corner. Aside from the rural health clinic that operates half-days, the itinerant optometrist, and the dentist who rents space at the back of Forman Drug one day a week, Schlecht is the town's only health care provider. He's the person on call when the local nursing home has questions

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about medications. He gives presentations on health issues at the local school and city hall. He does in-depth consultations with patients to talk through treatment approaches for chronic diseases like diabetes. A few years after taking over Forman Drug, he opened a telepharmacy ten miles up the road in Gwinner, and makes the drive once or twice a day to deliver prescriptions. “A lot of my decisions are based on what is needed in my community,” says Schlecht.¹

Independent, locally owned pharmacies like Forman Drug have become rare in much of the country, as drugstore chains, big-box retailers, and mail-order providers increasingly dominate the sector.² But North Dakota is a remarkable exception to this trend. In 1963, the state adopted a law that says that a drugstore may operate in the state only if it is owned by a pharmacist.³ This is unique in the United States, but many European countries have similar laws. The goal of the law is to ensure that pharmacies are run by people whose first priority is

¹ OLIVIA LAVECCHIA & STACY MITCHELL, NORTH DAKOTA’S PHARMACY OWNERSHIP LAW: ENSURING ACCESS, COMPETITIVE PRICES, AND QUALITY CARE 3 (2014), *available at* http://ilsr.org/wp-content/uploads/2014/10/ND_Pharmacy_Ownership_Report.pdf.

² Walgreens and CVS together control between fifty and seventy-five percent of the drugstore market in each of the country’s fourteen largest metropolitan areas. Corey Stern, *CVS and Walgreens Are Completely Dominating the U.S. Drugstore Industry*, BUS. INSIDER (July 29, 2015), <http://www.businessinsider.com/cvs-and-walgreens-us-drugstore-market-share-2015-7>.

³ N.D. CENT. CODE § 43-15-32 (2015). Thirteen countries in the European Union regulate pharmacy ownership. CRISTIANA VITALE, COMPETITION ISSUES IN THE DISTRIBUTION OF PHARMACEUTICALS (2014), *available at* [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2014\)32&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)32&docLanguage=En).

providing health care in their communities, not expanding the bottom line of a distant corporation. Today, North Dakota has more pharmacies per capita than any other state, and there is not a single Walgreens or Walmart pharmacy among them. Aside from a handful of grandfathered chain outlets, all of the state's 177 pharmacies are independent businesses.⁴

Given the conventional wisdom about the relative inefficiency of small business, one might assume that North Dakota's law has led to higher prescription prices. But the state has among the lowest drug prices in the country. Over the last five years, it has ranked thirteenth on average for lowest prescription prices among the fifty states.⁵ Compared to neighboring South Dakota, where both drugstore chains and big-box stores with pharmacies are common, North Dakota boasts lower prescription prices, and prices there have also been growing much more slowly than in South Dakota.⁶

Residents of North Dakota are getting more value for their dollar, too. In national surveys of customer satisfaction, independent pharmacies consistently outperform chains and mail-order providers. "Independents . . . earned readers' top marks for speed and accuracy, courtesy and helpfulness, and pharmacists' knowledge," noted *Consumer Reports* in a January 2014 story.⁷ Independent pharmacies have shorter wait times and fewer out-of-stock drugs, the magazine

⁴ LAVECCHIA & MITCHELL, *supra* note 1, at 6.

⁵ Based on an analysis of data from Symphony Health's *PHAST Prescription Monthly*, a leading source of prescription data, by the Institute for Local Self-Reliance. For more details, see LAVECCHIA & MITCHELL, *supra* note 1.

⁶ LAVECCHIA & MITCHELL, *supra* note 1.

⁷ *Finding the Right Pharmacy: Our Survey Offers 10 Reasons Why You May Want to Switch Drugstores*, CONSUMER REP., Jan. 2014.

found, and their patients receive more one-on-one time with the pharmacist. “Customers at independents were much more likely to have discussed prescriptions with their pharmacist,” the analysis noted.⁸ J.D. Power’s *2013 Pharmacy Study* reached similar conclusions.⁹

North Dakota residents also benefit from an unparalleled level of access and competition. The state has more pharmacies per capita than any other state—thirty percent more than the national average—and they are remarkably prevalent even in the most remote regions.¹⁰ North Dakota’s rural census tracts are fifty-one percent more likely to have a pharmacy than those in South Dakota, which has a similar population distribution.¹¹ North Dakota’s urban residents, meanwhile, enjoy more competition. In North Dakota’s two biggest cities, Fargo and Bismarck, there are 1.8 competing pharmacy firms per 10,000 people, compared to just 1.3 in Sioux Falls and Rapid City, the largest cities in South Dakota.¹²

II. EXPLAINING THE NORTH DAKOTA ANOMALY

How is it that independent pharmacies are so competitive in North Dakota and yet have been rapidly losing ground everywhere else? If independents can beat the chains on price,

⁸ *Id.*

⁹ *The Customer Satisfaction Gap Continues to Widen between Brick and Mortar and Mail-Order Pharmacies*, J.D. POWER REP., Sept. 30, 2013.

¹⁰ Based on an analysis of pharmacy data from the North Dakota Board of Pharmacy; South Dakota Board of Pharmacy; National Association of Chain Drug Stores, Fact Book 2013–14; and the U.S. Economic Census by the Institute for Local Self-Reliance. For more details, see LAVECCHIA & MITCHELL, *supra* note 1.

¹¹ LAVECCHIA & MITCHELL, *supra* note 1.

¹² *Id.*

service, and access in North Dakota, then they should be able to do that in Nebraska and New York, too. The likely answer to this puzzle has to do with pharmacy benefit management companies, or PBMs, and the ways they use their market power to exclude local pharmacies from competing. Although largely invisible to consumers, PBMs play a pivotal role in the healthcare system by managing prescription benefits for insurers. Just two PBMs—Express Scripts and CVS Health—control seventy-five percent of the market, handling prescription benefits for more than 180 million Americans.¹³

Both of these companies have a stake in retail pharmacy. They each own mail-order pharmacy services, and CVS Health owns the nation’s second largest drugstore chain. Not surprisingly, PBMs commonly provide incentives such as lower copays to steer patients to their own pharmacies, while offering independent drugstores take-it-or-leave-it contracts that force them to choose between losing money on many of the prescriptions they fill or being left out of an insurer’s network altogether.¹⁴ As Brian Caswell, owner of Wolkar Drug in Baxter Springs,

¹³ *Hearing on H. 97 Before the S. Comm. on Health and Welfare and the H. Comm. on Health*, 2015–16 Sess. (Vt. 2015) (PBM Presentation by David Balto), *available at* <http://legislature.vermont.gov/committee/document/2016/27/Witness/David%20Balto>.

¹⁴ *The State of Competition in the Pharmacy Benefits Manager and Pharmacy Marketplaces: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of David A. Balto, Esq.) [hereinafter Balto Testimony]; Shelly Bradbury, *Independent Pharmacies Focus on Local Ties to Battle Competitors, Benefit Manager Cost Cutting*, TIMES FREE PRESS (Tenn.), Mar. 2, 2014, at <http://www.timesfreepress.com/news/business/aroundregion/story/2014/mar/02/independent-pharmacies/132965/>; Julia Talsma, *The PBM Squeeze*, DRUG TOPICS, Apr. 15, 2013,

Kansas, told CNN Money: “The contracts have become egregious, with 15 to 20 pages of legal documents and red tape that we can't understand. As the PBM industry has shrunk to a handful of companies, they take more and more and give us less and less.”¹⁵

North Dakota’s pharmacists have to deal with PBMs too, but because they are the only pharmacies in the state, they have the leverage to negotiate fairer terms. The state’s pharmacy ownership law has, in effect, filled the vacuum left by the failure of antitrust policy to promote and maintain an open and competitive market.

Although independent pharmacies are healthy and stable in North Dakota, across the rest of the United States their numbers have been falling, and their market share has dropped to twenty-eight percent.¹⁶ That is bad news for health care and for our communities. Independent pharmacies provide a variety of health screenings and counseling services that mail-order

<http://drugtopics.modernmedicine.com/drug-topics/news/tags/mac/pbm-squeeze>; Timothy Martin, *Drugstores Press for Pricing Data*, WALL ST. J., Mar. 27, 2013, at <http://www.wsj.com/articles/SB10001424127887323466204578382990730159644>; Karen E. Klein, *End of Days for Independent Pharmacies?*, BLOOMBERG BUS. WK., Mar. 8, 2012, <http://www.bloomberg.com/news/articles/2012-03-08/end-of-days-for-independent-pharmacies>; Emily Maltby, *The Death of the Corner Pharmacy*, CNN MONEY, June 16, 2009, at http://money.cnn.com/2009/06/16/smallbusiness/small_pharmacies_fight_for_survival.smb/.

¹⁵ Maltby, *supra* note 14.

¹⁶ Data on the change in number of local pharmacies are from U.S. Economic Census for 2002 and 2012. Prescription drug market share figures are derived from NAT’L ASS’N OF CHAIN DRUG STORES, FACT BOOK 2013–2014, and NAT’L COMMUNITY PHARMACISTS ASS’N, 2013 DIGEST.

providers and many chain drugstores do not, and often at prices much lower than those charged by doctors' offices and hospitals.¹⁷

Although there have been repeated calls for federal legislation to level the playing field for community drugstores—by compelling PBMs to deal fairly or forcing them to divest their retail pharmacies—so far these efforts have gone nowhere. Attempts to convince the Federal Trade Commission (FTC) to take a tougher stance on PBMs have likewise fallen on deaf ears. “The FTC has brought no enforcement actions against PBMs in spite of numerous complaints. None. In fact when a Federal Judge asked the FTC to investigate egregious conduct by CVS Caremark [now CVS Health] in excluding a community pharmacy . . . from continued participation in [its] network, the FTC declined to do so,” reports David Balto, an antitrust attorney and previous enforcement officer at both the U.S. Department of Justice (DOJ) and the FTC.¹⁸ Indeed, the agency has gone further: In several states, the FTC has actively opposed legislation designed to make PBMs more transparent and prevent conflicts of interest in how they manage benefits.¹⁹

¹⁷ See CENTER FOR RURAL HEALTH POL’Y ANALYSIS, UPDATE: INDEPENDENTLY OWNED PHARMACY CLOSURES IN RURAL AMERICA, 2003–2013, at 1 (2014) (“Loss of pharmacists in rural areas, particularly in areas where there was only one pharmacist in the community, can have serious implications for health care provision. In addition to providing prescription and nonprescription medications, rural pharmacists report providing clinical services such as blood pressure checks, diabetes counseling and blood glucose testing, and immunizations.”).

¹⁸ Balto Testimony, *supra* note 14.

¹⁹ The FTC has issued numerous comment letters opposing state bills to regulate PBMs. See, e.g., *FTC Staff Comment to Hon. Terry G. Kilgore Concerning Virginia House Bill No. 945 to Regulate the*

The FTC contends such legislation “likely will raise the cost of prescription drug coverage” by limiting the leverage PBMs have to negotiate lower prices from both drug makers and pharmacies.²⁰ But the evidence, in North Dakota and nationally, is to the contrary. PBMs are using their market power to steer more business to their own retail pharmacies and to secure

Contractual Relationship Between Pharmacy Benefit Managers and Both Health Benefit Plans and Pharmacies Federal Trade Commission (Oct. 2, 2006), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.terry-g.kilgore-concerning-virginia-house-bill-no.945-regulate-contractual-relationship-between-pharmacy-benefit-managers-and-both-health-benefit/v060018.pdf; FTC Staff Comment to the Honorable James L. Seward Concerning New York Senate Bill 58 on Pharmacy Benefit Managers (Mar. 31, 2009), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-james-l.seward-concerning-new-york-senate-bill-58-pharmacy-benefit-managers-pbms/v090006newyorkpbm.pdf; FTC Staff Letter to the Honorable Mark Formby, Mississippi House of Representatives, Concerning Mississippi Senate Bill 2445 and the Regulation of Pharmacy Benefit Managers (Mar. 22, 2011), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-honorable-mark-formby-mississippi-house-representatives-concerning-mississippi/110322mississippiipbm.pdf.

²⁰ Press Release, Fed. Trade Comm’n, FTC Staff Comment Says New York Bill to Regulate Pharmacy Benefit Managers May Increase Pharmaceutical Prices for New York Consumers (Apr. 3, 2009), <https://www.ftc.gov/news-events/press-releases/2009/04/ftc-staff-comment-says-new-york-bill-regulate-pharmacy-benefit>.

kickbacks from drug manufacturers by favoring certain drugs over others.²¹ The result is a less diverse, competitive, and responsive pharmacy market, and a more expensive one. “PBM profits are increasing at the same time drug costs increase,” notes Balto.²²

The FTC’s insistence that there is nothing amiss in this sector is emblematic of the wide gulf that has opened up between the assumptions that guide antitrust enforcement today—including the notion that gains in efficiency justify high levels of concentration—and the actual consequences of allowing markets to become increasingly devoid of small-scale entrepreneurs.

III. THE DECLINE OF SMALL BUSINESS

The United States is much less a nation of entrepreneurs than it was a generation ago. Independent businesses have been disappearing across many sectors of the economy. This chapter argues that this decline is, to a significant extent, the result of a pervasive bias in favor of large corporations that crept into government policy beginning about thirty-five years ago. In particular, it contends that changes in how we enforce antitrust laws have left small businesses vulnerable to being excluded by dominant firms and that the decline of entrepreneurship has far-reaching implications for the economy and democracy. It presents a case for bringing a commitment to small business back into competition policy and outlines steps for doing so.

Before delving into this argument, let’s take a look at the recent trends. Between 1997 and 2012, the number of small construction firms declined by about 15,000, while the number of

²¹ Brian S. Feldman, *Big Pharmacies Are Dismantling the Industry that Keeps U.S. Drug Costs Even Sort-Of Under Control*, QUARTZ, Mar. 17, 2016, <http://qz.com/636823/big-pharmacies-are-dismantling-the-industry-that-keeps-us-drug-costs-even-sort-of-under-control/>.

²² Balto Testimony, *supra* note 14.

small manufacturers fell by more 70,000.²³ Local retailers also saw their ranks diminish by about 108,000—a drop of forty percent when measured relative to population.²⁴ As recently as the 1980s, independent retailers supplied about half of the goods Americans bought in stores; today their share is down to about one-quarter.²⁵ The number of community banks and credit unions has likewise fallen, dropping from 26,000 to 13,000 since 1995.²⁶ These local financial institutions held nearly half of bank assets twenty years ago, but today they control just twenty-three percent.²⁷ All told, between 1997 and 2012, the share of total business revenue going to firms with fewer than 100 employees fell by nearly one-fifth, from twenty-nine to twenty-four percent.²⁸

Meanwhile, unprecedented levels of market concentration have spread to every corner of the economy. One company makes nearly every brand of sunglasses in the world, while another produces virtually every plastic clothes hanger.²⁹ Supermarket aisles might appear to offer a

²³ U.S. ECONOMIC CENSUS, 1997–2012.

²⁴ *Id.*

²⁵ Independent retailers are defined here as those with fewer than 10 locations. U.S. ECONOMIC CENSUS, 1982–2012.

²⁶ Calculations based on data in FED. DEPOSIT INS. CORP., STATISTICS ON DEPOSITORY INSTITUTIONS REPORT, <http://www2.fdic.gov/SDI/main.asp> [hereinafter FDIC CALL REPORTS], NAT'L CREDIT UNION ADMIN., FINANCIAL PERFORMANCE REPORT, <http://webapps2.ncua.gov/NCUAFPR/FPRRequestSet.aspx>.

²⁷ Author's analysis of data in FDIC CALL REPORTS, *supra* note 26.

²⁸ U.S. ECONOMIC CENSUS, 1997–2012.

²⁹ David Dayen, *Bring Back Antitrust*, AM. PROSPECT, Nov. 9, 2015, at <http://prospect.org/article/bring-back-antitrust-0>].

wide range of brands, but most are owned by a handful of firms. Just two companies make seventy percent of our beer; one company processes more than one-third of U.S. milk; and four companies slaughter and process over eighty percent of U.S. beef.³⁰ In finance, the share of banking assets held by megabanks rose from seventeen percent in 1995 to fifty-nine percent today.³¹ In retail, Walmart now captures one of every four dollars Americans spend on groceries, including more than half of grocery sales in forty metropolitan areas.³² Online retail is even more consolidated. Amazon accounts for more than thirty-five percent of online sales in the United States and is rapidly expanding its share.³³ In 2015, Amazon captured fifty-one percent of the growth in online spending.³⁴

³⁰ Safari Chaudhuri, Shandy Rice & Tripp Mickle, *How AB InBev Won Over SABMiller*, WALL ST. J., Oct. 14, 2015, at <http://www.wsj.com/articles/sabmiller-ab-inbev-agree-on-deal-in-principle-1444717547>; Ilan Brat, *Dean Foods Bets on One National Milk Brand*, WALL ST. J., May 4, 2015, at <http://www.wsj.com/articles/dean-foods-bets-on-one-national-milk-brand-1430712167>; Christopher Leonard, *How the Meat Industry Keeps Chicken Prices High*, SLATE, Mar. 3, 2014, http://www.slate.com/articles/life/food/2014/03/meat_racket_excerpt_how_tyson_keeps_chicken_prices_high.html.

³¹ Megabanks are defined here as those with more than \$100 billion in assets in 2010 dollars. Author's analysis of data in FDIC CALL REPORTS, *supra* note 26.

³² CHAIN STORE GUIDE, GROCERY INDUSTRY MARKET SHARE REPORT (2012), <https://www.chainstoreguide.com/c-134-grocery-market-share.aspx>.

³³ Jack Hough, *Amazon Could Be Largest U.S. Company by 2020*, BARRON'S, June 2, 2016, at <http://www.barrons.com/articles/amazon-could-be-largest-u-s-company-by-2020-1464866783>.

³⁴ Hiroko Tabuchi, *It's Amazon and Also-Rans in Retailers' Race for Online Sales*, N.Y. TIMES, Dec. 30, 2015, at B1.

In 2010, the DOJ tacitly accepted this massing of market power by officially raising the threshold at which it considers an industry to be highly concentrated for the purpose of evaluating mergers. (In doing so, the Department noted that it was simply aligning its formal guidelines with what had already been happening in practice for some time.) Even under the new threshold, one-third of industries are still “highly concentrated,” according to an analysis by the *Wall Street Journal*.³⁵ A new wave of proposed mergers—between beer giants, hotel chains, pharmacy chains, and others—threatens to make many industries even more consolidated.³⁶

IV. THE SLOW-DOWN IN START-UPS

In this environment, starting a new entrepreneurial venture appears to have become harder than ever. Although startups are central to Americans’ self-image as a nation, especially in this high-tech age, new business creation has in fact declined sharply. The number of startups launched each year fell by nearly half between 1978 and 2011, according to a Brookings Institution study. And the decline has been picking up speed. “The precipitous drop since 2006 is both noteworthy and disturbing,” the study’s authors, Ian Hathaway and Robert E. Litan, report, adding that “the number of business deaths now exceed business births for the first time in the 30-plus year history of our data.”³⁷ Their research also shows that the trend is not confined to any

³⁵ Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, WALL ST. J., Oct. 18, 2015, at <http://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306>.

³⁶ Olivia LaVecchia, *With New Wave of Mega-Mergers, the Big Aim to Get Bigger*, INSTITUTE FOR LOCAL SELF-RELIANCE (Nov. 23, 2015), <https://ilsr.org/new-wave-of-mega-mergers-means-the-big-get-bigger/>.

³⁷ Ian Hathaway & Robert E. Litan, *Declining Business Dynamism in the United States: A Look at States and Metros* (Economic Studies at Brookings, 2014),

region; business dynamism has declined in all fifty states and in all but a handful of more than 360 U.S. metropolitan areas.

As stunning as these figures are, there has been remarkably little public debate about this profound structural shift taking place in the U.S. economy. We tend to accept the decline of small business as the inevitable result of market forces. Big companies are thought to be more efficient and productive; therefore, although we may miss the corner drugstore or the family-owned auto repair shop, their demise is unavoidable, and it's economically beneficial.

But North Dakota's experience with its thriving and highly effective independent pharmacies raises a different, and very troubling, explanation for the dwindling ranks of small businesses. It suggests that their decline is owed, at least in part, to the anticompetitive exercise of market power by dominant corporations. And it offers evidence that the most significant threat to America's entrepreneurs is not technological change or global trade, but rather the rise of an economic and political ideology that has discounted the harmful effects of monopoly power and infused public policy with a bias in favor of big business.

V. HOW PUBLIC POLICY CAME TO FAVOR BIG BUSINESS

It all started more than thirty-five years ago, when policymakers, influenced by the theories of economists and legal scholars associated with the University of Chicago, began systematically refashioning antitrust policy and enforcement. The election of Ronald Reagan was pivotal. "I have no hostility against large mergers," declared William Baxter, Reagan's choice to run the DOJ's Antitrust Division. He characterized the new approach to antitrust as "an exclusive concern with economic efficiency" and said that regulators would no longer be

http://www.brookings.edu/~media/research/files/papers/2014/05/declining-business-dynamism-litan/declining_business_dynamism_hathaway_litan.pdf.

“concerned with fairness to smaller competitors,” as had been the case during prior administrations of both political parties.³⁸ Under Baxter, enforcement was sharply curtailed and new merger guidelines, adopted in 1982, stressed the potential efficiencies that might be gained from corporate consolidation, while dismissing other considerations, such as the economic and civic costs communities incur when they lose a locally owned and headquartered company to a merger.

The DOJ and the FTC also largely abandoned enforcement of the Robinson-Patman Act. Adopted in 1936 in response to the emergence and growth of national retail chains like A&P,³⁹ the law embodies an explicit goal of protecting a level playing field for small competitors, particularly with regard to powerful buyers that could use their sway over suppliers to game markets. This clearly articulated intent made it hard to reinterpret Robinson-Patman to fit the new era in antitrust enforcement, in which efficiency supplanted fair markets as the primary goal. Few changes in competition policy have had as much impact on the landscape and daily life of America’s communities: Robinson-Patman was shelved just as Walmart was marching out of Arkansas on its way to overtaking the national economy, in no small part by using its vast leverage over suppliers to shift production and distribution in ways that enlarged its market position and undermined smaller businesses.⁴⁰

Although the conservative movement played a central role in this sea change, many liberals, notably the influential economist John Kenneth Galbraith, also supported it, arguing that

³⁸ Jack Egan, *Big is Beautiful*, NEW YORK, May 11, 1981, at 10 (quoting Baxter).

³⁹ A&P’s full name is the Great Atlantic & Pacific Tea Co.

⁴⁰ CHARLES FISHMAN, *THE WALMART EFFECT: HOW THE WORLD’S MOST POWERFUL COMPANY REALLY WORKS—AND HOW IT’S TRANSFORMING THE AMERICAN ECONOMY* (2006).

antitrust was outdated.⁴¹ A modern economy ought to be composed of large, technocratic corporations, the thinking went, and the role of government is to maximize economic growth and ensure lower prices for consumers, which large companies are better able to deliver. And so, with support from a key block of liberals, policymakers stripped antitrust of its longstanding commitment to maintaining open, diverse markets and protecting the liberty of citizens as *producers*, not merely as consumers. As an outgrowth of its increasingly narrow focus on prices, antitrust enforcement also became heavily reliant on mathematical modeling, which has led enforcers to further marginalize other values that cannot easily be quantified.

This preference for big business eventually spread beyond antitrust to influence virtually all policy governing the economy. Major changes to federal banking policies in the 1990s ushered in a tsunami of mergers and put small banks on increasingly precarious footing.⁴² Changes to telecommunications policy in the 1990s opened the way for big media firms to take

⁴¹ JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 244 (Princeton Univ. Press 2007) (1967) (“It follows that the antitrust laws, in seeking to preserve the market, are an anachronism in the larger world of industrial planning. They do not preserve the market. They preserve rather the illusion of the market . . .”).

⁴² For a graphic look at the largest mergers in this period, see *How Banks Got Too Big to Fail*, MOTHER JONES, Jan./Feb. 2010, at <http://www.motherjones.com/politics/2010/01/bank-merger-history>. See also Julapa Jagtiani, *Understanding the Effects of the Merger Boom on Community Banks*, FED. RES. BANK OF KANSAS CITY ECON. REV. (2008), <https://www.kansascityfed.org/publicat/econrev/PDF/2Q08jagtiani.pdf>.

over local markets.⁴³ Agricultural policy has likewise heavily subsidized large commodity growers, while shortchanging small farms.⁴⁴ Each year local governments give out billions of dollars in tax incentives to support economic development, with upwards of ninety percent of these subsidies going to big companies.⁴⁵

Federal and state tax laws further distort the market. A neighborhood bicycle shop cannot stash profits in a Delaware shell company or undertake a foreign “inversion,” but large corporations routinely devise and exploit such loopholes. As a result, small businesses appear to pay higher effective tax rates, on average, than big companies do.⁴⁶ And, of course, the larger

⁴³ Gene Kimmelman, Mark Cooper & Magda Herra, *The Failure of Competition Under the 1996 Telecommunications Act*, 58 FED. COMM’NS L.J. 511 (2006).

⁴⁴ Between 1995 and 2012, through the annual farm bill, the federal government distributed \$275 billion to farmers. Nearly eighty percent of those dollars went to the largest ten percent of farms in the country. ENVIRONMENTAL WORKING GROUP, FARM SUBSIDY DATABASE, <https://farm.ewg.org/index.php>.

⁴⁵ An analysis of economic development incentives awarded to companies in fourteen states found that ninety percent of the \$3.2 billion given out between 2007 and 2011 went to large firms. *See* GREG LEROY, ET AL. SHORTCHANGING SMALL BUSINESS: HOW BIG BUSINESSES DOMINATE STATE ECONOMIC DEVELOPMENT INCENTIVES (2015), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/shortchanging.pdf>. Both Walmart and Amazon have been top recipients of these public dollars. Amazon, for example, picked up over \$430 million in subsidies between 2012 and 2014 alone to finance its new distribution centers. *See* Subsidy Tracker, Good Jobs First, <http://www.goodjobsfirst.org/subsidy-tracker>.

⁴⁶ Press Release, U.S. Small Business Administration, Effective Federal Income Tax Rate Faced By Small Businesses Varies by Legal Form of Organization (Apr. 2. 2009),

dominant companies become, the more political muscle they have to defend these policy advantages and push for new ones.

VI. THE CASE FOR COMMITTING TO FAIR AND OPEN MARKETS FOR SMALL BUSINESS

All of this adds up to a political economy that has become inhospitable to independent business. Because their disappearance fits our assumptions about smaller businesses being less competitive and efficient than big firms, we have tended to overlook the significant role of government policy in driving this trend. It is time to take a fresh look at these assumptions. There are at least three compelling reasons, analyzed below, that we should bring a commitment to protecting fair and open markets for small businesses back into antitrust specifically and into policymaking more broadly.

A. Small businesses deliver more value in many sectors

Just as independent pharmacies like Forman Drug are more responsive to the needs and interests of their patients, so too do small businesses in many sectors deliver more overall value and better outcomes. And, importantly, they often achieve these superior results because of their small scale, not in spite of it. Three examples help illustrate this important point.

- Community banking

The first example is the banking sector. A wealth of evidence indicates that community banks⁴⁷ outperform megabanks across several critical measures. These small, local institutions

<https://www.sba.gov/advocacy/effective-federal-income-tax-rate-faced-small-businesses-varies-legal-form-organization>.

⁴⁷ Community banks and credit unions are defined here as those with under \$10 billion in assets in 2010 dollars.

are less expensive, for example. On checking accounts and other services, community banks charge fees that are roughly twenty-five percent lower on average than those charged by big banks.⁴⁸ How do small banks win on price? Not by providing less sophisticated services; most community banks offer mobile banking and other leading-edge features. The main reason for their lower costs is that small banks are not saddled with the top-heavy bureaucracy of large banks. Indeed, the most efficient size for a bank is under \$10 billion in assets, according to the International Monetary Fund's former chief economist, Simon Johnson, citing a raft of scholarship on the subject.⁴⁹ More than three-quarters of U.S. bank assets are now held by banks bigger than this, often much bigger: JP Morgan Chase, for example, is 240 times larger than this optimal size.

Community banks also do a better job of judging and managing risk than megabanks do. In the aftermath of the financial crisis, researchers found that local banks were far less likely to have issued mortgages that borrowers had trouble paying back, and that foreclosure rates were

⁴⁸ U.S. PIRG EDUCATION FUND, *BIG BANKS, BIGGER FEES: A NATIONAL SURVEY OF BANK FEES IN 2012* (2012), http://www.uspirg.org/sites/pirg/files/reports/USPIRG_Big_Banks_Bigger_Fees_0.pdf. See also Stacy Mitchell, *Average Consumer Fees by Size of Financial Institution in 2009*, INSTITUTE FOR LOCAL SELF-RELIANCE (Feb. 22, 2010), <https://ilsr.org/chart-average-consumer-fees-size-financial-institution-2009/>.

⁴⁹ *Implications of the "Volcker Rules" for Financial Stability: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. (2010) (testimony of Simon Johnson, Ronald A. Kurtz Professor of Entrepreneurship, Sloan School of Management, Mass. Inst. of Tech.).

lower in counties with greater community bank presence.⁵⁰ Indeed, local banks consistently post lower default rates across their loan portfolios, despite funding more borrowers that fall outside of big banks' standardized lending formulas.⁵¹

Another critical advantage of local banks is that they devote a larger share of their resources to productive lending. Megabanks, on the other hand, are more engaged in speculative trading that is of little value to the real economy. This difference is particularly striking in the context of small-business lending. Although community banks and credit unions control only twenty-three percent of industry assets, they supply sixty percent of all bank lending to new and growing businesses, a major source of net job growth.⁵² In contrast, the top four banks—Bank of America, Citigroup, JP Morgan Chase, and Wells Fargo—have nearly forty percent of assets but provide just thirteen percent of small business lending.⁵³ As a result, places with a greater

⁵⁰ Kathy Fogel, Raja Kali & Tim Yeager, *Have Community Banks Reduced Home Foreclosure Rates?*, 35 J. BANKING & FIN. 2498 (2011).

⁵¹ Community banks have lower default rates on small business loans, for example. For overall loan charge-off rates by size of bank, see Olivia LaVecchia, *Percentage of Bad Loans by Size of Bank, 1999 to 2014*, INSTITUTE FOR LOCAL SELF-RELIANCE, <https://ilsr.org/percentage-of-bad-loans-by-size-of-bank/>.

⁵² Author's analysis of data in FDIC CALL REPORTS, *supra* note 26; Jason Wiens & Chris Jackson, *The Importance of Young Firms for Economic Growth* (Sept. 14, 2015), <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-importance-of-young-firms-for-economic-growth>.

⁵³ Author's analysis of data in FDIC CALL REPORTS, *supra* note 26. Community banks excel at small-business lending by virtue of being small and local. Their deep knowledge of their communities and face-to-face relationships with borrowers yield a wealth of “soft” information that gives them an edge in judging the credit risk of entrepreneurs. Big banks operating at a national scale often lack this information. See Jeffery W. Gunther & Robert R. Moore, *Small Banks' Competitors Loom Large*, SW.

prevalence of local banks have more startups and stronger economic growth. “Lower banking concentration is associated with greater [rates of business] entry” and “more firms in operation,” the economists Nicola Cetorelli and Philip E. Strahan found in a 2006 study.⁵⁴

Despite the many ways that community banks better fulfill our banking needs, these institutions have nevertheless seen their ranks shrink dramatically, a trend that is largely the result of the dismantling of our once robust antimonopoly policies. During the 1990s, Congress threw out Depression-era banking laws that kept banks focused on meeting the needs of their regions.⁵⁵ At the same time, federal regulators systematically preempted state laws that had

ECON., Jan./Feb. 2004, at 1, *available at*

<https://www.dallasfed.org/assets/documents/research/swe/2004/swe0401b.pdf>.

⁵⁴ Nicola Cetorelli & Philip E. Strahan, *Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets*, 61 J. FIN. 437 (2006). *See also* Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237 (2007) (“Credit access in markets dominated by big banks tends to be lower for small businesses than in markets with a relatively larger share of small banks.”). Other research finds that countries in which small banks constitute a larger share of the financial system experience faster growth and concluded that more funding for small businesses was the likely reason. *See, e.g.*, Allen N. Berger et al., *Further Evidence on the Link between Finance and Growth: An International Analysis of Community Banking and Economic Performance*, 25 J. FIN. SERV. RES. 169 (2004).

⁵⁵ The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 removed many of the restrictions limiting the ability of banks to branch across state lines, which had been put in place by the McFadden Act of 1927. Another crucial change came with the Financial Services Modernization Act of 1999. This law allowed federally insured deposit-taking banks to engage in trading and other investment banking activities, which had been prohibited by the Glass-Steagall Act of 1933.

ensured fair dealing and protected small banks from exclusion, opening the way for big banks to use their control of electronic funds transfer networks and other essential infrastructure to impose excessive fees and other barriers on local financial institutions.⁵⁶ An unprecedented period of mergers and consolidation followed these policy changes. As big banks grew larger, they gained another policy-driven competitive advantage. The fact that government cannot let these sprawling institutions fail provides a kind of taxpayer-funded insurance policy for their investors, which allows big banks to raise capital at costs lower than those available to community banks.⁵⁷ All of this has worked to create a market in which local banks are losing ground, not because they can't compete and offer as much or more value, but because policy has created a rigged game that favors big financial institutions.

- Internet access

⁵⁶ One critical arena involved automated teller machines and the networks on which they operate. Control of these networks is dominated by large banks. By the early 1990s, several states had taken steps to ensure that big banks could not use fees or other terms to block access to these networks or impose excessive costs on small financial institutions. Iowa, for example, established common carriage rules for electronic banking networks and banned ATM surcharges. But at the behest of several national banks, the Office of the Comptroller of Currency, the nation's chief banking regulator, declared that Iowa's law and similar laws in other states were preempted. See Stacy Mitchell, *Rogue Agencies Gut State Banking Laws*, NEW RULES MAG., Sept. 5, 2001, at 4, available at <https://ilsr.org/wp-content/uploads/files/images/nrfall01.pdf>.

⁵⁷ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, LARGE BANK HOLDING COMPANIES: EXPECTATIONS OF GOVERNMENT SUPPORT (July 31, 2014); Santos, João, *Evidence from the Bond Market on Banks' "Too Big To Fail" Subsidy*, FED. RES. BANK OF N.Y. ECON. POL'Y REV., Mar. 2014, at 29.

Another example of a sector in which small companies deliver more value is Internet access. Here again we find a highly concentrated market in which small firms appear to offer superior service and yet struggle to gain a toehold against powerful incumbents. Consider the example of LightTUBE, a fiber-to-the-home broadband network in Tullahoma, Tennessee. It is one of dozens of small citywide networks that provide higher data speeds at lower prices than are charged by Time Warner Cable, Comcast, and AT&T, which together control nearly sixty percent of the national market.⁵⁸ Launched in 2008 by Tullahoma's municipal utility, LightTUBE has repeatedly increased speeds without raising rates.⁵⁹ Today, it offers 30-megabit-per-second (Mbps) service for about \$40 a month, and one-gigabit service for less than \$90 a month.⁶⁰ To get gigabit speeds in Fayetteville, about thirty miles up the road, business customers are paying Time Warner Cable upwards of \$500 per month.⁶¹

⁵⁸ Jon Brodtkin, *Comcast, Time Warner Cable Get 71% of New Internet Subscribers*, ARSTECHNICA, Nov. 23, 2015, at <http://arstechnica.com/business/2015/11/comcast-time-warner-cable-get-71-of-new-internet-subscribers/>.

⁵⁹ Lisa Gonzalez, *Speedy Holiday Gift in Tullahoma*, COMMUNITY BROADBAND NETWORKS (Dec. 12, 2015), <https://muninetworks.org/taxonomy/term/347/all/content/att-groups-lawsuit-wisconsin-fails?page=2> (scroll to blog posting); Lisa Gonzalez, *LightTUBE Lowers the Price of a Gig; Increases Speeds for Free Again*, COMMUNITY BROADBAND NETWORKS (Dec. 17, 2014), <https://muninetworks.org/content/lighttube-lowers-price-gig-increases-speeds-free-again> .

⁶⁰ Tullahoma Utilities Board, *Internet*, <https://www.tub.net/internet> (last visited Mar. 15, 2016).

⁶¹ Allan Holmes, *How Big Telecom Smothers City-Run Broadband*, CENTER FOR PUBLIC INTEGRITY (Aug. 28, 2014), <https://www.publicintegrity.org/2014/08/28/15404/how-big-telecom-smothers-city-run-broadband>.

LightTUBE would like to expand its services beyond the city limits, perhaps eventually to Fayetteville. And, given Tullahoma's much faster job growth, which appears to be linked to its superior broadband, Fayetteville residents and businesses are eager for the option.⁶² But, in order for LightTUBE to do so, the state would need to remove limits on the ability of publicly owned networks to offer services beyond their electrical footprint. (Companies like AT&T and Time Warner Cable are already free to operate across the entire state.) Tullahoma's state senator, Janice Bowling, has introduced several bills that would do just that, but each time, attorneys from AT&T have lobbied aggressively and succeeded in blocking the proposed legislation.⁶³ Elsewhere, big cable and phone companies have gone even further. In twenty states, they have pushed through promonopoly laws that bar or severely restrict local governments and public utilities from launching broadband networks to serve their communities.⁶⁴

- Innovation in multiple sectors

The third example of how small firms deliver more value is the crucial role they play in innovation across many sectors of the economy. When markets become so concentrated that small businesses are marginalized and the entry of startups is impeded, the pace of innovation

⁶² Tullahoma's job growth lagged the state's prior to LightTUBE's launch in 2009. Since then, its job growth has outpaced the state's and Fayetteville's. Tullahoma, with 19,000 people, added almost 3,600 jobs between 2009 and 2014. *Id.* See also Robert Crandall, William Lehr & Robert Litan, *The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data* (Brookings Institution, July 2007).

⁶³ Holmes, *supra* note 61.

⁶⁴ *Id.*

slows. These losses are often invisible: We cannot know what inventive new products and services are missing as a consequence.

Small firms play a crucial role in innovation in two ways. The first is direct. Research has shown that industries populated by small businesses generate new products and processes at a faster clip than those consisting of a few large companies.⁶⁵ When small firms become few and far between, as has happened in many sectors, the conditions are no longer optimal for innovation. In today's highly concentrated markets, even when small businesses do succeed in developing a breakthrough product, dominant corporations can block their path to market. One particularly egregious example involved the small startup Retractable Technologies, which invented a revolutionary syringe that eliminates accidental needle sticks, and then spent eighteen years trying to overcome a monopoly incumbent that offered an inferior product.⁶⁶

The second way that small businesses drive innovation is by creating diverse pathways to market that enable new products to find an audience. Independent retailers, in particular, have long played an outsized role in identifying and introducing new products to consumers. This has been well documented in the book industry, where many beloved books and authors owe their initial success to recommendations by a few local bookstores. More recently, market surveys have found that readers browsing in an independent bookstore "discover" new books at about three times the rate they do while shopping on Amazon.⁶⁷ This same phenomenon is evident in

⁶⁵ Wilfred Dolfsma & Gerben van der Velde, *Industry Innovativeness, Firm Size, and Entrepreneurship: Schumpeter Mark III?*, 24 J. EVOLUTIONARY ECON. 713 (2014).

⁶⁶ Dayen, *supra* note 29.

⁶⁷ See, e.g., Laura Owen, *Why Online Book Discovery is Broken (and How to Fix It)*, GIGAOM (Jan. 17, 2013), <https://gigaom.com/2013/01/17/why-online-book-discovery-is-broken-and-how-to-fix-it/>.

many retail categories. Inventive, award-winning new toys, for example, originate mostly from small toy manufacturers, which in turn depend heavily on independent toy stores to carry these toys and put them in shoppers' hands.⁶⁸

Yet, despite the ways that industries consisting of a wide range of businesses better support innovation, current antitrust doctrine has shown little concern for this type of marketplace diversity. Industries with only a few firms are often deemed to be sufficiently competitive and open to new entrants, even though the experiences of innovators like Retractable Technologies suggest otherwise. Regulators have also discounted the value of diversity in distribution and retailing, opting not to interfere when big retailers extort special treatment from suppliers or engage in predatory loss-leader strategies to the detriment of their small competitors.

The impact of this is particularly striking in the food sector. Even as consumer demand for local and artisanal food soars, high levels of concentration in both production and retailing are stunting small-scale producers.⁶⁹ Craft brewers, for example, may be popular with beer drinkers, but in many states they struggle to secure sufficient shelf space because distribution is tightly controlled by their giant competitors. The world's largest beer producer, Anheuser-Busch InBev, provides lucrative incentives to distributors whose sales volume is made up of at least

⁶⁸ Stacy Mitchell, *The Growth of Internet Retailing: Implications and Strategies for the Specialty Toy Industry* (Am. Specialty Toy Retailing Ass'n, June 2011), <http://ilsr.org/wp-content/uploads/2012/08/ASTRA-white-paper-final.pdf>.

⁶⁹ Diana L. Moss, *Consolidation in Agriculture and Food: Challenges for Competition Enforcement*, CONCURRENTS COMPETITION LAW REVIEW, No. 1-2016, at 10.

ninety-five percent of the beer giant's brands and who limit their offerings from small breweries.⁷⁰

B. Entrepreneurship is essential to broad prosperity and an expansive middle class

A second reason to restore our robust antimonopoly tradition, with its commitment to diverse markets and small-scale enterprise, is that an economy in which power and ownership are broadly distributed also tends to more broadly distribute income. Indeed, after more than thirty years of consolidation premised on the idea that bigger companies would generate more prosperity, most Americans are not in fact better off. Incomes have stagnated for all but the wealthiest, and economic inequality has reached levels not seen since the Gilded Age.⁷¹ Job

⁷⁰ Diane Bartz, *Exclusive: U.S. Probes Allegations AB InBev Seeking to Curb Craft Beer Distribution*, REUTERS (Oct. 12, 2015), <http://www.reuters.com/article/us-abinbev-doj-antitrust-exclusive-idUSKCN0S623R20151012>; Tripp Mickle, *Craft Brewers Take Issue with AB InBev Distribution Plan*, WALL ST. J., Dec. 7, 2015, at <http://www.wsj.com/articles/craft-brewers-take-issue-with-ab-inbev-distribution-plan-1449227668>.

⁷¹ Between 1979 and 2013, wages for the top 1 percent of earners grew 138 percent, while the wages of the bottom 90 percent grew just 15 percent. Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts* (Econ. Pol'y Inst., Jan. 6, 2015), <http://www.epi.org/publication/charting-wage-stagnation/>; Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS, May 8, 2014, at <http://www.nybooks.com/articles/2014/05/08/thomas-piketty-new-gilded-age/>; Estelle Sommeiller & Mark Price, *The Increasingly Unequal States of America: Income Inequality by State, 1917 to 2012* (Econ. Pol'y Inst., Jan. 26, 2015), <http://www.epi.org/publication/income-inequality-by-state-1917-to-2012/>).

creation rates have plummeted, while growing numbers of Americans rely on precarious “on-demand” freelance work rather than full-time, permanent jobs.⁷²

All of these trends can be traced, in part, to concentration. Yet current competition policy does not recognize this. It is hamstrung by its narrow focus on efficiency and its inclination to see people merely as consumers—that is, the economic welfare of individuals measured solely as a function of the prices we pay. But we are also producers of value. How well we are doing as producers—what we are earning as workers and entrepreneurs—has at least as much or more impact on our well-being as how we are faring as consumers.

During the middle decades of the 20th century, when prosperity was relatively broadly distributed across the income spectrum (though still not equitably shared by women and people of color),⁷³ starting a small business or getting a union-wage production job were two of the most effective pathways for moving into the middle class, particularly for immigrants, those unable to afford college, and others on the economic margins. But as regulators have come to favor

⁷² Barry C. Lynn & Phillip Longman, *Who Broke America’s Jobs Machine?*, WASH. MONTHLY, Mar./Apr. 2010, at <http://washingtonmonthly.com/magazine/marchapril-2010/who-broke-americas-jobs-machine-3/>; Noam Scheiber, *Growth in the “Gig Economy” Fuels Work Force Anxieties*, N.Y. TIMES, July 12, 2015, at http://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html?_r=0.

⁷³ From the 1940s to the late 1970s, “workers from the lowest-paid wage earner to the highest-paid CEO experienced similar growth in incomes,” and the gap in income levels between those at the top and bottom ends of the spectrum narrowed. Sommeiller & Price, *supra* note 71.

consolidation, allowing a handful of giant companies to gain control of large swaths of the economy, these avenues have been increasingly cut off.⁷⁴

Consolidation has not only left more people stuck at the bottom; it has also funneled more of the nation's income to those at the very top. Although small businesses tend to support a relatively large number of middle-income positions,⁷⁵ big publicly traded firms distribute much of their revenue to a small class of top executives and shareholders. They are under constant pressure to deliver even more by cutting labor costs in the middle and lower ends of the job hierarchy. In a 2015 study, three economists looked at thirty years of data across fifteen countries and found that, as small and medium-size businesses give way to large companies, the gap between rich and poor expands.⁷⁶ The economists—Holger M. Mueller, Paige P. Ouimet, and Elena Simintzi—explained that, while large companies pay more, on average, than smaller firms,

⁷⁴ Gillian B. White, *Entrepreneurship: Increasingly, the Province of the Wealthy*, ATLANTIC, Sept. 9, 2015, at <http://www.theatlantic.com/business/archive/2015/09/entrepreneurship-increasingly-the-province-of-the-wealthy/404443/>. Increasing concentration has helped drive off-shoring as large, publicly traded firms almost invariably prioritize short-term investor profits over the needs of other stakeholders. See, e.g., Nelson D. Schwartz, *Carrier Workers See Costs, Not Benefits, of Global Trade*, N.Y. TIMES, Mar. 19, 2016, at <http://www.nytimes.com/2016/03/20/business/economy/carrier-workers-see-costs-not-benefits-of-global-trade.html>.

⁷⁵ Consider the difference between a town with forty locally owned retail businesses, each with its own manager-owner earning a middle-class income, and each sourcing services from other local businesses, thus supporting printers, bankers, graphic designers, and so on, and a town with a Walmart supercenter that employs just four managers at midlevel incomes and requires few local services.

⁷⁶ Holger M. Mueller, Paige P. Ouimet & Elena Simintzi, *Wage Inequality and Firm Growth* (LIS Working Paper 632, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2540321.

this disparity is entirely driven by salaries at the top. At big companies, people in low- and medium-skilled positions earn the same or less than their counterparts at smaller firms, while those at the top earn much more. In highly concentrated economies, like the United States, inequality has expanded dramatically, the study found, whereas, in countries where the market share of small and medium-size businesses has held steady, inequality has not grown much.⁷⁷

A decentralized economy populated by many small, locally owned businesses also ensures that economic opportunities extend to every region. As Phillip Longman and Brian S. Feldman have both observed, many American cities, such as St. Louis, were once flourishing economic centers, home to thousands of locally owned companies, including distinct, homegrown industry clusters that could compete nationally.⁷⁸ This local control of business nurtured local talent and fostered thriving regional networks of trade and commerce, as locally

⁷⁷ *Id.* Another recent paper, written by Jason Furman and Peter Orszag, presents data showing that a small number of firms are now earning “supernormal” returns, a possible sign of monopoly power. These outsized returns are being distributed to an elite group of top-level employees and shareholders and, the authors surmise, may be a significant factor fueling inequality. Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality* (Presentation at A Just Society: Centennial Event in Honor of Joseph Stiglitz, Columbia Univ. Oct. 2015), https://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf.

⁷⁸ Brian S. Feldman, *The Real Reason Middle America Should Be Angry*, WASH. MONTHLY, Mar./Apr./May 2016, at <http://washingtonmonthly.com/magazine/maraprmay-2016/the-real-reason-middle-america-should-be-angry/>; Phillip Longman, *Bloom and Bust*, WASH. MONTHLY, Nov./Dec. 2015, at <http://washingtonmonthly.com/magazine/novdec-2015/bloom-and-bust/>.

owned firms sourced goods and services from one another. But, as government embraced consolidation, economic opportunity and market clout shifted to a small number of dominant cities, leaving much of the rest of the country behind. Over time, Longman and Feldman both note, a yawning gap in household income and wealth has opened up between cities like New York and San Francisco, on the one hand, and places like St. Louis and Cleveland, on the other.

Indeed, places that have managed to skirt the consolidation trend, keeping a large share of their economy in the hands of small, locally owned businesses, are more prosperous, with faster income growth and lower poverty rates, according to research by Anil Rupasingha, an economist at the Federal Reserve Bank of Atlanta.⁷⁹ Local ownership also appears to influence business decisions in ways that enhance community resiliency. In the aftermath of Hurricane Katrina, for instance, New Orleans' locally owned businesses reopened much sooner than national chains,

⁷⁹ Anil Rupasingha, *Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-Being?* (Fed. Res. Bank of Atlanta Community and Economic Discussion Paper No. 01-13, 2013), <https://www.frbatlanta.org/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.aspx>. A separate study analyzed 2,953 counties, including both rural and urban places, and found that, after controlling for other factors that influence growth, those with a larger density of small, locally owned businesses experienced greater per capita income growth between 2000 and 2007. The presence of large, nonlocal businesses, meanwhile, had a negative effect on incomes. Stephan Goetz & David Fleming, *Does Local Firm Ownership Matter?*, 25 *ECON. DEV. Q.* 277 (2011).

some of which opted not to return for years, if at all.⁸⁰ Other research has found that, during recessions, small firms lay off fewer employees than large companies do.⁸¹

Consolidation is also impairing the U.S. economy's ability to create jobs. During the expansion of 2000 to 2007, the United States created *one-third* as many jobs as during the previous expansion, in the 1990s.⁸² One likely culprit is the sharp drop-off in the number of startups. "New and young companies are the primary source of job creation in the American economy," observe Jason Wiens and Chris Jackson of the Ewing Marion Kauffman Foundation, citing data showing that recent startups account for nearly all net job growth.⁸³ Today's economy is marked by worrisome structural problems, they write, including "high rates of unemployment and underemployment, and a 'missing generation' of firms"—businesses that would have been created had startup rates kept pace. They add, "These factors are a drag on the economy, sapping dynamism."⁸⁴

C. *Dispersing economic power safeguards democracy*

⁸⁰ Richard Campanella, *Street Survey of Business Reopenings in Post-Katrina New Orleans*, Tulane University, Jan. 2007,

http://richcampanella.com/dev/assets/pdf/study_Campanella%20analysis%20of%20post-Katrina%20business%20reopenings%20in%20New%20Orleans.pdf.

⁸¹ Giuseppe Moscarini & Fabien Postel-Vinay, *The Contribution of Large and Small Employers to Job Creation in Times of High and Low Unemployment*, 102 AM. ECON. REV. 2509 (2012).

⁸² Lynn & Longman, *supra* note 72.

⁸³ Wiens & Jackson, *supra* note 52.

⁸⁴ *Id.*

The third, and arguably most important, reason to reorient competition policy is that small-scale enterprise is compatible with democracy, while concentrated economic power threatens our liberty and our ability to be a self-governing people. This was well understood by the early Americans. The Boston Tea Party, after all, was as much about the power of the East India Co., and the favorable treatment this large multinational received from the British government, as it was about the authority of Parliament.⁸⁵ The conviction that political freedom and democracy can exist only when economic power is decentralized was a guiding principle of U.S. policy for many decades after the Revolution. As Franklin Roosevelt declared in 1938, “The liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself.”⁸⁶

Today, we see widespread evidence of market power translating into political power, enabling dominant companies to subvert democracy. After sifting through more than 1,800 policies enacted since 1981, scholars at Princeton and Northwestern universities concluded that wealthy people and powerful corporate lobbies have far more influence on government than the majority of citizens.⁸⁷ As a result, much of public policy no longer aligns with the views and

⁸⁵ NICK BUNKER, *AN EMPIRE ON THE EDGE: HOW BRITAIN CAME TO FIGHT AMERICA* (2015).

⁸⁶ Franklin D. Roosevelt, Message to Congress on the Concentration of Economic Power (Apr. 29, 1938), *available at* <http://publicpolicy.pepperdine.edu/academics/research/faculty-research/new-deal/roosevelt-speeches/fr042938.htm>.

⁸⁷ Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POLITICS* 564 (2014). *See also* DAVID CALLAHAN & J. MIJIN CHA, *STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES*

preferences of most Americans. “The central point that emerges from our research is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence,” they report.⁸⁸

Although centralizing economic power has a corrosive effect on democracy, diffusing it has the opposite impact. The more broadly economic decisionmaking is distributed, the more say people have over their livelihoods, and the more liberty they have to ply a trade independently, the more effective and engaged they are as citizens. Sociologists report that, all else being equal, communities with more locally owned businesses exhibit a greater ability to solve problems, and have higher levels of civic participation, including voting.⁸⁹ This may arise from any number of factors—the sense of belonging and connection that healthy Main Streets foster, or the leadership of local business owners themselves—but whatever the specific mechanisms, it’s clear that antitrust policy governs more than markets. It also shapes the character of society and the operation of democracy.

ECONOMIC MOBILITY IN AMERICA (2013), <http://www.demos.org/sites/default/files/publications/Demos-Stacked-Deck.pdf>.

⁸⁸ Gilens & Page, *supra* note 87.

⁸⁹ Troy C. Blanchard, Charles Tolbert & Carson Mencken, *The Health and Wealth of U.S. Counties: How the Small Business Environment Impacts Alternative Measures of Development*, 5 CAMBRIDGE J. REGIONS, ECON. & SOC’Y 149 (2011); Troy Blanchard & Todd L. Matthews, *The Configuration of Local Economic Power and Civic Participation in the Global Economy*, 84 SOC. FORCES 2241 (2006); Stephan J. Goetz & Anil Rupasingha, *Walmart and Social Capital*, 88 AM. J. AGRIC. ECON. 1304 (2006).

VII. CASE STUDY: AMAZON, ANTITRUST, AND THE FUTURE OF ENTREPRENEURSHIP

If these three reasons—better economic outcomes, a more equitable distribution of income, and a healthier democracy—build a case for restoring a commitment to small independent business in antitrust policy, perhaps no other company better illustrates the risks of not doing so than Amazon.

Measured by market capitalization, Amazon is now the largest retailer in the country.⁹⁰ It already controls over thirty-five percent of e-commerce in the United States, and its share is projected to grow rapidly in the coming years.⁹¹ Amazon got its start as a book retailer and then moved into other categories, becoming one of the largest sellers of toys, electronics, clothing, and more.⁹² But Amazon is more than a big retailer. Increasingly it is also a manufacturer,

⁹⁰ On April 6, 2016, Amazon's stock was valued at \$280.4 billion. Walmart, the next largest retailer, was valued at \$215.1 billion.

⁹¹ Hough, *supra* note 33.

⁹² Over the last three years, Amazon has doubled its share of the toy market and is now neck and neck with the two category leaders, Target and Walmart. Lutz Muller, *The Western Toy Market*, TOYDIRECTORY (Feb. 1, 2015), <http://www.toydirectory.com/monthly/article.asp?id=5685>. Similarly, in electronics, Amazon has moved from the eighth to the third largest seller since 2009, closing in on leaders Best Buy and Walmart. See Ian King, *Apple Is Getting Beat by Amazon in Retail Gadget Sales, So Why Doesn't It Care About CES?*, BLOOMBERG (Jan. 5, 2015), <http://www.bloomberg.com/news/2015-01-02/amazon-reps-are-taking-over-ces-and-apple-is-practically-nowhere-to-be-found.html>. On groceries: *Amazon is Poised to Chew Up the Food Chain*, BLOOMBERG NEWS, Mar. 17, 2016, <https://www.internetretailer.com/2016/03/17/amazon-poised-chew-food-chain>. On apparel: Marc Bain, *If You Think Amazon Is Huge Now, Wait Until It Becomes America's Biggest Fashion Retailer*, QUARTZ

competing directly with its suppliers, and it has emerged as the dominant platform in online commerce, which means that other sellers now depend on Amazon to reach their customers.

Both Amazon's history in the book industry and its more recent evolution as a platform are instructive for what they reveal about the shortcomings of current antitrust enforcement and the consequences for entrepreneurs, competition, and the public interest.

Today Amazon captures almost half of all new book sales.⁹³ It gained this position in part by using its size and clout to weaken competitors and wring concessions from publishers. It routinely sells books at a loss, for example, which has injured competing booksellers that lack other product lines or deep pockets to fall back on, including chains like Borders, which folded in 2011, and independent stores.⁹⁴ Amazon finances below-cost selling in part by extracting special fees from publishers. Those who decline to pay up face crippling retaliation, including the removal of the "buy" button from their titles, a tactic that can cause a publisher's revenue to

(July 27, 2015), <http://qz.com/464578/if-you-think-amazon-is-huge-now-wait-until-it-becomes-americas-biggest-fashion-retailer/>.

⁹³ Amazon sells sixty-five percent of new books sold online, and online sales now account for sixty-seven percent of all book sales, up from twenty-eight percent in 2010. *See Amazon Dominance at Monopoly Level Say Authors*, BOOKSHED (Jan. 28, 2016), <http://www.thebookshed.co.uk/amazon-dominance-at-monopoly-level-say-authors/>.

⁹⁴ For its first twelve years in business, Amazon reported a cumulative loss of over \$700 million. Slim to negative profit margins have continued in recent years, even as the company's stock value has soared. In 2014, Amazon posted a loss of \$241 million. Amazon.com, Inc., Annual Report (Form 10-K), at 17 (Jan. 29, 2015). For a discussion of Amazon's pricing tactics in the book industry, see Ken Auletta, *Paper Trail*, NEW YORKER, June 25, 2015, at <http://www.newyorker.com/magazine/2012/06/25/paper-trail-2>.

plummet by forty percent or more.⁹⁵ Amazon also harms competition by publishing its own books and promoting these titles over those from other publishers.⁹⁶

By laying waste to a once diverse marketplace, Amazon has reduced opportunities for new ideas to enter the public sphere. Publishers have responded to Amazon's financial squeeze by cutting their investment in new books and authors and focusing more on books by established authors.⁹⁷ Those debut authors who do make it into print have a more difficult time finding

⁹⁵ In 2014, after the publisher Hachette refused Amazon's demand for additional fee payments, Amazon stopped taking preorders, delayed shipping, and eliminated discounts on Hachette's books. It also modified its search engine to steer customers away from Hachette titles. These tactics drove down sales by fifty to ninety percent. Letter from Authors United to William J. Baer, Ass't Attorney General, U.S. DOJ (July 14, 2015), *available at* <http://www.nytimes.com/interactive/2015/07/13/business/document-amazon-book-practices.html>. Amazon has similarly suspended sales of books published by Macmillan and Melville House during contract disputes. Another effort to extract fees targeted small publishers and was known internally as the Gazelle Project after Amazon's CEO Jeff Bezos said "that Amazon should approach these small publishers the way a cheetah would pursue a sickly gazelle." BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 243 (2013).

⁹⁶ Jane Litte, *Has Everyone Conceded the U.S. Ebook Market to Amazon?*, DEAR AUTHOR (Mar. 9, 2014), <http://dearauthor.com/ebooks/has-everyone-conceded-the-us-ebook-market-to-amazon/>. Authors who agree to publish and sell their books exclusively through Amazon receive even better terms and placement. Saabira Chaudhuri, *Amazon's Kindle-Exclusive Books Surge Past 100 Million Mark*, WALL ST. J., Aug. 28, 2012, at <http://blogs.wsj.com/digits/2012/08/28/amazons-kindle-exclusive-books-surge-past-100-million-mark/>.

⁹⁷ According to the Authors Guild, average revenue for authors has fallen by about one-quarter since 2009. Letter from Authors United, *supra* note 95.

readers. Even though customers can buy virtually any title from Amazon, the more important question is how they learn about a book in the first place. Even with its large market share, Amazon accounts for only seven percent of new book discovery, while physical bookstores account for twenty percent.⁹⁸

Despite its effect on competition, Amazon has drawn little scrutiny from antitrust enforcers, because it offers low prices. In fact, when the DOJ did opt to intervene in the book industry, in 2012, it acted to *strengthen* Amazon's position. Two years before, in 2010, Apple had entered the market for e-books with the release of the iPad. At the time, Amazon had about ninety percent of the market for e-books.⁹⁹ With Apple now entering the market, several publishers switched to a commission pricing model for e-books, under which they set the retail prices of their books and offered Amazon, Apple, and other sellers a fixed commission. A similar approach has long been used for books in Germany, with procompetitive results, including more publishers and titles published per capita than in the United States, as well as lower prices.¹⁰⁰

⁹⁸ See Owen, *supra* note 67.

⁹⁹ George Packer, *Cheap Words*, NEW YORKER, Feb. 17, 2014, at <http://www.newyorker.com/magazine/2014/02/17/cheap-words>.

¹⁰⁰ Michael Naumann, *How Germany Keeps Amazon at Bay and Literary Culture Alive*, NATION, May 29, 2012, at <https://www.thenation.com/article/how-germany-keeps-amazon-bay-and-literary-culture-alive/> (“In Germany, approximately 90,000 new books are published each year, which per capita is about four times as many as in the United States Additionally, average book prices in Germany are the lowest in Europe, with the possible exception of Iceland and Finland.”). See also Stacy Mitchell, *Why Publishers, Not Amazon, Should Set Book Prices*, INSTITUTE FOR LOCAL SELF-RELIANCE (June 23, 2011), <https://ilsr.org/why-publishers-not-amazon-should-set-book-prices/>.

After publishers adopted commission pricing in the United States, Amazon’s share of e-book sales fell to about sixty-five percent.¹⁰¹ In 2012, the DOJ filed suit, accusing the publishers and Apple of colluding—over an expensive dinner, no less—to put the new pricing model in place.¹⁰² Perhaps they did. But what does collusion mean, one wonders, when an internal meeting at Amazon entails as much market power assembled in one room as the heads of five publishing houses gathered for dinner? As part of the settlements it reached with the publishers, the DOJ suspended their use of the commission pricing model, allowing Amazon to once again sell e-books at a loss and thereby protect its market position from new competitors. Many industry observers were stunned by the DOJ’s actions. “Imagine the shock when the bullet aimed at threats to competition went whizzing by Amazon—which not long ago had a 90 percent stranglehold on e-books—and instead, struck five of the six biggest publishers and Apple, a minor player in the realm of books,” quipped *New York Times* media critic David Carr.¹⁰³

Unchecked by regulators, Amazon has used many of these same tactics to expand into other products and, over the last few years, has emerged as a powerful gatekeeper to the online market. Consider these remarkable figures: In 2009, eighteen percent of people looking to buy something online went directly to Amazon to search for the product. Most of the rest relied on

¹⁰¹ Packer, *supra* note 99.

¹⁰² Ylan Q. Mui and Hayley Tsukayama, *Justice Department Sues Apple, Publishers over E-book Prices*, WASH. POST, April 11, 2012, at https://www.washingtonpost.com/business/technology/justice-department-files-suit-against-apple-publishers-report-says/2012/04/11/gIQAzyXSAT_story.html.

¹⁰³ David Carr, *Book Publishing’s Real Nemesis*, N.Y. TIMES, Apr. 15, 2012, at http://www.nytimes.com/2012/04/16/business/media/amazon-low-prices-disguise-a-high-cost.html?_r=1&ref=books.

search engines, which display results from an array of companies.¹⁰⁴ Today, just one-third of shoppers begin at a search engine. Almost half start at Amazon.¹⁰⁵ And that number will almost certainly soar as Amazon expands its Prime membership.¹⁰⁶

The practical effect of this is that many competing sellers—including other Internet retailers, brick-and-mortar stores that sell online, and manufacturers—are facing a Faustian bargain. Either they continue to hang their shingles out on a road less and less traveled, or they give in and become, as tens of thousands already have, third-party sellers on Amazon’s website.¹⁰⁷

Relying on your biggest competitor for access to the market is precarious, to say the least. Amazon controls a large component of its sellers’ costs through the fees it charges them to use

¹⁰⁴ Lauren Indvik, *Amazon Beating Google as First Stop for Shoppers*, MASHABLE, July 26, 2012, <http://mashable.com/2012/07/26/amazon-beating-google-shopping/#vkZF2A9Gskqm>.

¹⁰⁵ Jason Del Rey, *Amazon Is Absolutely Eviscerating Other Retailers Online, New Survey Shows*, CNBC.com, Oct. 6, 2015, at <http://www.cnbc.com/2015/10/06/amazon-is-absolutely-eviscerating-other-retailers-online-new-survey-shows.html>.

¹⁰⁶ Being a Prime member greatly reduces the likelihood someone will buy from another retailer, and less than one percent of Prime shoppers compare prices at other sites while shopping on Amazon. See Jillian D’Onfro, *These New Stats about Amazon Should Make Google Very Nervous*, BUS. INSIDER, April 20, 2015, <http://www.businessinsider.com/macquarie-amazon-prime-estimates-2015-4>. In his book on Amazon, Brad Stone interviews a former company executive, who said this about Prime: “It was never about the seventy-nine dollars. It was really about changing people’s mentality so they wouldn’t shop anywhere else.” STONE, *supra* note 95, at 187.

¹⁰⁷ Items offered by third-party sellers account for over forty percent of everything the company sells. Amazon.com, Inc., *supra* note 94.

its site. It also effectively sets a ceiling on the price at which they can sell their wares, because it can bring the same items into its own inventory and thereby set the going price. If it lowers the price of an item below cost, Amazon forces a seller to either lose money or forgo sales. Even the savviest entrepreneurs cannot defend against such tactics.¹⁰⁸ Indeed, the more astute the seller—the more expertise she has about her industry, products, and customers—the more value she delivers to Amazon, which not only acquires her knowledge by monitoring her inventory and sales, but owns all of her customer data.

For businesses that manage to bypass this juggernaut and find their own way to market, Amazon has a track record of using its size to crush them and take their business. When the upstart firm behind Diapers.com emerged as a vigorous competitor in diaper sales, Amazon offered to buy the company and then, when the founders declined to sell, slashed its diaper prices, offering Pampers and Huggies at prices below cost. According to reporting by Brad

¹⁰⁸ Greg Bensinger, *Competing with Amazon on Amazon: Small Retailers Need the Site to Reach Millions of Shoppers but Some Say Behemoth Swoops In on Hits*, WALL ST. J., June 27, 2012, at <http://www.wsj.com/articles/SB10001424052702304441404577482902055882264>; Amy Martinez, *Amazon Sellers Complain of Tied-Up Payments, Account Shutdowns*, SEATTLE TIMES, Nov. 17, 2012, at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjG2risg4LOAhUIbz4KHZmnC3gQFgglMAA&url=http%3A%2F%2Fwww.seattletimes.com%2Fbusiness%2Famazon-sellers-complain-of-tied-up-payments-account-shutdowns%2F&usg=AFQjCNEMSfryd0K6oc0eoMiARh1e0Q-NYQ&cad=rja>; Barney Jopson, *From Warehouse to Powerhouse: Once Just a Bookseller, the Company Provides Vital Logistics for Many but It Seems Set to Face Sterner Political Scrutiny*, FIN. TIMES, July 8, 2012, at <https://next.ft.com/content/cc3a0eee-c1de-11e1-8e7c-00144feabdc0>.

Stone, Amazon was prepared to lose \$100 million over three months in its bid to compel the company to sell.¹⁰⁹ It succeeded. Although Diapers.com and its sister sites, like Soap.com, remain standalone online stores with their own branding, they are now owned by Amazon.

Amazon thus embodies a new kind of economic power, made possible by its ability to leverage its vast digital network and the data that network generates. In other words, Amazon has gone from being one of the market's leading retailers to having outsized influence over the terms that govern the market itself. Nor is Amazon's ambition limited to goods. It extends to such essential infrastructure as cloud computing, media streaming, payments processing, and, most recently, freight shipping and logistics.¹¹⁰

Unless antitrust policy begins to consider more than efficiency and short-term prices, the great technological leap offered by the advent of Internet retailing will not produce a flourishing market open to all entrepreneurs. Instead this new world of commerce will largely be under the domain of a single company that has the power to dictate terms to everyone else.

¹⁰⁹ STONE, *supra* note 95, at 298.

¹¹⁰ Ari Levy, *Amazon's Cloud Threatens to Become Tech's Wal-Mart*, CNBC.com, Apr. 13, 2016, <http://www.cnbc.com/2016/04/13/amazons-cloud-threatens-to-become-techs-wal-mart.html>; Kim Komando, *Five Amazon Prime Perks You Don't Want to Miss*, USA TODAY, Apr. 15, 2016, at <http://www.usatoday.com/story/tech/columnist/komando/2016/04/15/five-amazon-prime-perks-you-dont-want-miss/82932624/>; James Rufus Koren, *Amazon takes on PayPal with expanded payments-processing service*, L.A. TIMES, Apr. 4, 2016, <http://www.latimes.com/business/la-fi-amazon-payments-20160404-story.html>; Elizabeth Weise, *Amazon Leases 20 Planes, Starts Air Freight Service*, USA TODAY, Mar. 9, 2016, at <http://www.usatoday.com/story/tech/news/2016/03/09/amazon-leases-20-planes-starts-air-freight-service/81526238/>.

VIII. CONCLUSION: RESTORING COMPETITION AND ENTREPRENEURSHIP

As dismal as the current trends may seem, it's worth remembering that we have been here before. In the late 19th and early 20th centuries, the U.S. economy was highly concentrated, with monopolies in oil, railroads, and other sectors impeding competition. Reformers rose to the occasion, enacting policies to break up concentrated power, ensure a level playing field for small businesses, and protect the public interest. These laws and the principles they embody are still relevant. In fact, with a fresh look at how we enforce them, these existing policies can go a long way toward addressing today's concentrated power and restoring competition and entrepreneurship. In particular, we should:

- Reinstating the broader set of aims that once guided antitrust, balancing efficiency goals with other objectives, including a commitment to open markets in which small businesses have a fair opportunity to compete.
- Updating the merger guidelines to give greater weight to market structure and the impact of consolidation on new entrants and small-scale entrepreneurs.
- Doing more to address market power outside of merger reviews by taking more enforcement actions against companies that unilaterally harm competition.
- Taking a harder line against vertical integration, which can enable a dominant company to use its control of another part of the supply chain to exclude competitors, as the examples above in pharmacy, beer, and online retailing illustrate.
- Dusting off the Robinson-Patman Act and once again putting it to use to address the harmful effects of price discrimination on entrepreneurs that lack market power.

- Undertake a deep investigation of digital platforms like Amazon, with an eye toward extending common carriage rules to their operations, as policymakers did with utilities and railroads a century ago.

We should also remember that the tools for promoting competition are not limited to antitrust policy, but extend to other areas, such as banking regulation. Moreover, there are many relatively easy and immediate steps Congress could take to better protect entrepreneurs from monopoly power. Visa and MasterCard, for example, impose exorbitant fees on small businesses in the United States, but in much of Europe regulations cap what they can charge.¹¹¹

Today our modern Gilded Age offers fewer opportunities for people to start a business and succeed than at any time in the nation's recent memory. That fact has broad consequences for the character of our society and the well-being of our economy and democracy. Fortunately, we can remedy this by drawing on our own rich history of antimonopoly policy, which once had fairness and open markets for entrepreneurs as a central aim.

¹¹¹ Ron Graff Jr., *Opinion: Credit-Card Swipe Fees Still Hurting Ohio Grocers*, CLEVELAND.COM (Feb. 17, 2016), http://www.cleveland.com/opinion/index.ssf/2016/02/credit-card_swipe_fee_costs_a.html; Claire Tsosie, *Credit Card Fee You Didn't Know Existed—And Why It Matters*, USA TODAY, Mar. 26, 2016, <http://www.usatoday.com/story/money/personalfinance/2016/03/26/credit-deit-card-fees-rewards/82292680/>; Stacy Mitchell, *Soaring Credit Card Transaction Fees Squeeze Independent Businesses*, INSTITUTE FOR LOCAL SELF-RELIANCE, May 5, 2009, <https://ilsr.org/soaring-credit-card-transaction-fees-squeeze-independent-businesses/>.