AAI AMERICAN ANTITRUST INSTITUTE

COUNTERVAILING POWER:

A COMPREHENSIVE ASSESSMENT OF A PERSISTENT BUT TROUBLING IDEA

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I. OVERVIEW

Lax merger policy and other forces have resulted not only in highly concentrated markets, but in extreme imbalances in bargaining leverage. Although antitrust and competition policymakers and thinkers tend to focus disproportionately on market concentration, interest in the problems that imbalances in bargaining leverage have caused consumers, workers, and small businesses has increased. Significantly, a growing movement has sought to use antitrust law as a tool for combatting those imbalances and inequality generally. Academic and legislative proposals aimed at creating antitrust exemptions for small entities that bargain with behemoths have grown louder and more numerous.

Politically and socially, it is becoming increasingly apparent that extreme inequalities in bargaining leverage are widely considered to be undesirable and problematic. What is less apparent, and what this white paper addresses, is how and to what extent antitrust law and policy can and should be used to address imbalances in bargaining leverage.

In particular, this white paper provides a comprehensive assessment of countervailing power as a possible solution to market concentration and market power. At a high level, the theory of countervailing power is that where a firm at one level of a supply chain enjoys market power, entities that transact with (and thus negotiate with) that firm should be allowed to either merge or collaborate, even if doing so would otherwise be anticompetitive or illegal, because doing so will enable them to more effectively bargain with the powerful counterparty.

While this argument may seem facially appealing, it is also deeply concerning. The arguments in favor of countervailing power as a response to increasing and seemingly intractable market concentration are not driven by methodological, fact-based analysis; indeed, the economic evidence strongly suggests that countervailing market power, particularly among intermediaries in the supply chain, leads to increased prices, inefficiency, and worse outcomes for consumers in most cases.

Moreover, the adverse legal and policy consequences of adapting antitrust laws and competition policy to recognize countervailing market power as a defense to market concentration are profound and may be underappreciated. What is often overlooked is that concentrated firms at the two levels do not have the incentive to charge competitive prices. To the contrary, after the buying firms are permitted to join together to countervail the power of the sellers, the now-concentrated firms at the two levels have

> *"Simply put, countervailing power is not a competition-based response to market power. And, it is a response that risks significant additional harm to competition, consumers, and workers."*

the *mutual incentive* to exclude rivals and charge higher monopoly prices to consumers.[1] While countervailing market power may seem like a quick fix to the problem of increased concentration, in-depth analysis suggests it is a cure worse than the disease, at least insofar as competition remains the goal of antitrust. Simply put, countervailing power is not a competition-based response to market power. And, it is a response that risks significant additional harm to competition, consumers, and workers.

Bargaining power and imbalances in bargaining power have long been a focus of the American Antitrust Institute's (AAI) work. We have previously convened colloquia to study and analyze bargaining power issues, as they are so closely intertwined with competition. To the extent significant proposals based in notions of countervailing power have been put forth, AAI has made a point to carefully yet forcefully oppose them and articulate why countervailing power is an inadequate solution to increased market concentration and is unlikely to benefit consumers. Yet, because appeals to countervailing power persist, a more fulsome discussion of this topic is warranted.

> *"Interestingly, calls for competition policy to recognize the need for countervailing market power have come from both large corporate interests and from small players in highly atomized industries, and from a wide range of academics and policy makers whose views rarely align."*

Interestingly, calls for competition policy to recognize the need for countervailing market power have come from both large corporate interests and from small players in highly atomized industries, and from a wide range of academics and policy makers whose views rarely align. Arguments and proposals rooted in countervailing power have been put forth, in one variation or another, by players ranging from Apple to Uber drivers, and from organizations as diverse as the American Hospital Association and the Open Markets Institute. Appeals to countervailing power have likewise been made as of late in a variety of contexts—as a defense from alleged cartelists and alleged monopolists, as an animating force for legislative exceptions from the Sherman Act for certain industries or types of joint ventures, and for those advocating for the break-up of dominant companies in a range of industries.

This AAI white paper offers a comprehensive analysis of the concept of countervailing market power. It synthesizes current economic and legal analysis in this area and then explores the policy implications that flow from them. The white paper begins by explicating the economic theory related to countervailing power and surveys current research on point. It then assesses how countervailing power arguments are currently treated under U.S. antitrust law. The white paper then discusses the resurgence in calls

[1] Similarly, after input sellers are permitted to collaborate or merge to countervail the power of their buyers, they have the incentive to charge low monopsony prices to their workers or their own suppliers.

for antitrust enforcers and legislators to credit countervailing market power arguments, and connects them with the history of countervailing power in U.S. legislation. Finally, we examine why antitrust enforcers and policy makers should continue to resist calls to recognize countervailing market power as a defense to anticompetitive conduct or a basis for relaxing long-standing antitrust rules generally or for particular industries. The white paper concludes by identifying alternative, competition-based policy solutions to address imbalances in bargaining leverage.

II. THE ECONOMICS OF COUNTERVAILING POWER

Any sensible proposal to work changes in markets through countervailing power must account for the underlying economics. Countervailing power concerns bargaining leverage.[2] Although market power is often discussed as a company's relationship to its horizontal competitors, market power operates on horizontal and vertical dimensions.

Countervailing power primarily concerns the vertical aspects of market power, namely a company's bargaining leverage with respect to its customers or its suppliers. Where companies confront a powerful buyer or sell into a concentrated market or, conversely, are dependent on a single large supplier or purchase inputs from a highly concentrated market, the companies are subject to the superior bargaining leverage of their counterpart(s). By increasing their own bargaining leverage, the theory goes, the companies facing the powerful counterparty can countervail the counterparty's market power and mitigate the effects of this imbalance in bargaining leverage. In this sense, countervailing power is an inherently vertical concept.

But, bargaining leverage and countervailing power are also inseparable from the horizontal aspects of market power. Bargaining leverage is a form of market power,[3] and it derives from the *relative* horizontal market power that each of the two parties to a bargain enjoys in its respective market. Where two parties to a bargain have comparable levels of horizontal market power in their respective markets, neither will have significant bargaining leverage advantage over the other.[4] Where one party to the vertical bargain has market power in its horizontal market and the other does not, that imbalance gives the party with horizontal market power bargaining leverage over the party without market power.[5] And, when small players with lots of horizontal competitors negotiate with a monopolist, the monopolist has the ultimate bargaining leverage. Indeed, in this scenario no bargaining takes place at all and the monopolist simply imposes the monopoly price and non-price terms.

[2] C. Scott Hemphill & Nancy L. Rose, Comment, *Mergers that Harm Sellers*, 127 Yale L.J. 2078, 2093–94 (2018).

[3] Aviv Nevo, Dep't of Justice, Antitrust Div., Mergers that Increase Bargaining Leverage, Remarks as Prepared for the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries (Jan. 22, 2014), https://www.justice.gov/atr/file/517781/download ("[B]argaining leverage is a source of market power and a merger that involves an increase in bargaining leverage is a form of lessening of competition.").

[4] This assumes neither company is vertically integrated. Where horizontal competitors also own input suppliers or downstream distributors, the bargaining dynamics and leverage analysis is more complex. *See, e.g.*, Steven C. Salop, *The AT&T/Time Warner merger: How Judge Leon Garbled Professor Nash*, 6 J. Antitrust Enforcement 459 (2018).

[5] Robert L. Steiner, *Vertical Competition, Horizontal Competition, and Market Power,* 53 Antitrust Bull. 251, 252 (2008) (discussing correlation between market/buyer power and bargaining power); *see also* Hemphill & Rose, *supra* note 2, at 2081 ("When buyers and sellers each have some market power—for example, a health insurer facing a hospital—prices may be set through a negotiation process. As we explain, economists have developed a rich theoretical and empirical literature to describe this bargaining process and the determinants of its outcomes. These models suggest that the agreed upon price is a function, in part, of each side's ability to inflict an unattractive 'outside option' on the other if bargaining breaks down. A horizontal merger enables the merging parties to inflict a worse outside option—that is the source of the increased leverage—and thus alter the prices paid. Here, the principal effect of reduced competition may be a wealth transfer, with no necessary immediate effect on quantity transacted.").

Countervailing power reduces *the disparity* in relative bargaining leverage that the two parties to a bargain experience. The primary means by which it does so is to increase the horizontal market power of the company with less leverage to balance out the market power of the company with more leverage. The result is that efforts to assert countervailing power decrease the imbalance in bargaining leverage (a vertical effect) by increasing horizontal market power (a horizontal effect). The interaction between these two dynamics determines the effect of countervailing power on downstream and upstream price and non-price terms of trade.[6]

For example, take the case of a group of manufacturers who buy a necessary input for their products from a monopolist but sell their finished products into a competitive downstream market. In this scenario, assuming the standard downward sloping demand curve, the monopolistic supplier will opt to sell fewer inputs at inflated prices, leading to deadweight loss and monopoly profits for the supplier. To mitigate the effect of the upstream monopoly, the manufacturers might seek to form a collective buying agreement. If the collective buying agreement is successful and includes all of the buyers of the input, then the buyer power of the collective will countervail the seller power of the monopolistic supplier, and the supplier's bargaining leverage over the manufacturers will be neutralized.

> *"The economic result from a cooperative formed to countervail market power is bilateral monopoly, which does not augur well for consumers or, generally, efficiency."*

The economic result in this scenario will be a bilateral monopoly, which does not augur well for consumers or, generally, efficiency. Although economic theory allows that a bilateral monopoly could lead the parties to transact the competitive quantity of goods, in practice it rarely does so.[7] Also, even if the exercise of countervailing power would lead to competitive levels of output, both theory and practice suggest it will have an uncertain effect on the price of the input.

Moreover, in the above scenario, even if countervailing power does decrease the price of the input to a more efficient level, there is little reason to expect that decrease will be passed on in the downstream market. In a recent study, Dranove, et al., concluded that mergers between intermediaries may well cause prices to go up, even if they equalize bargaining power with powerful sellers.[8] The authors found that pricing benefits are only passed on to consumers under highly specific circumstances that rarely obtain in the real world: namely, when the upstream market is highly concentrated, the downstream market is highly competitive, and the two merging parties (or, in this case, cooperating

[6] *See* Steiner, *supra* note 5, at 256-58 (discussing the close relationship between the horizontal and vertical aspects of market power).

[7] *See generally*, Jonathan B. Baker, Joseph Farrell, & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 Antitrust L.J. 637, 640-41 (2008) (bilateral monopoly generally results in less than the efficient quantity of goods being transacted, even absent vertical collusion and independent of the downstream market).

[8] David Dranove, Dov Rothman, & David Toniatti, *Up or Down? The Price Effects of Mergers of Intermediaries*, 82 Antitrust L.J. 643, 664 (2019).

parties) are not close competitors competing for the same customers.[9] Moreover, any potential benefits to consumers must be heavily discounted by the very real risk that such cooperation or merger will facilitate vertical coordination rather than vigorous bargaining between the various levels of the supply chain.

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This last point should not be minimized. Bilateral monopoly does not just pose a risk of vertical coordination, it very nearly guarantees vertical coordination will occur. The reason is straightforward: vertical coordination in this context is profitable. Just as a monopolist at one level of a market will set a monopoly price to maximize profits, two monopolists at adjacent levels in a market will quickly realize their interests align in imposing a monopoly price on the downstream market and dividing the resulting monopoly profits amongst themselves.[10] Moreover, because this outcome can be achieved without a tacit or express agreement, it is perfectly legal under the Sherman Act. Accordingly, bilateral monopolists have every incentive and ability to impose monopoly prices on the downstream market.[11]

In sum, countervailing power—whether exercised by buyers or sellers—does not reliably drive down prices for consumers and cannot even be relied on to bring intermediate prices closer to competitive levels.

What countervailing power does reliably do, is to improve the outcomes for the parties allowed to exercise it. As discussed in the following section, it is this feature of the economics of countervailing power that has been behind the instances where lawmakers have instituted legislative solutions rooted in countervailing power. Antitrust exemptions, such as labor unions and agricultural cooperatives, for example, represent a policy decision to bolster the bargaining leverage of workers and family farms because we, as a society, determined that it is in our best interest to prioritize the living standards of these groups over competition in affected labor and agricultural markets. Allowing these groups to exercise countervailing power is viewed as a means toward that end. However,

[9] *Id.* at 644 (the authors conclude that a merger between intermediaries will lead to lower prices for consumers only if all of the following conditions apply: (1) "the upstream input market must not be very competitive and the downstream market must be highly competitive"; (2) "the merging intermediaries must not be close competitors"; and (3) "for the consumers who would substitute from one merging intermediary to the other merging intermediary if the consumer's preferred intermediary were not available, the merging intermediaries and non-merging intermediaries must not be close competitors for these consumers." Moreover, they find that "[i]t is unlikely that all three of these conditions will be satisfied in many markets."). These results are also consistent with rigorous industry-specific studies. For example, in the health care sector, some studies show that higher concentration in commercial health insurance markets correlates with lower prices for hospital services. Asako S. Moriya, William B. Vogt, & Martin Gaynor, *Hospital Prices and Market Structure in the Hospital and Insurance Industries*, 5 Health Econ., Pol'y & L. 459 (2010); Erin E. Trish & Bradley J. Herring, *How Do Health Insurer Market Concentration and Bargaining Power with Hospitals Affect Health Insurance Premiums?*, 42 J. Health Econ. 104 (2015); Glenn A. Melnick et al., *The Increased Concentration of Health Plan Markets Can Benefit Consumers through Lower Hospital Prices*, 30 Health Aff. 1728 (2011). Yet, studies also show that patients' premiums have increased despite reductions in insurers' provider costs. Leemore S. Dafny, Issue Brief, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience* 1(2015), http://www.commonwealthfund.org/~/media/files/publications/issue-brief/2015/nov/1845_dafny_impact_hlt_ins_industry_consolidation_ib.pdf; *Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask? Before the S. Comm. on the Judiciary*, 114th Cong. 5, 9 (2015) (testimony of Leemore Dafny), http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf ("If past is prologue, insurance consolidation will tend to lower payments to healthcare providers but those lower payments will not be passed on to consumers. On the contrary, consumers can expect higher insurance premiums."); Richard Scheffler & Daniel R. Arnold, *Insurer Market Power Lowers Prices in Numerous Concentrated Provider Markets*, 36 Health Aff. 1539 (2017). Likewise, studies in the retailer sector have shown that countervailing power only reduces prices to consumers where the downstream market remains competitive. Zhiqi Chen, *Dominant Retailers and the Countervailing Power Hypothesis*, 34 RAND J. of Econ. 4, at 612 (Winter 2003). The author of those studies concluded that his model "shows the importance of competition and the limitation of countervailing power." *Id.* at 614. Earlier work in the retail sector showed the same result. *See, e.g.*, Paul W. Dobson & Michael Waterson, *Countervailing Power and Consumer Prices*, 107 Econ. J. 418, 428–29 (finding that countervailing power by retailers only reduced consumer prices when retailers had very close substitutes and the supplier refrained from vertical constraints).

[10] *See* Baker, et al., *supra* note 7, at 640 (discussing the prevalence of above-cost pricing in bilateral monopoly-type settings).

[11] Of course, if consumers, collectively, are one of the "monopolists" in a bilateral monopoly scenario, bilateral monopoly can benefit consumers. But, end consumers almost never act in a unitary way such that they hold market power. The notable exception to this is the federal government acting on consumers' behalf.

as recent economic work on countervailing power demonstrates, it would be a mistake to assume that allowing countervailing power to be deployed by intermediaries—such as news organizations or health insurers—would do anything beyond enriching those intermediaries. Enriching those intermediaries may well be the point of some of the arguments and proposals related to countervailing power, but because the proposals are often put forward as promoting competition or consumer welfare, the true economic impact of countervailing power warrants careful examination whatever the stated intention.

III. THE LAW ON COUNTERVAILING POWER

Antitrust law has been and remains rightly and deeply skeptical of countervailing power as a justification for otherwise anticompetitive conduct. Courts generally do not recognize it as a permitted defense in antitrust cases, and the agencies do not endorse it.

THE COURTS. The Supreme Court has never expressly accepted countervailing power as a defense in an antitrust case, and lower courts likewise have been skeptical.[12] In cartel cases in particular, the few defendants that have been brash enough to assert a countervailing power defense have seen it rejected. Apple, for example, raised a countervailing power argument in the *eBooks* case. Although the argument was surprisingly well received by a wide swath of the public, the majority of the appellate court roundly dismissed Apple's argument that the conspiracy should escape per se condemnation because "the presence of a strong competitor—[Amazon]—justifies a horizontal price conspiracy."[13] The majority characterized that argument as "endors[ing] a concept of marketplace vigilantism that is wholly foreign to the antitrust laws."[14] It went on: "Plainly, competition is not served by permitting a market entrant to *eliminate price competition*, as a condition of entry."[15]

In *California ex rel. Harris v. Safeway, Inc.*, the majority reached a decision without addressing defendants' argument that their cartel agreement would generate efficiencies by providing them increased bargaining leverage to drive down labor costs.[16] The defendants, a collection of grocery stores, had entered into a revenue sharing agreement

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[12] *See* Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 Antitrust L.J. 195, 220 (2001) (critically noting this fact).

[13] United States v. Apple, Inc., 791 F.3d 290, 298 (2d Cir. 2015).

[14] *Id.*

[15] *Id.* One judge, in a troubling dissent, did embrace Apple's argument and would have held that Apple's conduct was "unambiguously and overwhelmingly procompetitive" because the countervailing power bestowed on the publishers by the conspiracy would enable Apple to enter the eBooks market as a competitor to Amazon. *Id.* at 341–42 (Jacobs, J., dissenting).

[16] 651 F.3d 1118, 1138 n.17 (9th Cir. 2011) ("The grocers argue that the RSP has procompetitive benefits in the form of lower prices for consumers as a result of the grocers' ability to negotiate a more favorable contract on labor costs. Because California has not met its burden to show that the RSP is obviously anticompetitive, we need not address the grocers' procompetitive justifications.")

to strengthen their bargaining position during a labor strike. They argued that, to the extent the agreement enabled them to prevail in the strike, it would reduce their cost of labor (by strengthening their bargaining position vis-à-vis the labor union, a monopoly seller of labor), which would allow them to compete more effectively in the grocery market. Thus, they asserted, what appeared to be straightforward collusion was actually a procompetitive attempt to combat a monopoly labor supplier. The case was ultimately decided on other grounds, but the dissent strongly condemned defendants' countervailing power argument.[17]

Some have cited to the courts' acceptance of cooperative buying schemes as a limited endorsement of countervailing power as a defense to collusive conduct, but the courts have generally limited their endorsement of cooperative buying (and selling) schemes to situations where cognizable efficiencies of the scheme derive from reduced transaction costs and not from countervailing bargaining leverage. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*[18] and *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*[19] are the most notable examples. In *Appalachian Coals, Inc. v. United States*, the Court included language that could be read to endorse a countervailing power rationale for cartel conduct,[20] but the Court effectively rejected that reading less than a decade later in *United States v. Socony-Vacuum Oil Co*.[21]

Countervailing power arguments in merger cases, which have been raised primarily in health care and pharmaceuticals, likewise tend to be rejected, but perhaps less consistently. In defending the Anthem-Cigna merger, witnesses and lawyers for Anthem and Cigna attempted the difficult if not impossible task of asserting a countervailing power defense without also conceding an increased ability and incentive to exercise market power.

On the one hand, Anthem argued that by merging with Cigna it would be able to secure the lower of Anthem's and Cigna's rates for each provider contract.[22] Anthem's lead economic expert also testified that the merged entity could, potentially, use its combined size to leverage even more favorable provider contracts in the future.[23] On the other hand, Anthem's Answer disclaimed that the merged entity would exercise its enhanced leverage to seek new volume discounts post-merger, and Anthem's CEO hedged on this point in his trial testimony.[24] The government strongly objected to the idea that increased

[17] *Id.* at 1160 (Kozinski, C.J., dissenting) ("Rule of reason examination of defendants' countervailing power defense is accordingly unnecessary. 'Suffice it to say that the theoretical literature suggests that countervailing cartels seldom improve the welfare of consumers.'") (quoting XII Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 2015b at 158 (2d ed.2000)); *see also id.* at 1161 ("A central problem with allowing a countervailing power defense to justify buyer collusion is that such defense would be raised 'in almost any case where the selling market is not perfectly competitive,' such that all '[n]on-immune employers would claim the right to collude on wages because their employees are organized into unions and thus have significant power.) (quoting XII Hovenkamp, *supra* ¶ 2015b at 156).

[18] 472 U.S. 284 (1985). *See also*, Grimes, *supra* note 12, at 224 ("*Northwest* can be read as a precedent that the per se rule will not govern joint procurement schemes in which there is no substantial market power exercised by the collectively acting players. The Court did not expressly address, however, a fact pattern in which the primary intent or effect of the cooperative was the exercise of countervailing power.").

[19] 441 U.S. 1 (1979).

[20] 288 U.S. 344, 363-64 (1933), *abrogated on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 763 n.7 (1984) ("In addition to these factors, the District Court found that organized buying agencies, and large consumers purchasing substantial tonnages, constitute unfavorable forces. The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past."); *see also id.* at 373-74 ("A co-operative anterprise [sic], otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities.").

[21] 310 U.S. 150, 214-15 (1940) (reaffirming the per se rule against price fixing and distinguishing *Appalachian Coals* on the basis that the agreement in that case was to improve distribution, not to fix or elevate prices). Scholars have since characterized the *Appalachian Coals* decision as a "Depression-era aberration" explained by the idea that "the Court appeared to have lost faith in free market competition and welcomed experiments with sector-wide private ordering." William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. of Econ. Perspectives 43, 48 (Winter 2000). For an interesting discussion of a potential resolution of *Appalachian Coals* and *Socony-Vacuum*, *see* Sheldon Kimmel, U.S. Department of Justice, *How and Why the Per Se Rule against Price-Fixing Went Wrong*, March 2006, https://www.justice.gov/atr/how-and-why-se-rule-against-price-fixing-went-wrong (arguing that *Socony-Vacuum* and *Appalachian Coals* together anticipated the Court's later holding in *Broadcast Music, Inc.*).

[22] Anthem, Inc.'s Answer at 14-16, United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C. 2017) (No. 1:16-cv-01493).

[23] United States v. Anthem, Inc., 236 F. Supp. 3d 171, 182 (D.D.C. 2017).

[24] Anthem, Inc.'s Answer, *supra* note 22, at 16; United States v. Anthem, Inc., 855 F.3d 345, 360 (D.C. Cir. 2017).

> *The government strongly objected to the idea that increased bargaining leverage is a cognizable efficiency, and ultimately, the court rejected all of Athem and Cigna's efficiency defenses based on countervailing power.*

bargaining leverage is a cognizable efficiency, and ultimately, the court rejected all of the merging parties' efficiency defenses based on countervailing power, as a combination of non-cognizable, unproven, and not merger-specific.[25] Notably, however, then-Judge Kavanaugh dissented from the decision and would have accepted the countervailing power defense.[26]

Smaller healthcare mergers have played on some of these same themes. Somewhat ironically, in light of the health insurers' arguments discussed above, the need to increase bargaining power to countervail market power held *by* insurance companies has been repeatedly cited as a justification for hospital mergers and physician group acquisitions.[27] Physician groups have likewise cited the need for countervailing power as a justification for joint bargaining agreements.[28] For many years these arguments were either unaddressed or tacitly accepted, but agencies and courts have more recently treated them much more directly and skeptically.[29] Courts have likewise consistently blocked discovery aimed at building a countervailing power defense.[30]

THE AGENCIES. The FTC and DOJ have not endorsed countervailing power as a defense to anticompetitive conduct. Indeed, as a defense to collusion, they have unequivocally condemned it.[31] In the merger context, the agencies have been less direct, but have nonetheless shown considerable skepticism to the idea that a merger increasing market power could be justified by a need to countervail market power at another level of the supply chain.

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[25] United States v. Anthem, Inc., 236 F. Supp. 3d at 181-82 ("[T]he antitrust laws are designed to protect competition, and the claimed efficiencies do not arise out of, or facilitate, competition."); Thomas L. Greaney & Barak D. Richman, Consolidation in Provider and Insurer Markets: Enforcement Issues and Priorities 2, Am. Antitrust Inst. (June 12, 2018) https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI_Healthcare-WP-Part-I_6.12.18.pdf, at 13-14. Commentators, but not the parties, argued that similar claimed countervailing efficiencies would result from the proposed merger of Aetna and Humana which was being litigated in this same time frame. *See* Victor R. Fuchs & Peter V. Lee, *A Healthy Side of Insurer Mega-Mergers*, Wall St. J. (Aug. 26, 2015), http://www.wsj.com/articles/a-healthy-side-of-insurer-mega-mergers-1440628597.

[26] United States v. Anthem, Inc., 855 F.3d 345, 378 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("To be clear, if Anthem-Cigna would obtain lower provider rates merely because of its enhanced ability to negotiate lower prices with providers, that alone would not necessarily be an antitrust problem. But if Anthem-Cigna would obtain provider rates that are below competitive levels because of its exercise of unlawful monopsony power against providers that could be a problem, and perhaps a fatal one for this merger."). The dissent does not use the term "countervailing power" and does not clearly articulate the distinction between "bargaining power" and "monopsony power" being relied upon. But the reasoning seems to track that of scholars advocating countervailing power, such as Sokol and Blair, discussed in Part II, *infra.*

[27] *See, e.g.*, Roger D. Blair et. al., *Hospital Mergers and Economic Efficiency*, 91 Wash. L. Rev. 1, 30 n.167 (2016) (citing Saint Alphonsus Med. Ctr.-Nampa, Inc., v. St. Luke's Health Sys., Ltd., Nos. 12-CV-00560-BLW, 13-CV-00116-BLW, 2014 WL 407446, at *12 (D. Idaho Jan. 24, 2014), *aff'd*, 778 F.3d 775 (9th Cir. 2015)) ("The leverage gained by the Acquisition would give St. Luke's the ability to make these higher rates 'stick' in future contract negotiations.").

[28] Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 Antitrust L.J. 471, 497 (2012) (citing Minn. Rural Health Coop., FTC Docket No. 05-0199 (Jan. 8, 2010)); N. Tex. Specialty Physicians, FTC Docket No. 021-0075 (Sept. 17, 2003); Mem'l Hermann Health Network, FTC Docket No. 031-0001 (Nov. 25, 2003).

[29] *See* Greaney & Richman, *supra* note 25, at 4; FTC v. Sanford Health, 926 F.3d 959, 964 (8th Cir. 2019) (rejecting providers' argument that merger would not increase prices despite diminished competition because of presence of large insurer as a dominant purchaser).

[30] *See* In re Vitamins Antitrust Litig., 198 F.R.D. 296, 301 (D.D.C. 2000) ("To suggest that a conspiracy was not as successful as it might otherwise have been because of the plaintiffs' countervailing economic power is absurd. Such an alleged 'economic check' is of no consequence in a price fixing case. Whether certain buyers made profits is irrelevant to the question of whether those buyers actually paid higher prices as a result of the alleged conspiracy to fix prices.") (quotations and citations omitted); *see also* In re Aspartame Antitrust Litig., No. CIV.A.2:06-CV-1732LDD, 2008 WL 2275528, at *5 (E.D. Pa. Apr. 8, 2008) (rejecting defendants' argument that they were entitled to discovery of "information [that] is relevant to determining Plaintiffs' buying power, elasticity of demand and leverage," because the materials sought and defendants' arguments were not relevant at the class certification stage); In re Pressure Sensitive Labelstock Antitrust Litig., 226 F.R.D. 492, 496 (M.D. Pa. 2005) ("The status of a class member as a 'power buyer' does not affect the common question of whether there existed a conspiracy to fix prices. In any event, there are more direct means of determining whether a particular class representative is a 'power buyer'—evidence of the volume of labelstock purchased.").

[31] *See* FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990); United States v. Apple, Inc., 791 F.3d 290 (2d. Cir. 2015).

As discussed above, in the Anthem-Cigna merger, the DOJ forcefully opposed the argument that the merged entity's ability to use its increased bargaining leverage from powerful providers could justify an otherwise anticompetitive merger. Although the so-called "power buyer" defense did momentarily gain purchase in the early 1990s when it was first introduced,[32] current guidance from the agencies clarifies that the presence of a powerful buyer does not fully mitigate the anticompetitive effects of a merger and notably declines to endorse a power-buyer defense.[33] The Horizontal Merger Guidelines now recognize a powerful buyer's impact on prices and competition as mixed, at best.[34] Agency officials have also expressed considerable skepticism about the relevance of large buyers in their speeches and articles, litigation, and in their *Dose of Competition* report.[35]

> *"Proposals for antitrust exemptions and modifications to the antitrust laws rooted in countervailing power are nearly as old as the Sherman Act. The vast majority of these proposals have been unsuccessful."*

CONGRESS. Proposals for antitrust exemptions and modifications to the antitrust laws rooted in countervailing power are nearly as old as the Sherman Act. The vast majority of these proposals have been unsuccessful. When Congress has enacted antitrust exemptions rooted in countervailing power, it has generally recognized that in doing so it is not promoting competition; rather, such exemptions represent a choice to promote other social goals above competition.

For example, countervailing power has a long history in the labor movement.[36] The imbalance in bargaining leverage between individual workers and the companies that employ them is, absent collective bargaining, often extreme.[37] And, that extreme imbalance has historically been deemed socially undesirable, in part for competition

[32] Mary Lou Steptoe, *The Power-Buyer Defense in Merger Cases*, 61 Antitrust L.J. 493 (1993) ("Since the beginning of 1990 such arguments have figured, sometimes cryptically, sometimes prominently, in at least eight cases; and in most of these the merging parties prevailed.").

[33] The agencies' 2010 Horizontal Merger Guideline contain the following language: "The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects. However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer." U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 8 (2010); *see also* Grimes, *supra* note 12, at 228 ("At best, then, the Guidelines can be cited as support only for a carefully limited power buyer defense. The judicial response to asserted power buyer defenses has varied, but also suggests caution in embracing such a defense.").

[34] For example, the 2010 Merger Guidelines also contain an example illustrating how a large buyer, who enjoys substantial bargaining leverage, could be uniquely harmed by a merger between the only two suppliers large enough to supply its needs. DOJ Horizontal Merger Guidelines § 8, ex. 23; Hemphill & Rose, *supra* note 2, at 2106–107 ("Purported purchaser benefits premised on reductions in competition are not cognizable. This point is reflected in the Guidelines' consideration of price reductions resulting from a merger, provided that the reduction does not 'aris[e] from the enhancement of market power.'").

[35] *See, e.g.*, Steven C. Sunshine, Deputy Assistant Att'y Gen., Antitrust Div., Remarks Before the Brookings Health Affairs Conference, Market-Based Reforms of Health Care Delivery: Where Does Antitrust Fit In? (Jan. 23, 1995); Kevin J. Arquit, Director, Bureau of Competition, Fed. Trade Comm'n, Remarks Before the American Bar Association Section on Antitrust Law Health Care Committee, Group Buying and Antitrust (Apr. 2, 1992); Dep't of Justice & Fed. Trade Comm'n, *Improving Health Care: A Dose of Competition* 27 (July 2004), http://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/204694.pdf.

[36] Jordan Brennan, *United States Income Inequality: The Concept of Countervailing Power Revisited*, 39 J. Post Keynesian Econ. 72 (2016); Walter Adams & James W. Brock, *Countervailing or Coalescing Power? The Problem of Labor/Management Coalitions*, 6 J. Post Keynesian Econ. 180 (1983); Arthur Schweitzer, *Countervailing Power Revisited*, 14 J. Econ. Issues 999 (1980); John Kenneth Galbraith, *American Capitalism, the Concept of Countervailing Power*, (1952); C.O. Gregory, *Some Problems of Policy in Collective Bargaining Practices*, 33 Am. Econ. Rev. 174 (1943); S.J. Coon, *Collective Bargaining and Productivity*, 19 AM. ECON. REV. 419 (1929).

[37] *See* Tom Campbell, *Bilateral Monopoly in Mergers*, 74 Antitrust L.J. 521, 523-24 (2007) (noting that the labor exemption is rooted, in part, in countervailing power).

reasons but primarily for reasons related to larger social design and political issues.[38] Accordingly, collective bargaining among workers has long been exempted from the antitrust laws.[39]

Another area where principles of countervailing power have shaped policy and markets is agriculture.[40] Agricultural cooperatives have long been recognized as a necessary force to ensure the continued viability of small farms. To enable such cooperatives, the Capper-Volstead Act exempts such arrangements from the Sherman Act and other antitrust statutes.[41] Importantly, however, the purpose of this exception has not primarily been to aid competition; rather, the exception for agricultural cooperatives in the Capper-Volstead Act reflects a policy decision to elevate other values—such as the continued viability of small farms to preserve a way of life and diversity and robustness in the food supply—above the values of competition enshrined in the antitrust laws.[42]

More controversial examples include the Webb-Pomerene Act, which can be viewed as an attempt to deploy countervailing power as a weapon in international trade and warfare.[43] By allowing exporters to collude, the Act sought to enrich American firms and promote American exports without regard to the impact on (foreign) consumers or efficiency.[44]

Most recently, legislation was put forth that would allow local news outlets to negotiate collectively with large online platforms.[45] If passed, the legislation would effectively carve out an exception from the antitrust laws to allow small content creators to cooperate horizontally to increase their bargaining leverage with online platforms. Such cooperation would, but for the proposed exception, be per se illegal as a violation of Section 1 of the Sherman Act. The bill's authors argue the legislation is necessary because "[i]n recent years, the control of information online has been centralized among just a few online gatekeepers."[46]

[38] *See* Hiba Hafiz, *Labor's Antitrust Paradox*, 87 U. Chi. L. Rev. 381, 386 (2020) (noting that the labor "exemption was motivated by the view that labor was not a 'commodity' whose price should be set by market forces alone.").

[39] *See id.*, at 383–88 (providing a historical account of the separation of labor regulation from antitrust). Although, with the decline in labor power, increased employer concentration, and the erosion of labor law protections for workers, recent years have brought a resurgence of interest in antitrust laws as a means for combatting market power, anticompetitive conduct, and bargaining imbalances in labor markets. *See* Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice* 7-14, Am. Antitrust Inst. (2018).

[40] *See, e.g.*, Campbell, *supra* note 37 (noting that agricultural exemption from antitrust rooted in countervailing power); *see also* Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608, 614 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983) (purpose of the agricultural exemption includes "(c) to provide its members some countervailing power with which to bargain with processors for prices above the federal order minimum price and more reflective of market conditions").

[41] 7 U.S.C. §291 (1922). *See, e.g.* Nat'l Broiler Mktg Ass'n v. United States, 436 U.S. 816, 842 (1978) ("The aid extended to farmers by the Capper-Volstead Act was of a very special variety. It was not a system of price supports or surplus purchases. The assistance offered farmers by the Capper-Volstead Act was to allow combination in a way that would otherwise violate the antitrust laws.").

[42] *See* Nat'l Broiler Mktg. Ass'n, 550 F.2d at 1386–87 ("Congress meant to improve the bargaining position of farmers vis-à-vis corporate middlemen in order to increase farm income and, importantly, to stop the rise of tenancy and the migration of farm families to the cities.").

[43] 15 U.S.C. §§ 61-66 (Export Trade Act of 1918). As one commentator put it: "The fundamental purpose of the Webb-Pomerene Act was to permit American exporters, particularly smaller firms, to develop 'countervailing power' to compete on an equal basis in international markets." John F. McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 Wash. & Lee L. Rev. 105, 108 (1980). It is ambiguous whether "countervailing power" in this context is being used to describe the vertical bargaining dynamic that is the focus of this white paper or whether it is being used more loosely to describe an attempt to even out horizontal market power.

[44] Those subsequently seeking repeal of Webb-Pomerene have contended it has shielded cartel conduct without yielding any significant efficiencies. Proponents of retaining the Act's immunities argue that U.S. firms need its protections unless and until U.S. foreign policy succeeds in unwinding foreign cartels. *See generally*, McDermid, *supra* note 43.

[45] H.R. 2054, 116th Cong. (2019). A similar legislative proposal was also recently made in Australia. *See* Daisuke Wakabayashi & Mike Isaac, *Facebook Could Block Sharing of News Stories in Australia*, N.Y. Times, Aug. 31, 2020, https://www.nytimes.com/2020/08/31/technology/facebook-block-news-stories-australia.html.

[46] Press Release, David Cicilline, Collins Introduce Bill to Provide Lifeline to Local News, United States Congress (Apr. 3, 2019), https://cicilline.house.gov/press-release/cicilline-collins-introduce-bill-provide-lifeline-local-news.

IV. RESURGENT INTEREST IN COUNTERVAILING POWER

Deploying countervailing power to address market power and the attendant imbalances in bargaining leverage is not a new idea. John Kenneth Galbraith is generally credited with coining the term "countervailing power" in his 1952 treatise on the subject,[47] but, as discussed above, the roots of the idea go back much farther. Galbraith's argument that countervailing power is a socially desirable response to monopoly power and should be embraced was controversial from the outset; Scholars, Stigler and Hunter most notably, argued that there was no reason to believe that any gains reaped by the party asserting countervailing power would be passed on to end consumers.[48]

Since Galbraith's seminal work, more sophisticated economic analyses, discussed above and below, have identified only very narrow circumstances in which bilateral monopoly can improve efficiency and even more narrow circumstances where those efficiency gains are passed on to smaller or weaker players. Additionally, we have accumulated a fair amount of experience with legally-sanctioned cartels, and they generally have not fared well. Yet, the idea persists.

> *"Deploying countervailing power to address market power and the attendant imbalances in bargaining leverage is not a new idea."*

Notably, the renewed interest in countervailing power within antitrust and competition law and policy has come both from traditional corporate defense sources advocating for narrower application of the antitrust laws and from progressive voices who typically advocate on behalf of disenfranchised and under-privileged actors in the economy. While this could be interpreted as diverse antitrust thinkers uniting around a universally true idea, it is better understood as strange bedfellows created by the failure of antitrust enforcement and competition policy to preserve competition and block anticompetitive concentration in the first instance.

In the absence of effective antitrust enforcement, large and powerful players see concentration of market power at every level in the supply chain as preferable to concentration at only some levels of the supply chain.[49] On the other hand, some progressive antitrust advocates seem to view horizontal collaboration as their only remaining defense against the market power that has been allowed to foment among the power buyers and sellers with whom consumers, workers, small businesses, and news organizations negotiate.

[47] Galbraith, *American Capitalism, supra* note 36; Lall Ramrattan & Michael Szenberg, Memorializing John K. Galbraith: A Review of His Major Works, 1908-2006, 55 Am. Economist 31, 32 (2010) ([F]ormulating his own theory of 'Countervailing Power' . . . .'); *Countervailing Power, A Dictionary of Sociology* (4th ed. 2014) ("A term first used by American economist John Kenneth Galbraith in *American Capitalism: The Concept of Countervailing Power* . . . .").

[48] Zhiqi Chen, *Dominant Retailers and the Countervailing Power Hypothesis*, 34 RAND J. of Econ. 4, at 612 (Winter 2003).

[49] Some large players also clearly use this idea opportunistically to justify an accumulation of market power that they would welcome regardless of developments in other levels of the supply chain.

"The failure of antitrust enforcement and competition policy to preserve competition and block anticompetitive concentration in the first instance has resulted in a diverse array of strange bedfellows embracing countervailing power."

Perhaps the easiest place to see the renewed interest in these ideas is in scholarship and policy advocacy. From progressives, there are increasing calls to deploy countervailing power to counteract market power, reduce wealth inequality, protect small businesses, and promote democracy. According to this line of reasoning, markets have become concentrated and large companies have acquired market power, despite the antitrust laws. At the same time, the Sherman Act and, in particular, its per se condemnation of collaboration among competitors, prevents small buyers and sellers from banding together to bargain against huge corporations with market power. To protect small businesses and to mitigate the harm from the market power held by large corporations, some progressive policymakers and academics advocate for a limited exception to the per se rule against horizontal collusion to allow smaller businesses to band together to collectively bargain with powerful corporations and countervail their market power.

This cynicism from certain groups about the effectiveness of the antitrust laws is not entirely new. For example, Warren Grimes wrote 20 years ago: "a wholesale failure of antitrust to acknowledge a collective action defense in the face of, say, a dominant buyer possessing monopsony power, leads to economic consequences that are the very antithesis of competition and to well-founded cynicism about the antitrust laws."[50] But, these long-circulating ideas have recently been picked up by some progressives seeking to expand the antitrust laws to account for goals beyond or instead of consumer welfare or even total welfare.

More recent progressive advocates of countervailing power argue not only that it is inefficient, but that it is unfair to maintain a single-firm exception to collaboration,[51] and that there is a need to "protect democratically owned and governed businesses and collectives from antitrust suits and to support these entities as a means of countering the power of monopolistic corporations."[52] Those in this camp are largely critical of applying a consumer welfare standard to the antitrust laws; instead, they advocate for antitrust to focus on equity, social justice, and the furtherance of democratic values. At the same time, like Grimes, they often argue that countervailing power promotes competition

[50] Grimes, *supra* note 12, , at 196–197. Grimes is forthright in acknowledging that the outcome of the type of collaboration he proposes to allow would not be competition, but a bilateral monopoly. Grimes, *supra* note 50, at 207–208 ("If, as a response to substantial market power possessed by a powerful buyer or seller, small firms are allowed to respond collectively, the likely result is that market power will exist on both the buyer and seller side of the transaction.").

[51] Sanjukta Paul, *The Double Standard of Antitrust Law*, The American Standard (June 24, 2019), https://prospect.org/economy/double-standard-antitrust-law/. *See also* Sanjukta Paul, *Antitrust As Allocator of Coordination Rights* (February 19, 2019), UCLA L. Rev., Vol. 67, No. 2, 2020, *available at* https://ssrn.com/abstract=3337861. Paul's overarching thesis is much broader and more radical than the embrace of countervailing power. She argues that competition should not be regarded as the goal of antitrust, and for a recognition that antitrust is primarily an exercise in allocating rights to economic coordination. As such, she asserts that those rights should be allocated according to principles of justice and social benefit. This entails, among other things, dispensing with the single firm exemption that excludes coordination within firms from antitrust scrutiny.

[52] Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise As an Antimonopoly Strategy*, 124 PA. St. L. Rev. 1, 48–49 (2019). *See also*, Paul, *Antitrust as Allocator, supra* note 51, at 430 ("Among other things, a reformed antitrust law would make space for more democratic, horizontal forms of economic coordination.")

and that, by combatting market power, countervailing power will yield healthier, better-functioning markets.[53]

A second vein of interest in countervailing power comes from largely conservative thinkers those who believe antitrust should be guided by a total welfare, rather than a consumer welfare, standard. Members of this camp, such as Daniel Sokol and Roger Blair, find support for countervailing power in a rejection of the consumer welfare standard in favor of a total welfare standard.[54] They argue that "[m]ergers (or agreements) that convert monopoly (or monopsony) to bilateral monopoly are welfare-enhancing," not because of benefits from wealth distribution but because bilateral monopoly, theoretically, generates more surplus than monopoly or monopsony.[55]

Importantly, these authors are measuring "welfare" in this context as total welfare, not consumer welfare. Nevertheless, because they argue that the goal of antitrust should be to maximize total welfare—a minority position at odds with the broad acceptance of the consumer welfare standard in modern antitrust—they take the position that mergers or agreements that enhance total welfare should pass muster under the rule of reason.[56] Blair and Sokol acknowledge that this position—advocating for merger or collusion to monopoly—is "disconcerting," and that the outcome is much less clear under a consumer welfare standard, but nonetheless adhere to this position.[57]

> *"Although their support is rooted in different goals and ideas, those who support relaxing or adapting antitrust enforcement to account for countervailing power sometimes unite on particular cases or issues."*

Although their support is rooted in different goals and ideas, those who support relaxing or adapting antitrust enforcement to account for countervailing power sometimes unite on particular cases or issues. The *eBooks* case is a prime example. As Chris Sagers details in his book on the subject, a diverse coalition of thinkers and advocates from camps that normally oppose one another united behind Apple's defense of its conduct. Although the court rejected Apple's argument that it organized a cartel to counter Amazon's eBook monopoly for the good of consumers, the argument was surprisingly well received by the public; a wide array of commentators and industry participants defended Apple's blatant orchestration of a horizontal conspiracy among the major publishing houses because they perceived that it was a beneficial response to counter Amazon's market power in the eBooks market.[58] This support came from a combination of corporate representatives of competing tech firms and from champions of the proverbial little guy.

[53] *See, e.g.*, Paul, *Antitrust as Allocator, supra* note 51, at 386 (advocating for a fairer dispersion of horizontal coordination rights because, in part, it would promote competition characterized by "a dynamic social and economic process of business rivalry").

[54] D. Daniel Sokol & Roger D. Blair, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 Antitrust L.J. 471 (2012). Others have made similar arguments. *See, e.g.*, Campbell, *supra* note 37 (arguing that sellers should be allowed to merge to monopoly when facing a single buyer to increase total surplus).

[55] Sokol & Blair, *The Rule of Reason, supra* note 54. *But see*, Baker, et al., *supra* note 7 (critiquing Campbell's arguments).

[56] Even this position is mistaken, as the weight of modern economic evidence shows that bilateral monopoly does not tend to maximize total welfare. *See* Baker, et al., *supra* note 7.

[57] Other academics who don't fit neatly into either camp likewise argue for a countervailing power defense where the colluding or merging parties face a bargaining partner that holds significant intellectual property rights. They argue that "given the practical and theoretical difficulties of remedying anticompetitive abuses of patent rights under the antitrust laws,... taking antitrust out of patent law would allow competition to flourish in dynamic markets while enhancing the patent system's incentives to innovate." *See* Gregory Dan & W. Michael Schuster, Colluding Against a (Patent) Monopoly, Competition Pol'y Int'l, July 29, 2020, https://www.competitionpolicyinternational.com/colluding-against-a-patent-monopoly/.

[8] *See generally*, Chris Sagers, United States v. Apple: Competition in America (2019).

In an ironic twist on the *eBooks* case, we are currently seeing a push to allow app developers to collude and collectively bargain against Apple to countervail Apple's market power resulting from its control of its app store.[59] Such collective bargaining by competing app developers would be prohibited under current antitrust law. But, it is argued, allowing an exception for app developers would be a simple and meaningful way to counteract Apple's power as a gatekeeper to all iPhone users and force it to provide more reasonable and evenhanded rules.

These examples are not exhaustive. Nevertheless, they illustrate the extent to which countervailing power is being put forward in every aspect of antitrust enforcement and policy as a potential solution to imbalances in bargaining leverage and to high market concentration.[60]

V. LAWMAKERS, ENFORCERS, AND THE COURTS SHOULD RESIST COUNTERVAILING POWER RATIONALES AS AN ANTITRUST SOLUTION TO ADDRESS CONCENTRATION

Imbalances in bargaining power are a serious social and economic problem—they foster and perpetuate wealth inequality, stifle small business opportunities, and allow large companies to extract socially undesirable terms and conditions. Moreover, in many instances, the failure of antitrust enforcement and competition policy to effectively check increasing concentration and the accumulation of market power has contributed to skewed bargaining dynamics.[61] In the absence of effective antitrust enforcement, countervailing power is a superficially appealing response to combat this dynamic. But, beneath its surface appeal, a deeper examination of countervailing power reveals that it is both an ineffective solution to the problem at hand and rife with problems of its own.[62] Overall, there are compelling reasons why enforcers and antitrust and competition policymakers ought to resist this instinct.

Although lawmakers, facing calls to exempt certain groups from the antitrust laws, confront a qualitatively different question than courts and enforcers evaluating and prosecuting the antitrust laws, they too should be cautious in deploying countervailing power. As discussed above and below, exempting a group from the antitrust laws, whether with the intent that it will enable them to exercise countervailing power or for some other reason,

[59] *See, e.g.*, Hal Singer, *Regulators Turn Their Attention Towards Apple's Exploitation of App Developers. Now What?*, ProMarket, June 24, 2020, https://promarket.org/2020/06/24/regulators-turn-their-attention-towards-apples-exploitation-of-app-developers-now-what/.

[60] Separate and apart from advocacy positions, we also see increased consolidation in certain industries seemingly in reaction to concentration at other levels of distribution chains. *See, e.g.*, Diana Moss, *Consolidation in Agriculture and Food: Challenges for Competition Enforcement, Concurrences* 1-2016, ¶ 4 ("Motivated in part by the quest for greater bargaining power vis-à-vis powerful firms in adjacent and nearby markets, consolidation has resulted in a few, often vertically integrated, competitors at each level that exert significant buyer power over growers of crops and animals."); Thomas L. Greaney, *Dubious Health Care Merger Justifications—the Sumo Wrestler and 'Government Made Me Do It' Defenses*, Health Aff. Blog (Feb. 24, 2016), https://www.healthaffairs.org/do/10.1377/hblog20160224.053297/full/ (noting that both hospitals and insurance companies have defended mergers on the grounds that "each side will exert countervailing power against the other.").

[61] Grimes, *supra* note 12, at 205 ("Small players would not need countervailing power if antitrust could maintain competition in every market.").

[62] Greaney & Richman, *supra* note 25, at 13.

is a valid political choice. But, it is an inherently political one, involving a choice between competition on the one hand and the values served by the exemption (protecting an industry, transferring wealth and power to politically protected class, etc.) on the other.

For the same reasons, as explained below, that an embrace of countervailing power is not consistent with sound antitrust and competition policy, it is important that lawmakers and those advocating for exemptions from the antitrust laws candidly and completely appreciate that such exemptions are a deliberate turn away from competition and its benefits. That is not to say that such an exemption is never the correct political choice, but it is one of considerable consequence that should be made deliberately, if at all.

> *"Exempting companies facing trading partners with market power from the antitrust laws would not diminish market power or promote competition. It would just lead to self-interested bargaining between two powerful parties."*

COUNTERVAILING POWER IS NOT A COMPETITION-BASED SOLUTION. Most fundamentally, although put forward as a solution to market power and a lack of effective competition, deploying countervailing power does not promote competition, either in process or in outcomes.[63] Countervailing power, particularly as a justification for mergers, only serves to increase, not decrease, market concentration. Bargaining is often an adversarial process—focused on dividing surplus—but it is not competition or a substitute for competition.

Allowing companies to merge or form their own cartel to collectively negotiate with, and serve as a counterweight to, powerful counterparties simply creates another powerful entity in the market. Exempting companies facing trading partners with market power from the antitrust laws would not diminish market power or promote competition. It would just lead to self-interested bargaining between two powerful parties. "This bargaining is not a replacement for competition. Rather, it will act to mutually benefit the two powerful parties, at the expense of consumers, workers, and others who are impacted."[64]

The antitrust laws' application to markets generally without regard to the specifics of an industry's circumstances is one of its greatest strengths; the laws are premised on identifiable truths about markets and aimed at fundamental choices in American policy to

[63] For an eloquent defense of the values of competition and explication of why appeals to countervailing power are antithetical to competition, *see* Baker, et al., *supra* note 7, at 644-46.

[64] Pub. Knowledge, Am. Antitrust Inst., Consumer Rep., & Consumer Fed'n of Am., *Letter to the Chairman and Ranking Member of the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law*, ¶ 6-7, *available at* https://www.antitrustinstitute.org/work-product/aai-joins-with-leading-advocacy-groups-in-highlighting-risks-of-antitrust-exemptions-for-news-content-creators/; *see also* Hemphill & Rose, *supra* note 2, at 2106–07 ("Purported purchaser benefits premised on reductions in competition are not cognizable. This point is reflected in the Guidelines' consideration of price reductions resulting from a merger, provided that the reduction does not 'aris[e] from the enhancement of market power.' A concurring opinion in Anthem made the same point: 'there is no dispute that, to have any legal relevance, a proffered efficiency cannot arise from anticompetitive effects.' And even an Anthem dissent agreed that purported benefits amounting to 'the fruit of a poisonous tree' are not cognizable. The same point is often made in horizontal agreement cases. For example, engineers cannot refrain from price competition on the ground that competition will result in shoddy bridges. As the Supreme Court explained, 'the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.' Nor may a horizontal agreement be defended on the ground that the resulting extra profit induces or is spent on increased innovation.") (internal citations omitted).

favor competition over collusion or regulation, all else equal. An important and radical (at least in the context of U.S. antitrust law) premise underlying many of the arguments in favor of recognition of countervailing power is that antitrust law should adjust to account for monopolized markets, rather than apply the same rules to monopolized and competitive markets. This is a dramatic departure from what has long been considered a fundamental idea in U.S. antitrust law: that the role of antitrust law is to protect against decreases in competition, not to create or maintain monopolistic market structures.

COUNTERVAILING POWER FOSTERS COLLUSION. The risks to competition and consumers from deploying countervailing power go beyond the immediate price effect—most notably, they entail significantly increased incentives to collude. The economic case for countervailing power is often premised on the notion that bilateral monopolists will (as adversaries) bargain to a competitive and efficient solution. The economic case for this outcome is dubious, at best.[65]

But perhaps the greater concern is "that 'powerful buyers might find it more profitable to share in their suppliers' excess profits and/or collaborate with their suppliers to exclude competitors rather than trying to get supply prices down to competitive levels.'"[66] That is, once there is concentration at two levels of the market, it only increases the incentives for the powerful parties at both levels to work to exclude rivals and extract monopoly rents from the other levels of the market.

"Once there is concentration at two levels of the market, it only increases the incentives for the powerful parties at both levels to work to exclude rivals and extract monopoly rents from the other levels of the market."

"Whether accomplished by coercion or sharing monopoly rents, there are documented instances in which insurers and hospitals have conspired to disadvantage their rivals."[67] Another example is currently playing out in the dairy industry, where the two agricultural cooperatives that control the raw milk market in the Carolinas are fighting over control of the dominant milk processor that is their primary customer.[68]

HARM TO SMALL BUYERS AND SELLERS. Consolidation motivated largely by the quest for greater bargaining leverage between various participants in the supply chain is a

[65] *See* Baker, et al., *supra* note 7.

[66] Letter from Diana L. Moss & Tomas Greaney to Ass't Att'y Gen. William J. Baer, Re: Antitrust Review of the Aetna-Humana and Anthem-Cigna Mergers, at 3 (Jan. 11, 2016) https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Health-Insurance-Ltr_1.11.16.pdf ("The health sector has ample experience with dominant insurers reaching understandings or explicit agreements with large health systems in which the two sides reciprocally agreed to protect the other's economic interest."); *see also, e.g.*, Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000) (illegal agreement between powerful toy distributors and toy manufacturer to restrict access to toys by competing warehouse stores); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999) (Posner, J.) (illegal bid rigging between road contractors and asphalt producers in highly concentrated local market).

[67] Moss & Greaney, *supra* note 66.

[68] MDVA, the smaller of the two cooperatives, argues that the larger cooperative, Dairy Farmers of America, has engaged in a decades-long attempt to monopolize the dairy industry that included an exclusive supply agreement with the powerful milk processor controlling almost 70% of the processing market. Now that the milk processor has declared bankruptcy, the dominant raw milk cooperative has purchased its assets, which MDVA alleges is simply an attempt to make permanent their longstanding and illegal vertical supply agreement. Complaint, Food Lion, LLC v. Dairy Farmers of America, Inc., No. 1:20-cv-442 (M.D.N.C. May 19, 2020).

losing proposition for competition, consumers, and small sellers. As discussed above, as a matter of economics, there is no basis to assume that offsetting market power will result in lower prices for consumers. Prices that are determined by bargaining between powerful buyers and sellers, as opposed to rivalry in competitive markets, rarely improve consumer welfare.[69] The weight of the most recent and thorough economic analysis in this area concludes that countervailing power increases efficiency only in narrow circumstances and that the benefits of those increased efficiencies are passed on to consumers only in an even narrower set of circumstances.[70] Courts and enforcers have rightly recognized this.[71]

Consolidation or collaboration among intermediaries to counter powerful buyers can likewise harm small sellers. As discussed above, where hospitals consolidate or collaborate to counter market power exerted by large insurers, the resulting consolidation risks harming physicians and other suppliers of medical goods and services, as they are forced to bargain with increasingly powerful hospitals. This can inflict both absolute harm on suppliers, in the form of lost revenue, but also produce inefficient outcomes as the market power of the hospitals can drive supply prices below competitive levels resulting in deadweight loss. This deadweight loss comes in the form of investments foregone and medical supplies not produced. Likewise, in agriculture, consolidation among intermediaries, in part to counter consolidation at other levels of the supply chain, has demonstrably led to artificially depressed prices for farmers and higher prices and reduce choice for consumers.[72]

> *"The end result of an arms race to countervail market power is not competition, but monopoly at every level of the supply chain."*

ARMS RACE. Beyond harm to certain players and competition generally, there are additional systemic harms from concentrated supply chains. Mergers to counter bargaining power "perpetuate the cycle of 'reactive' consolidation in [the] supply chain as [participants at one level] leverage up to counter the greater bargaining power of other, rapidly consolidating parts of the supply chain with which they do business."[73] Scholars have aptly analogized this phenomenon to an arms race.[74] Over time, "competition at each level [is] gradually eliminated..., leaving just a few large rivals in each segment."[75] Even those who advocate for deploying countervailing market power to mitigate the effects of monopoly acknowledge that this is a real risk.[76]

[69] *See, e.g.*, Moss & Greaney, *supra* note 66, at 3 (discussing this issue in the context of health insurance).

[70] *See* Part II, *supra*.

[71] FTC v. ProMedica Health Sys., Inc., No. 3:11CV47, 2011 WL 1219281, at 27, 51, 57 (N.D. Ill. Mar. 29, 2012; Aviv Nevo, Dep't of Justice, Antitrust Div., Mergers that Increase Bargaining Leverage (Jan. 22, 2014), https://www.justice.gov/atr/file/517781/download. *See* Part III, *supra*.

[72] *See, e.g.*, Moss, *Consolidation in agriculture and Food*, *supra* note 60, at ¶ 5 (describing the "squeeze" inflicted on growers and consumers by consolidation in food and agriculture); *id.* ¶ 19 (explaining that this concentration has resulted in part from "reactive" consolidation along the supply chain).

[73] Moss & Greaney, *supra* note 66; Greaney & Richman, *supra* note 25, at 2 ("The foregoing problem arises in part from the rush to consolidation induced by hospitals and physicians wanting to be assured they will be in a strong bargaining position."); *see generally* Greaney, *supra* note 60 (noting that both hospitals and insurance companies have defended mergers on the grounds that "each side will exert countervailing power against the other").

[74] Hemphill & Rose, *supra* note 2, at 2104–05 ("A collateral benefit is avoiding an arms race in which sellers feel compelled to merge in response to a merger of buyers, in order to offset the resulting market power.").

[75] Moss & Greaney, *supra* note 66.

[76] *See, e.g.*, Grimes, *supra* note 12, at 196 ("Moreover, if collective action were uniformly permitted as a response to any power buyer or seller, a chain reaction of collective action at all levels of the distribution system could end effective competition."); *see also id.* at 200.

The end result of such an arms race is not competition, but monopoly at every level of the supply chain. The redundancy in the supply chain that is almost guaranteed through robust competition at each level is lost through reactive consolidation,[77] leading to a more fragile supply chain that is less able to withstand exogenous shocks such as input market disruptions, shortages, or even information technology failures.[78] We recently received a particularly tragic and salient reminder of the risks of an overly concentrated supply chain in the case of ventilators and the Covid-19 pandemic.[79]

ADMINISTRATIVE RISKS AND COSTS. Allowing countervailing power as a defense to otherwise anticompetitive conduct and mergers also imposes significant administrative costs and risk. If countervailing power is accepted as a cognizable efficiency, we can expect to see it asserted by defendants in virtually every antitrust case. We already see large corporations trying to use countervailing power to escape liability for revenue sharing agreements,[80] mergers,[81] and even cartels.[82] Few markets are perfectly competitive, and almost every company deals with at least one marginally powerful buyer or seller.[83]

Moreover, even in situations where there is an imbalance in bargaining leverage that might theoretically justify a countervailing power defense, there is an attendant risk that an attempt to gain countervailing power could overcompensate and simply result in a reversal of the imbalance. (This is arguably what has happened in the health care industry over the years.) The risk of excusing anticompetitive and inefficient conduct under the mistaken belief that it is procompetitively balancing bargaining leverage is a real and significant concern that cannot be overlooked.[84]

Beyond false negatives, the mere availability of a countervailing power defense would lead to increased cost and complexity. The per se rule against horizontal price fixing is motivated not only by doctrine, but also by practicality. Rule of reason cases are significantly more complicated, costly, and time-consuming to litigate. The nuanced case-specific nature of the rule of reason standard further makes outcomes less predictable, which is itself costly. Carving a class of conduct out of the per se rule or recognizing a novel defense to a per se claim is costly. In some cases, those costs are worth the doctrinal clarity, increased efficiency, or basic fairness that comes from a more flexible rule. But, in all cases, those costs must be recognized and weighed against the benefits to be achieved by the relaxed standard.

[77] This concern is particularly acute for mergers. Cooperatives among atomistic sellers and collective bargaining on behalf of individual workers would not seem to present this particular risk, or at least not directly.

[78] Moss & Greaney, *supra* note 66, at 3 (discussing this concern as it relates to the health care market).

[79] Diana L. Moss, *Can Competition Save Lives? The Intersection of COVID-19, Ventilators, and Antitrust Enforcement*, ¶7 (Mar. 31, 2020), https://www.antitrustinstitute.org/can-competition-save-lives-the-intersection-of-covid-19-ventilators-and-antitrust-enforcement/.

[80] *California ex rel. Harris*, 651 F.3d at 1160.

[81] *See, e.g.*, Blair, *supra* note 27, at 70 (citing Saint Alphonsus Med. Ctr.-Nampa, Inc., v. St. Luke's Health Sys., Ltd., Nos. 12-CV-00560-BLW, 13-CV-00116-BLW, 2014 WL 407446, at *12 (D. Idaho Jan. 24, 2014), *aff'd*, 778 F.3d 775 (9th Cir. 2015)) ("The leverage gained by the Acquisition would give St. Luke's the ability to make these higher rates 'stick' in future contract negotiations.").

[82] In re Vitamins Antitrust Litig., 198 F.R.D. at 301.

[83] *California ex rel. Harris*, 651 F.3d at 1161 ("A central problem with allowing a countervailing power defense to justify buyer collusion is that such defense would be raised 'in almost any case where the selling market is not perfectly competitive,' such that all '[n]on-immune employers would claim the right to collude on wages because their employees are organized into unions and thus have significant power.'") (citing XII Hovenkamp ¶ 2015b at 156).

[84] Hemphill & Rose, *supra* note 2, at 2103 (2018) ("Once again, in a particular case it may be possible to argue that the merger is harmless or even beneficial. For example, a defendant might argue that an increase in buy-side 'countervailing power' will offset sellers' existing market power and thereby move input prices closer to a social ideal of marginal costs. Courts are equally reluctant to adjudicate the defense that a merger of hospitals offsets the existing power of insurers, and the reciprocal claim that a merger of insurers offsets the existing power of hospitals. Here, once again, the trading partner welfare perspective reflects an implicit judgment that a fine-grained search for case-specific exceptions carries an unacceptable risk of false negatives.").

"The better solution—indeed, the only solution to increased market concentration that is consistent with competition—is to vigorously enforce the antitrust laws."

VI. POLICY RECOMMENDATIONS

The better solution—indeed, the only solution to increased market concentration that is consistent with competition—is to vigorously enforce the antitrust laws and other rules and regulations designed to check anticompetitive and anti-consumer behavior and to keep playing fields level. This includes:

1. **Reject countervailing power as a rationale or efficiency benefit for horizontal mergers or collaborations.** Many of the initiatives rooted in notions of countervailing power take the form of exemptions from the per se rule against collaborations between competitors at intermediate levels of the supply chain. These initiatives should be rejected and the per se rule against collusion between competitors should be preserved. We are already seeing erosion of the per se rule in the form of expanding the ancillary restraints doctrine. Opening another front, in the form of countervailing power, further risks the integrity of what has been a bulwark of effective and administrable antitrust law for over 100 years.

2. **Resist industry-specific carve outs from generalized antitrust rules.** Today, it is the news content providers seeking an industry-specific exemption from the antitrust rules to countervail the power of Big Tech. But, if they are successful, other industries will follow. Such industry-specific exemptions should be resisted. Instead of reacting to innovation that is upending traditional business models by abandoning competition, we must instead adapt our competition laws, enforcement strategies, and policies to ensure they can effectively safeguard and promote competition in new and changing markets. To do otherwise risks converting the antitrust laws from a tool to foster competition into a tool for creating and maintaining monopolistic market structures.

3. **Increase enforcement against consolidation and monopolistic practices.** The resurgence of arguments about countervailing power highlights the overwhelming need for increased antitrust enforcement and competition policies that effectively guard against concentration of market power, regulations that mitigate the effects of market power by keeping playing fields level and incentivizing entry, and vigilant enforcement against monopolistic practices and cartel conduct. By preventing concentration in the first place and attacking monopolization directly, we can get at the root of the problem that countervailing power seeks to solve. This enforcement should include not just Section 1 of the Sherman Act, but Sections 2 and 7, as well. This, combined with other policies to

> *By preventing concentration in the first place and attacking monopolization directly, we can get at the root of the problem that countervailing power seeks to solve.*

prevent accumulation and exercise of market power in the first place, are the only remedy that preserves competition and provides a sustainable model for free markets that benefit consumers, producers, and the country as a whole.

4. **Enhance antitrust solutions to market concentration.** Unlike many other countries, the United States' antitrust laws do not prohibit entrenched monopoly or market power, provided it was lawfully obtained and is not illegally maintained. Nor does the U.S. law contain an analogue to the laws against abuse of superior bargaining position that many jurisdictions have enacted.[85] If the current laws, when fully enforced, are insufficient to prevent the growth and entrenchment of market power, a better solution than further loosening those laws to allow countervailing power would be to enhance existing antitrust laws to allow them to better prevent market concentration, reduce accumulated market power, or deter exploitation of market power. Done thoughtfully, such a solution has the potential to increase competition, consistent with the fundamental principles of antitrust policy. Moreover, it is far preferable to locking in a second-best outcome based on monopoly or collusion at every level.

5. **Deploy additional public policy tools.** Antitrust is but one means for preventing and countering undesirable market behavior. The increased concentration and imbalanced bargaining power driving the current interest in countervailing power stems not just from lax antitrust enforcement or ineffective competition policy, but from a wide range of public policy trends and failures. And in some cases, the ills people seek to correct with countervailing power are actually the result of competition working and industries changing. Rather than gutting antitrust by opening up a new line of merger defense and undermining the per se rule against competitor collaborations, we should seek multifaceted solutions that check corporate power, decrease inequality, and unwind the incentives for winner-take-all approaches to markets.[86]

[85] Albert A. Foer, Submission to Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201, Abuse of Superior Bargaining Position (ASPB): *What Can We Learn from Our Trading Partners?*, Federal Trade Commission (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0054-d-0007-151038.pdf.

[86] *See, e.g.*, Hafiz, *supra* note 38, at 405-409 (proposing regulatory sharing between antitrust and labor law to address imbalances in bargaining leverage in the employment context while keeping labor and antitrust law doctrinally coherent).