

12-30-2020

THE POLITICAL FACE OF ANTITRUST

Spencer Weber Waller

Jacob E. Morse

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjcfcl>



Part of the [Administrative Law Commons](#), [Antitrust and Trade Regulation Commons](#), [Business Organizations Law Commons](#), [Civil Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Spencer W. Waller & Jacob E. Morse, *THE POLITICAL FACE OF ANTITRUST*, 15 Brook. J. Corp. Fin. & Com. L. 75 (2021).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol15/iss1/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of Corporate, Financial & Commercial Law by an authorized editor of BrooklynWorks.

THE POLITICAL FACE OF ANTITRUST

Spencer Weber Waller Jacob E. Morse***

ABSTRACT

The last twenty years have brought antitrust back to the fore as a political issue of greater salience. Several booms and busts in the economy have highlighted the issue of corporate power in the economy and the political system. The growing influence and aggressiveness of the European Union and other jurisdictions' competition laws have highlighted the relative retreat in the United States. Political movements in the United States have brought issues of corporate power and its abuse back into the public limelight and with them a greater political salience for antitrust in the election cycle of 2020.

INTRODUCTION

Antitrust law is having a moment. After decades of languishing as a relatively technical legal specialty, issues of corporate concentration, income inequality, abuse of dominance and power, and the harms of lenient merger policy have returned as issues of public discussion and debate.

The return of antitrust as a matter of political and public discourse is welcome, but not surprising. United States antitrust law was born out of the political turbulence that arose from industrialization of the national economy in the second half of the nineteenth century, following the end of the Civil War.¹ Candidates ran for state and federal office under the banner of the Anti-Monopoly and Populist Parties.² Political turmoil led to the enactment of state,³ and then federal,⁴ antitrust laws. By 1912, the U.S. Presidential race arguably turned on the differing antitrust visions of the three leading

* John Paul Stevens Chair in Competition Law; Professor and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. Thanks to Reilly Dougherty for additional research and Maciej Bernatt, John Breen, Darren Bush, Christine Chabot, Ted Janger, Barry Sullivan, and participants at virtual workshops at Brooklyn Law School, Instituto Derecho Competencia (Buenos Aires), Loyola University Chicago School, and the Yale Thurman Arnold Project for their thoughtful comments. The preparation of this essay was supported by a summer grant research from Loyola University Chicago School of Law.

** J.D. Expected 2021, Loyola University Chicago School of Law.

1. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955); Overview and history of the antitrust laws, 1 *Health Care and Antitrust L.* § 1:3 (2020).

2. GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA 1865-1996* 8–12 (1997).

3. See generally James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

4. See generally WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT* 95–99 (1965).

candidates.⁵ In the post-World War II era, both major parties supported the vigorous enforcement of the antitrust laws and trumpeted that support in their political platforms in Presidential campaigns.⁶

That tide began to ebb in the late 1970s and 1980s. At first, bi-partisan deregulation gained support and then the Regan Revolution and the Chicago School of Law and Economics eroded public and judicial support for antitrust enforcement.⁷ Antitrust law became lumped in the public view as part of generally disfavored government regulation of the economy.

The last twenty years have brought antitrust back to the fore as a political issue of greater salience. Several booms and busts in the economy have highlighted the issue of corporate power in the economy and the political system. The growing influence and aggressiveness of the European Union and other jurisdictions' competition laws have highlighted the relative retreat in the United States.⁸ Political movements in the United States have brought issues of corporate power and its abuse back into the public limelight and with them a greater political salience for antitrust in the election cycle of 2020.

This Article examines the modern political face of antitrust. First, we discuss the numerous antitrust platforms, promises, legislation, hearings, and investigations that have been introduced and discussed during the 2020 election cycle. Second, we survey some of the ways that antitrust issues have become part of the public discourse. Finally, we celebrate this trend as good for antitrust and the body politic.

I. CAMPAIGN PLATFORMS AND POLICIES

The principal campaign promises and proposals by the leading candidates in the 2020 Presidential election are a sign of the return of antitrust as an important contemporary political discussion. Unlike recent past elections, antitrust issues were front and center among the many Democratic contenders in the 2020 primaries until Super Tuesday largely decided that contest and the COVID-19 pandemic dominated the news cycle.⁹

5. See generally JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT AND DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2005).

6. See *National Political Party Platforms*, AM. PRESIDENCY PROJECT (last visited Aug. 26, 2020), <https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/national-political-party-platforms>.

7. See generally ROBERT PITOFSKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (2008).

8. See generally Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Law*, 52 CONN. L. REV. 123 (2020) (surveying the history of antitrust law in the United States and offering comparisons with the European Union).

9. The COVID-19 pandemic also brought a host of new antitrust issues which are discussed in current news cycles. Issues of COVID-19-related price gouging, for example, were almost immediately discussed. See, e.g., Michael Levenson, *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html>; Stephanie Zimmerman, *Illinois*

A. SENATOR AMY KLOBUCHAR

Senator Amy Klobuchar centered many of her antitrust proposals around merger reform. Klobuchar sought to clarify that existing antitrust laws required agencies to take into account more than just possible effects on price when reviewing a merger.¹⁰ Klobuchar also sought to increase the cost of merger filing fees “so that merging parties of the largest deals start paying their fair share.”¹¹ Further, Klobuchar wanted to shift the burden of proof to merging parties to show that their merger would not materially harm competition.¹²

Senator Klobuchar, like many of the other 2020 candidates, also proposed antitrust reform in the agribusiness sector. Klobuchar was concerned with concentration in the agriculture industry and pledged to look at recent large mergers and acquisitions.¹³ Klobuchar further pledged that she would require the United States Department of Agriculture (USDA) “to collect and publish concentration information in agricultural markets and to allow the USDA to participate in the review of proposed mergers in the agricultural sector.”¹⁴

Senator Klobuchar’s flagship idea was the creation of the Office of Competition Advocate (OCA).¹⁵ The OCA would be an arm of the Federal Trade Commission (FTC),¹⁶ headed by a Competition Advocate, who reports directly to the Chairman of the FTC.¹⁷ The OCA would effectively be the federal government’s antitrust thinktank. It would collect data on

attorney general calls for Amazon, other sellers to police coronavirus price-gouging, CHI. SUN TIMES (Mar. 25, 2020, 6:14 PM), <https://chicago.suntimes.com/coronavirus/2020/3/25/21194411/illinois-attorney-general-raoul-coronavirus-price-gouging-sanitizer-masks-amazon-facebook-walmart>; Geneva Sands & Priscilla Alvarez, *Feds target price gouging as states and hospitals swarm private market for supplies*, CNN (Apr. 25, 2020, 12:09 PM), <https://www.cnn.com/2020/04/25/politics/fema-doj-price-gouging-supplies/index.html>.

10. See Amy Klobuchar, *Senator Klobuchar’s Plan for the Future of Work and a Changing Economy*, MEDIUM (Dec. 5, 2019), https://medium.com/@Amy_Klobuchar/senator-klobuchars-plan-for-the-future-of-work-and-a-changing-economy-4c7c0b859fec; see also John Delaney’s *Plan for Antitrust Policy*, JOHN DELANEY, <https://www.johndelaney.com/issues/antitrust/> (last visited Apr. 3, 2020) (proposing policy that would “[i]nstruct the federal courts and the antitrust enforcement agencies to also weigh long term market structure when reviewing a proposed merger”).

11. Klobuchar, *supra* note 10.

12. *Id.* See also Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. § 2(b)(4) (2019).

13. Klobuchar, *supra* note 10.

14. Amy Klobuchar, *Senator Klobuchar’s Plan from the Heartland: Strengthening our Agricultural and Rural Communities*, MEDIUM (Aug. 7, 2019), https://medium.com/@Amy_Klobuchar/senator-klobuchars-plan-from-the-heartland-strengthening-our-agricultural-and-rural-communities-405cb6b3234d.

15. Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. § 5(b) (2019); Klobuchar, *supra* note 10.

16. Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. § 5(b) (2019).

17. *Id.* at § 5(c)(1)(A).

anticompetitive activity—through coordination with other agencies and subpoena power—and then publicly release such data, along with recommendations to enforcement agencies on what action should be taken.¹⁸ While the OCA would lack formal enforcement authority, it would have the authority to subpoena information that it was unable to obtain through coordination with other agencies.¹⁹

B. SENATOR BERNIE SANDERS

Senator Bernie Sanders similarly centered his antitrust platform around anticompetitive mergers and acquisitions.²⁰ Senator Sanders proposed revisiting recent mergers and pledged to undo those that have highly concentrated markets, harmed workers, raised prices, or are otherwise anticompetitive.²¹ He likewise pledged to break up any corporation that attained dominant market share and could use its market power in an anti-competitive way.²²

Senator Sanders also sought to use the FTC to study mergers and acquisitions.²³ Sanders proposed that the FTC study and identify common anti-competitive business practices, and that any company engaging in such behavior would not be able to obtain merger approval.²⁴ The results of the FTC’s study would be utilized to craft new, “bright-line merger guidelines that set caps for vertical mergers, horizontal mergers, and total market share.”²⁵

Senator Sanders proposed to use the FTC in a way that no other candidate had contemplated. Sanders proposed allowing the FTC to issue administrative fines as well as the ability to halt mergers without first challenging them in federal court.²⁶ Further, Sanders sought to grant the FTC

18. *Id.* at §§ 5(e)–(g).

19. *Id.* at § 5(f)(1).

20. *See generally Corporate Accountability and Democracy*, BERNIE, <https://berniesanders.com/issues/corporate-accountability-and-democracy/> (last visited Apr. 10, 2020).

21. Senator Sanders was critical of mergers that have taken place under the Trump administration, pledging to look at all mergers which have taken place since Trump took office. Senator Sanders further proposed that the FTC review all mergers over the past 40 years to develop new merger guidelines. *Review All Mergers that Have Taken Place During the Trump Administration*, BERNIE, <https://berniesanders.com/issues/corporate-accountability-and-democracy/> (last visited Apr. 10, 2020).

22. *Id.*

23. *Id.*

24. *Id.* (The Sanders plan would also end institutional deference to the consumer welfare standard, and his plan instead cites to a paper from the Roosevelt Institute proposing a new standard: the effective competition standard); *See also* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard*, ROOSEVELT INST. (Sept. 25, 2018), <https://rooseveltinstitute.org/effective-competition-standard/>.

25. *Review All Mergers that Have Taken Place During the Trump Administration*, *supra* note 21.

26. *Id.* Sanders cites to a plan out of the Great Democracy Initiative. *See* Ganesh Sitaraman, *Taking Antitrust Away from the Courts*, GREAT DEMOCRACY INITIATIVE (Sept. 2018),

full rulemaking authority under the Sherman, Clayton, and Packers and Federal Trade Commission Acts.²⁷ Finally, the FTC would be directed to prepare an annual report on the impacts of mergers across markets.²⁸

Senator Sanders' plans also addressed anti-competitive harms faced by the agribusiness industry. Sanders proposed placing a moratorium on both mergers and vertical integration of large agribusiness corporations.²⁹ Sanders further proposed reestablishing and strengthening the Grain Inspectors, Packers, and Stockyards Administration (GIPSA) in order to provide basic protections to farmers dealing with big food companies.³⁰ Sanders also pledged to pass a national "right-to-repair" law that would give farmers full rights over the machines they buy, instead of being required to go to an authorized repair agent.³¹

C. SENATOR ELIZABETH WARREN

Senator Elizabeth Warren's proposals were perhaps the most comprehensive of all the candidates. Warren proposed plans directed at merger reform in the agribusiness sphere addressing consolidation in the healthcare and technology industries, as well as plans to address labor and antitrust law issues. Warren first proposed directing the FTC to block all future mergers between hospitals unless the merging companies could show that the merged entity can maintain or improve access to care.³² She likewise proposed reforms to strengthen FTC oversight of the healthcare industry as well as those that would require mergers involving healthcare centers be reported to the FTC.³³

Senator Warren further proposed several novel plans at the intersection of antitrust and labor laws. First, Warren proposed amending the antitrust

<https://greatdemocracyinitiative.org/wp-content/uploads/2018/09/Taking-Antitrust-Away-from-the-Courts-Report-092018-3.pdf>

27. In the same vein, Sanders proposed repealing the rulemaking burdens imposed upon the FTC by the Magnuson-Moss Act, as well as repealing the section of the Magnuson-Moss Act that states that the FTC will be funded through appropriations, and rather, proposed that the agency would be "granted reasonable fees to carry out its duties." Review All Mergers that Have Taken Place During the Trump Administration, *supra* note 21.

28. *Id.*

29. *Policies Leveling the Playing Field for Farmers and Farmworkers*, BERNIE, <https://berniesanders.com/issues/revitalizing-rural-america/> (last visited Apr. 13, 2020); Senator (and then-candidate) Cory Booker was the first among presidential contenders to suggest placing a moratorium on Big Food mergers. See Cory Booker, *Cory Booker: A handful of companies make most of our food. We need to end big food mergers*, CNN BUS. (Jul. 25, 2019, 8:08 AM), <https://www.cnn.com/2019/07/25/perspectives/cory-booker-antitrust-farmers/index.html>.

30. *Policies Leveling the Playing Field for Farmers and Farmworkers*, *supra* note 29.

31. *Id.*

32. *Investing in Rural America*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/invest-rural> (last visited Apr. 14, 2020).

33. Additional reforms included authorization of the FTC to conduct reviews for anti-competitive behavior of hospitals, updating Department of Justice (DOJ) vertical merger guidelines, and examining vertically integrated health care companies for anti-competitive practices. See *id.*

laws to protect gig workers, currently classified as independent contractors,³⁴ in order to allow them to bargain collectively or unionize.³⁵ Warren also suggested that she would use existing authority to reject mergers that would drive wages down.³⁶ She finally proposed banning “no-poach” agreements where competing firms refuse to recruit or hire each other’s employees.³⁷

Senator Warren also had plans to address anticompetitive practices in the agribusiness industry. Senator Warren committed to appoint “trustbusters” to review—and reverse—anticompetitive mergers.³⁸ Recognizing the harms caused by widespread vertical integration in the agribusiness sector, Warren further committed to break up vertically integrated agribusiness companies in order to give farmers more bargaining power when dealing with these companies.³⁹ Senator Warren finally committed to supporting “right-to-repair” legislation, as Bernie Sanders also proposed, as well as legislation that would make federal checkoff programs voluntary.⁴⁰

Most notably, Senator Warren released a comprehensive plan to break up tech monopolies, which garnered a fair amount of press and national attention.⁴¹ Warren’s proposal centers around a concept she terms “platform utilities.”⁴² These are companies with an annual global revenue of \$25 billion or more that offer some sort of online marketplace, exchange, or platform for connecting third-parties.⁴³ Such companies would be barred from owning

34. See generally *What is a gig worker?*, GIG ECON. DATA HUB, <https://www.gigeconomydata.org/basics/what-gig-worker> (last visited Apr. 14, 2020).

35. *Empowering American Workers*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/empowering-american-workers> (last visited Apr. 14, 2020).

36. *Id.* Warren relies on a law review article for this proposal. See Suresh Naidu, Eric. A Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 570 (2018).

37. Investing in Rural America, *supra* note 32. See also End Employer Collusion Act, S. 2215, 116th Cong. (2019).

38. *Leveling the Playing Field for America’s Family Farmers*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/americas-family-farmers> (last visited Apr. 14, 2020).

39. *Id.* (While Warren’s plan pledged to break up integrated agribusiness corporations, it did not specify to what extent such companies would need to be vertically integrated in order for her administration to break them up, nor did it make mention of integrated companies needing to engage in anticompetitive behavior).

40. Federal checkoff programs require producers of certain products—including beef, pork, eggs, chicken, and corn—to pay a portion of their sales into a federal checkoff program which is used to fund advertising campaigns. Arguably, the money small business farmers pay into the program eventuate in lobbying and advertising that benefit big agricultural companies. See, e.g., *Leveling the Playing Field for America’s Family Farmers*, *supra* note 38; OCM Staff, *Top 10 Most Egregious Checkoff Program Abuses*, ORG. FOR COMPETITIVE MKT. (May 14, 2018), <https://competitivemarkets.com/top-10-most-egregious-checkoff-program-abuses/>.

41. See, e.g., Matt Stevens, *Elizabeth Warren on Breaking Up Big Tech*, N.Y. TIMES (Jun. 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/elizabeth-warren-break-up-amazon-facebook.html>; Lauren Gambino, *‘Too much power’: it’s Warren v Facebook in a key 2020 battle*, GUARDIAN (Oct. 20, 2019 8:04 AM), <https://www.theguardian.com/us-news/2019/oct/19/elizabeth-warren-facebook-break-up>.

42. Elizabeth Warren, *Here’s how we can break up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

43. *Id.*

both the platform utility and any participants on the platform, and would be required to meet a standard of “fair, reasonable, and nondiscriminatory dealing” with its users.⁴⁴ Moreover, platform utilities would be prohibited from transferring or sharing data with third parties.⁴⁵ Warren’s proposal provided that federal regulators, State Attorneys General, and injured private parties would have standing to sue a platform utility in order to enjoin conduct in violation of her plan, to disgorge ill-gotten gains, and to be awarded treble damages.⁴⁶ Any company in violation of the requirements of her plan would also be forced to pay a fine of 5 percent of annual revenue.⁴⁷

D. FORMER VICE PRESIDENT JOSEPH BIDEN

As the eventual Democratic Nominee in the 2020 general election, it was somewhat surprising to see the former Vice President’s lack of any type of concrete antitrust proposal. Biden’s campaign website included various proposals, none of which squarely addressed antitrust issues.⁴⁸ Some of Biden’s plans tangentially mentioned increased enforcement modification of antitrust laws as a part of a greater economic vision,⁴⁹ but no plan was focused primarily on antitrust, and certainly none as comprehensive as several of Biden’s former competitors.

While Biden has recognized the dangers Big Tech poses to competition and consumers in the United States, he has only made off-hand comments related to antitrust enforcement particularly with respect to Big Tech, instead of putting forth or endorsing any specific policy proposals.⁵⁰

E. OTHER DEMOCRATIC CANDIDATE PROPOSALS

Among the remaining 2020 Democratic candidates, several others either proposed additional ideas or agreed with ideas already proposed by other candidates. Representative John Delaney proposed that he would instruct

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See generally* BIDEN HARRIS, <https://joebiden.com/joes-vision/> (last visited Oct. 25, 2020).

49. *See, e.g., The Biden Plan for Rural America*, BIDEN HARRIS, <https://joebiden.com/rural/> (last visited Oct. 25, 2020) (promising to protect small and medium farms from the harms of increased market concentration through strengthening enforcement of the Sherman, Clayton, and the Packers and Stockyards Acts); *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, BIDEN HARRIS, <https://joebiden.com/empowerworkers/> (last visited Oct. 25, 2020) (promising to modify antitrust laws to allow for independent contractors to organize and bargain collectively).

50. When asked if he would support breaking up Big Tech, Biden stated, “I don’t think we spend nearly enough time focusing on antitrust measures. And the truth of the matter is I think it’s something we should take a really hard look at.” *See Joe Biden says he’s open to breaking up Facebook*, CNBC (May 13, 2019, 7:56 PM), <https://www.cnbc.com/2019/05/14/2020-hopeful-joe-biden-says-hes-open-to-breaking-up-facebook.html>. He went on to praise Elizabeth Warren’s arguments for breaking up tech companies, however, he stopped short of endorsing Warren’s plan outright, calling it “premature.” *See id.*

federal courts to weigh long term market structure when reviewing a potential merger,⁵¹ and further stated that he would “make it clear” that the Clayton and Sherman Acts authorize the unwinding of previous mergers.⁵² Mayor Pete Buttigieg stated that he would lower reporting requirements for mergers and revive an arm of USDA responsible for policing competition in the agricultural marketplace.⁵³ Senator Cory Booker consistently criticized consolidation in the agriculture industry and advocated for policies (and legislation) that would address such concerns.⁵⁴

F. PRESIDENT DONALD TRUMP

President Trump has yet to put forward a cognizable plan related to antitrust.⁵⁵ In regard to Big Tech, President Trump has said that “there’s something going on,”⁵⁶ but has not elaborated with any formal policy proposals. Only after U.S. Representative David Cicilline opened an investigation into digital markets and competition concerns,⁵⁷ did the FTC order leading technology companies to turn over a trove of information related to their acquisitions during the 2010s.⁵⁸ The FTC and the DOJ announced that the FTC would focus its investigation on Facebook and Amazon, while the DOJ would focus on Google and Apple.⁵⁹ On the same day as the FTC announced its tech investigation, a federal judge approved

51. *John Delaney’s Plan for Antitrust Policy*, *supra* note 10.

52. *Id.* (Delaney also committed to extending the Clayton Act to block vertical mergers that could have anticompetitive effects—especially so in the agricultural industry).

53. Arren Kimbel-Sannit, *How Buttigieg would address rural economic issues*, POLITICO (Aug. 13, 2019, 3:36 PM), <https://www.politico.com/story/2019/08/13/buttigieg-rural-economy-iowa-trip-1657909>.

54. *See, e.g., Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019*, *infra* note 78 (discussing his legislative proposals); Booker, *supra* note 29.

55. *See, e.g., Tara Lachapelle, Trump Twists Heads with Antitrust Double Standard*, BLOOMBERG OPINION (Feb. 11, 2020, 2:36 PM), <https://www.bloomberg.com/opinion/articles/2020-02-11/trump-contradicts-with-big-tech-t-mobile-antitrust-actions> (examining the inconsistency between the Trump administration announcing a review of recent tech mergers and possible anticompetitive effects, but simultaneously allowing the Sprint/T-Mobile merger to move forward—a merger the author calls “one of the most anticompetitive megadeals ever in the tech sphere”); Kadhim Shubber, *Trump administration steps up push to sway antitrust cases*, FIN. TIMES (Jan. 20, 2020), <https://www.ft.com/content/1fad936e-38a3-11ea-a6d3-9a26f8c3cba4>.

56. Makena Kelly, *Donald Trump on tech antitrust: ‘There’s something going on’*, VERGE (Jun. 10, 2019, 11:51 AM), <https://www.theverge.com/2019/6/10/18659619/donald-trump-facebook-google-amazon-apple-antitrust-european-union-eu>.

57. Nancy Scola & Cristiano Lima, *The House Democrat Taking on Silicon Valley*, POLITICO (Jan. 21, 2020, 7:59 AM), <https://www.politico.com/news/magazine/2020/01/21/silicon-valley-congress-big-tech-anti-trust-legislation-100217>.

58. Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies*, FED. TRADE COMM’N (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

59. Lauren Feiner, *Here’s why the top two antitrust enforcers in the US are squabbling over who gets to regulate Big Tech*, CNBC (Sept. 18, 2019, 10:31 AM), <https://www.cnbc.com/2019/09/18/the-ftc-and-doj-are-squabbling-over-the-right-to-regulate-big-tech.html>.

the merger of Sprint and T-Mobile, the third-and fourth-largest U.S. cell phone carriers, with support of the DOJ.⁶⁰

The White House February 2020 Economic Report of the President outlined the administration's priorities with respect to antitrust enforcement and policy.⁶¹ The Report states: “[f]ederal enforcement agencies, which are already empowered with flexible legal framework, have the tools they need ... ,[and] are well equipped to handle competition challenges posed by the U.S. economy.”⁶²

There have been persistent reports that President Trump attempted to have the Time Warner/AT&T merger blocked by the DOJ due to his reported dislike of CNN—a network owned by Time Warner.⁶³ In addition, a whistleblower testified in Congress that the Antitrust Division issued burdensome second requests to mergers and acquisitions in the cannabis industry that otherwise posed no significant antitrust issues at the direction of Attorney General Barr because of his personal dislike for the industry.⁶⁴ These and other troubling signs suggest that political and/or personal motivations may be driving aspects of U.S. antitrust policy under the current administration.⁶⁵

II. PARTY PLATFORMS

Party platforms are another source of material that indicates the general level of attention to antitrust issues in electoral politics. Although platform positions often tend to be rather neutral designed to appeal to all, the language demonstrates a disconnect between the parties on these issues. Although both parties supported the vigorous enforcement of antitrust laws (for very

60. Taylor Telford, *Sprint, T-Mobile deal wins judicial approval, ushering in a new era of telecom behemoths*, WASH. POST (Feb. 11, 2020, 12:28 PM), <https://www.washingtonpost.com/business/2020/02/11/sprint-t-mobile-deal-wins-judicial-approval-ushering-new-era-telecom-behemoths/>.

61. See generally *Economic Report of the President*, WHITE HOUSE (Feb. 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf>.

62. *Id.* at 200.

63. Hadas Gold, *Report: Trump asked Gary Cohn to block AT&T/Time Warner merger*, CNN BUS. (Mar. 4, 2019, 4:53 PM), <https://www.cnn.com/2019/03/04/media/att-time-warner-trump-gary-cohn/index.html>; Ryan Goodman, *11 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Barr—and Office of Professional Responsibility's Opinion*, JUST SECURITY (June 26, 2020), <https://www.justsecurity.org/71059/top-antitrust-lawyers-assess-john-elias-whistleblower-complaint-against-a-g-barr-including-office-of-professional-responsibilities-letter/>.

64. *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence: Hearing Before the H. Comm. on the Judiciary 116th Cong.* (June 24, 2020) (statement of John W. Elias, Career Employee, Department of Justice), https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf.

65. See generally Spencer Weber Waller & Jacob E. Morse, *The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason*, COMPETITION POLICY INT'L (July 16, 2020), <https://www.competitionpolicyinternational.com/the-political-misuse-of-antitrust-doing-the-right-thing-for-the-wrong-reason/>.

different reasons), antitrust fell off the Republican agenda starting in the Reagan era.

The last time the Republican Party had anything substantive, or positive, to say about antitrust was 1976 when the party platform stated:

The Republican Party believes in and endorses the concept that the American economy is traditionally dependent upon fair competition in the marketplace. To assure fair competition, antitrust laws must treat all segments of the economy equally. Vigorous and equitable enforcement of antitrust laws heightens competition and enables consumers to obtain the lowest possible price in the marketplace.⁶⁶

After 1976, there was silence on the issue except in 1992 when the Republican platform identified antitrust enforcement with problematic government regulation and pledged: “We will modify outdated antitrust rules that prohibit hospitals from merging their resources to provide improved, cost-effective health care.”⁶⁷

The 2016 Republican platform did not include any direct mention of antitrust.⁶⁸ In 2020, due to the COVID-19 pandemic, the Republican party announced that they would not draft a new platform but would roll over the 2016 platform verbatim.⁶⁹

In contrast, the 2016 Democratic platform contained a general section entitled “Promoting Competition by Stopping Corporate Concentration.” That section stated:

Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction. We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy.

66. The American Presidency Project, *Republican Party Platform of 1976*, U.C. SANTA BARBARA (Aug. 18, 1976), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1976>.

67. The American Presidency Project, *Republican Party Platform of 1992*, U.C. SANTA BARBARA (Aug. 17, 1992), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1992>.

68. The American Presidency Project, *2016 Republican Party Platform*, U.C. SANTA BARBARA (July 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform>.

69. Alison Durkee, *The GOP Won't Bother to Write a New Platform for 2020*, VANITY FAIR HIVE (June 12, 2020), <https://www.vanityfair.com/news/2020/06/republican-party-keeping-2016-platform-2020>.

We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce. We support President Obama's recent Executive Order, directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices—such as tying arrangements, price fixing, and exclusionary conduct—and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.⁷⁰

The official 2020 Democratic Party Platform includes reference to perceived threats to competition in discrete industries and also takes aim at policies adopted by President Trump during his tenure. The official platform, in relevant part, reads:

Democrats are concerned that the increase in corporate concentration across a wide range of industries, from hospitals and pharmaceutical companies to agribusiness and retail chains, could be stifling competition and innovation and creating monopoly conditions that harm consumers. We will direct federal regulators to review a subset of the mergers and acquisitions that have taken place since President Trump took office, prioritizing the pharmaceutical, health care, telecommunications, technology, and agricultural industries, to assess whether any have increased market concentration, raised consumer prices, demonstrably harmed workers, increased racial inequality, reduced competition, or constricted innovation, and assign appropriate remedies. Democrats will direct regulators to consider potential effects of future mergers on the labor market, on low-income and marginalized communities, and on racial equity, as well as on consumer prices and market competition. And as a last resort, regulators should consider breaking up corporations if they find they are using their market power to engage in anti-competitive activities.⁷¹

III. LEGISLATIVE PROPOSALS AND INVESTIGATIONS

There has been a flurry of antitrust legislation introduced by some of the prior Democratic candidates and other members of Congress. These proposals range from targeted plans dealing with specific issues and industries to broad sweeping reforms of the fundamental principles of antitrust law and enforcement.

A. PHARMA

Antitrust law has become part of the playbook of legislators to address issues of prescription drug prices. Numerous pieces of legislation have been introduced to combat pricing issues associated with “pay-for-delay” or

70. The American Presidency Project, *2016 Democratic Party Platform*, U.C. SANTA BARBARA (July 21, 2016), <https://www.presidency.ucsb.edu/documents/2016-democratic-party-platform>.

71. *2020 Democratic Party Platform*, DEMOCRATIC NAT'L COMM. <https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf>.

“reverse payment” deals.⁷² In such deals, generic drug manufacturers form agreements with their branded competitors to refrain from entering the market for a certain period of time.⁷³ In turn, the branded drug competitor is able to raise or maintain price for that period of time, thereby robbing consumers of the generic entry that normally drives down the cost of the drug.⁷⁴

Senators Amy Klobuchar and Chuck Grassley jointly introduced in 2019 the “Preserve Access to Affordable Generics and Biosimilars Act,” which would prohibit brand name drug companies and biological product manufacturers from paying or compensating generic drug companies or biosimilar companies from entering the market.⁷⁵ The Senate and House version of the bills seek to amend Section 5 of the FTC Act to make it unlawful for brand name drug companies to pay their generic competitors to delay entry to the market.⁷⁶ The FTC would then be empowered to initiate enforcement actions against violators and levy to bring civil penalties if successful.⁷⁷

B. BIG AG

While every major 2020 Democratic primary candidate touted some sort of policy addressing consolidation and concentration issues in the food and agriculture industry, Congress has paid less attention to the issue. Most prominently, Senator Cory Booker introduced the Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019.⁷⁸ The bill would prohibit mergers of food and agribusiness firms where one firm’s annual net sales or total assets exceed \$160 million and another firm whose annual net

72. *See, e.g.*, Protecting Consumer Access to Generic Drugs Act of 2019, H.R. 1499, 116th Cong. (2019); Affordable Prescriptions for Patients Act of 2019, S. 1416, 116th Cong. (2019); Stop Significant and Time-wasting Abuse Limiting Legitimate Innovation of New Generics Act (Stop STALLING Act), H.R. 2374, 116th Cong. (2019); Stop Significant and Time-wasting Abuse Limiting Legitimate Innovation of New Generics Act (Stop STALLING Act), S. 1224, 116th Cong. (2019); Affordable Medications Act, S. 1801, 116th Cong. (2019); Strengthening Health Care and Lowering Prescription Drug Costs Act, H.R. 987, 116th Cong. (2019); Creating and Restoring Equal Access to Equivalent Samples Act of 2019 (CREATES Act of 2019), H.R. 965, 116th Cong. (2019).

73. *Pay-for-Delay*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/mergers-competition/pay-delay> (last visited Aug. 31, 2020).

74. *Id.*

75. *See generally* Preserve Access to Affordable Generics and Biosimilars Act, S. 64, 116th Cong. (2019). The companion bill was simultaneously introduced in the House. *See* Preserve Access to Affordable Generics and Biosimilars Act, H.R. 2375, 116th Cong. (2019).

76. Preserve Access to Affordable Generics and Biosimilars Act, S. 64, 116th Cong. § 27(d)(1) (2019).

77. *Id.* §§ 27(a)(1), (f)(1).

78. Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019, S. 1596, 116th Cong. (2019). The companion bill was simultaneously introduced in the House. *See* Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019, H.R. 2933, 116th Cong. (2019).

sales or total assets exceed \$16 million.⁷⁹ The bill empowers the Attorney General with rulemaking authority in order to carry out the objectives of the legislation.⁸⁰ The bill would also create the Food and Agriculture Concentration and Market Power Review Commission (Commission), which—like Klobuchar’s Office of the Competition Advocate (OCA)—would be primarily tasked with studying the nature and consequences of concentration in the food and agribusiness industries.⁸¹ The Commission would be empowered to hold hearings and collect data from other agencies in order to achieve its statutory mandate.⁸²

C. MORE COMPREHENSIVE REFORM BILLS

In addition to industry specific reforms, there have been two broader efforts so far to reform antitrust law and enforcement more generally. These efforts also have been led in the Senate principally by Senators Klobuchar and Warren.

1. The Klobuchar Reform Bills

Senator Amy Klobuchar has been perhaps the most active member of Congress introducing antitrust legislation in recent years. Over the course of the past year, Senator Klobuchar introduced four separate pieces of legislation squarely addressing antitrust issues ranging from exclusionary conduct to merger requirements.⁸³

With respect to mergers, Klobuchar’s bills address both pre-merger filing fees and post-merger activity. Klobuchar introduced legislation that would increase merger filing fees for larger mergers between firms, while simultaneously lowering the burden on smaller deals.⁸⁴ Moreover, the Merger Enforcement Improvement Act would require firms that enter into settlement agreements with the government to submit certain information to the government for five years after the close of the deal.⁸⁵ The Act would also require the FTC and the Comptroller General of the United States to conduct studies on institutional investors and mergers remedies.⁸⁶

79. Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019, S. 1596, 116th Cong. § 101(a)(1) (2019).

80. *Id.* § 101(e).

81. *Id.* § 201.

82. *Id.* § 204.

83. *See* Anticompetitive Exclusionary Conduct Prevention Act of 2020, S. 3426, 116th Cong. (2020); Monopolization Deterrence Act of 2019, S. 2237, 116th Cong. (2019); Merger Fee Modernization Act of 2019, S. 1937, 116th Cong. (2019); Merger Enforcement Improvement Act, S. 306, 116th Cong. (2019); Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. (2019).

84. S. 1937, 116th Cong. (2019); *see also* S. 306, 116th Cong. (2019).

85. S. 306 116th Cong. §3 (2019). The goal of this provision is to help federal agencies understand the impact the acquisition had on competition and requires the newly merged entity to submit information on price, availability, quality, source, etc. of their products. *See id.*

86. *Id.* §§ 4, 5.

Klobuchar also introduced the Consolidation Prevention and Competition Promotion Act, which contained many of the same provisions.⁸⁷ The Act tracked Klobuchar's campaign proposal of the OCA.⁸⁸ The Act requires companies to disclose certain information to the government after agreeing to a settlement.⁸⁹ The Act also shifts the burden of proof to merging parties in deals of a certain size, or where the merger would result in a significant increase in market concentration, to provide pro-competitive justifications.⁹⁰ Most significantly, and distinct from Klobuchar's other bills, the Act also amends the Clayton Act to prohibit mergers that would "materially" lessen competition.⁹¹ Similarly, the Act further amends the Clayton Act to prohibit mergers that would give firms monopsony power.⁹²

Shortly after dropping out of the Presidential race, Senator Klobuchar introduced a more comprehensive antitrust reform bill. On March 10, 2020, the eve of the shutdown of most of the U.S. economy due to COVID-19, Senator Klobuchar offered the Anticompetitive Exclusionary Conduct Prevention Act of 2020 (AECPA) cosponsored by Senators Booker and Blumenthal.⁹³

The AECPA deals with a broad range of antitrust issues, but not directly with merger issues that were subject to Klobuchar's prior proposals. The bill's core prohibition would make it unlawful for a person, or persons working in concert, to engage in exclusionary conduct that presents an appreciable risk of harming competition.⁹⁴ The key term "exclusionary conduct" means conduct that a) materially disadvantages one or more actual or potential competitors, or b) tends to foreclose or limit the opportunity of one or more actual or potential competitors to compete.⁹⁵ Exclusionary conduct is presumed unlawful if engaged in by a person, or persons acting in concert, with a market share of greater than 50% as a seller or buyer in the relevant market or otherwise have significant market power in the relevant market.⁹⁶

This presumption could be overcome if a defendant established by a preponderance of the evidence that a) distinct procompetitive benefits eliminate the risk of harm to competition; b) one or more persons (other than the defendants) have entered the market or expanded their presence in the market eliminating the risk of harming; or that the "exclusionary conduct

87. See generally Consolidation Prevention and Competition Promotion Act, *supra* note 15.

88. *Id.* § 5.

89. *Id.* § 4.

90. *Id.* § 3.

91. *Id.*

92. *Id.*

93. Anticompetitive Exclusionary Conduct Prevention Act of 2020, S. 3426, 116th Cong. (2020), <https://www.govtrack.us/congress/bills/116/s3426/text>.

94. *Id.* § 4(a).

95. *Id.*

96. *Id.*

does not present an appreciable risk of harming competition.”⁹⁷ The bill would also create civil penalties for antitrust violations of up to 15% penalty of total U.S. revenues.⁹⁸

Similarly, Senator Klobuchar’s Monopolization Deterrence Act would provide for identical remedies for monopolization violations.⁹⁹ It would grant both the DOJ and the FTC with civil penalty authority in the amount of 15% of all U.S. revenues or 30% of affected U.S. revenues.¹⁰⁰ The Act would also require the DOJ and FTC to issue guidelines how they would exercise their civil penalty authority.¹⁰¹

2. Senator Warren’s Draft Anti-Monopoly and Competition Restoration Act

Not surprisingly, Senator Warren prepared the most comprehensive draft antitrust legislation. In the fall of 2019, a nearly final version of draft legislation prepared by her Senate staff leaked to the press after being circulated privately among the academic community.¹⁰² In part due to the leak and the demands of the presidential campaign, the legislative package has not yet been introduced in final form, and is now subject to further delay as a result of COVID-19.

It is nonetheless interesting to view the wide-ranging progressive vision underlying this draft legislation which is likely to be introduced prior to the adjournment of this session of Congress. Published reports indicate that the bill would ban mega mergers when a company has \$40 billion or more in annual assets or both have \$15 billion or more in assets.¹⁰³ In addition, the bill would direct the retroactive review of two decades of such mega-mergers.¹⁰⁴ Exceptions and defenses to the ban on mega mergers would be limited to such issues as immediate insolvency.

Prohibitions on conduct by dominant firms would focus on entities with market shares as low as 25%.¹⁰⁵ In general, the proposal would align the treatment of powerful firms more closely with the abuse of a dominant

97. *Id.*

98. *Id.* §§ 4(a)-(b).

99. Monopolization Deterrence Act of 2019, §3(a), S. 2237, 116th Cong. (2019); *See also* Press Release, Amy Klobuchar, Senator, Introduces Legislation to Crack Down on Monopolies that Violate Antitrust Law (Aug. 2, 2019), <https://www.klobuchar.senate.gov/public/index.cfm/2019/8/klobuchar-introduces-legislation-to-crack-down-on-monopolies-that-violate-antitrust-law>.

100. Monopolization Deterrence Act of 2019, *supra* note 99 at § 3(b).

101. *Id.* § 4.

102. *See* Eric Newcomer & Joshua Brustein, *Elizabeth Warren drafting legislation to reverse ‘mega-mergers’*, L.A. TIMES (Dec. 4, 2019), <https://www.latimes.com/business/technology/story/2019-12-04/warren-drafts-legislation-reverse-mega-mergers>.

103. *Id.*

104. *Id.*

105. Lauren Hirsch, *Elizabeth Warren’s antitrust bill would dramatically enhance government control over the biggest US companies*, CNBC (Dec. 19, 2019), <https://www.cnn.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html>.

position approach taken by the European Union.¹⁰⁶ Firms would have additional restrictions on their ability to engage in predatory pricing, denial of essential facilities, use of non-compete and no-poaching clauses, and other behavior.¹⁰⁷

The goals and values of antitrust would be expanded beyond the currently predominate consumer welfare standard by requiring consideration of the impact of challenged business conduct on entrepreneurs, innovation, privacy, and workers. Public reports indicate that the bill, tentatively named the Anti-Monopoly and Competition Restoration Act (AMCRA), is coauthored with Representative David Cicilline, D-R.I., who chairs the antitrust subcommittee on the House Judiciary panel. Representative Cicilline has indicated that he will not introduce new antitrust legislation until the investigations he is leading into the growing power of digital platforms have concluded.¹⁰⁸

In November the Subcommittee majority staff issued a 449 page report and recommendations for widespread strengthening of the antitrust laws.¹⁰⁹ However, neither Senator Warren nor Representative Cicilline have yet introduced any comprehensive follow-up antitrust legislation.

Whether the AMCRA or any of the other proposals will ever be enacted into law is a different question. All the bills and proposals discussed above face substantial hurdles if the current split in Congress continues, regardless of the results of the next Presidential election. The most likely set of issues to be enacted appear to be the items dealing with the pharmaceutical industry which enjoy the broadest bipartisan legislative and executive branch support.

D. CONGRESSIONAL OVERSIGHT AND INVESTIGATION

Congress plays a crucial role in considering and enacting legislation in the antitrust arena. Besides legislating, Congress also considers agency and executive branch appointments, appropriates budgets, conducts oversight, holds hearings, conducts investigations, issues reports, and debates antitrust issues in committee and on the floor of the House and Senate as a part of their full responsibilities as members of the legislative branch. In a democracy, it is fitting that the most democratically elected branches set the fundamental public policies and values. These policy and value choices should then be

106. *Id.* See generally Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Law*, 52 CONN. L. REV. 123 (2020) (arguing for further harmonization of U.S. antitrust in line with international consensus around principle of EU competition law for abuse of dominance).

107. See also End Employer Collusion Act, *supra* note 37.

108. Newcomer & Brustein, *supra* note 102.

109. Investigation of Competition in Digital Markets, Majority Staff Rpt. & Recs., Subcomm. On Antitrust, Comm. on Admin. Law of the Comm. On the Judic. (2020),

implemented by skilled technocrats committed to the nonpartisan execution of these values and policies.¹¹⁰

It is heartening to watch Congress take antitrust issues more seriously, separate from what happens to any individual bill. One positive development is the formation of a House Antitrust Caucus to bring together members with common interests in this area.¹¹¹ Recent Senate and House hearings have included the effects of consolidation and anticompetitive conduct in health care markets,¹¹² competition in labor markets,¹¹³ and a series of hearings relating to competition issues in digital platforms.¹¹⁴ This is a substantial improvement from past Congresses which have too often focused on the minutia and the parochial, as opposed to the fundamental issues of competition law and policy.¹¹⁵

The most significant current Congressional antitrust initiative is the House Antitrust Subcommittee's ongoing investigation of digital platforms.¹¹⁶ The subcommittee has conducted several rounds of hearings, solicited the views of experts in the field, and requested numerous records from the industry.¹¹⁷

While the investigation is on hiatus during the COVID-19 crisis, observers anticipate that, when resumed, the investigation will lead to substantial reports and additional legislative proposals. Most recently, Representative Ciciline announced that he wanted further legislation providing financial relief for the COVID-19 crisis to include a ban on mergers during the pandemic except for those on the brink of collapse.¹¹⁸ Senator Warren and Representative Alexandria Ocasio-Cortez quickly

110. Spencer Weber Waller, *Antitrust and Democracy*, 46 FLA. ST. U. L. REV. 807 (2019); Harry First & Spencer Weber Waller, *Democracy's Antitrust Deficit*, 81 FORDHAM L. REV. 2543, 2555–61 (2013).

111. *CPI Talks... with Representative Ro Khanna*, COMPETITION POL'Y INT'L (Apr. 7, 2020), <https://www.competitionpolicyinternational.com/cpi-talks-with-representative-ro-khanna/>.

112. *Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets*, HOUS. COMM. ON JUDICIARY (Mar. 07, 2019), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=1976>.

113. *Antitrust and Economic Opportunity: Competition in Labor Markets*, HOUS. COMM. ON JUDICIARY (Oct. 29, 2019), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2241>.

114. *See, e.g., Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy*, HOUS. COMM. ON JUDICIARY (Jan. 17, 2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2386>

115. First & Waller, *supra* note 110, at 2559–60.

116. Press Release, House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets, HOUS. COMM. ON JUDICIARY (June 3, 2019), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2051>.

117. *See generally* Digital Markets Investigation, HOUS. COMM. ON JUDICIARY, <https://judiciary.house.gov/news/documentquery.aspx?IssueID=14921> (offering various press releases regarding the Digital Markets Investigation).

118. David McLaughlin, *U.S. House Antitrust Chair Seeks Ban on Mergers During Pandemic*, *Mergers & Antitrust Law News*, BLOOMBERG (Apr. 23, 2020, 8:52 AM), <https://news.bloomberglaw.com/mergers-and-antitrust/u-s-house-antitrust-chair-seeks-ban-on-mergers-during-pandemic>.

followed up by proposing the Pandemic Anti-Monopoly Act which would impose a moratorium on mergers deemed risky to competition until the FTC also determines that small businesses, workers, and consumer are no longer under severe financial distress.¹¹⁹

IV. ANTITRUST IN CIVIL SOCIETY

Competition issues are also part of the general civic discourse separate from the campaign rhetoric and legislative proposals offered by politicians. This is also a significant sign that antitrust has begun to be an important source of small “p” politics that engages substantial segments of the public at large.

One example is the increased number of non-technical books intended for a lay audience that deal with the role of antitrust in a healthy economy and democracy. Recent and forthcoming books dealing with these themes include Tim Wu’s “The Curse of Bigness,”¹²⁰ Matt Stoller’s “Goliath,”¹²¹ Maurice Stucke and Ariel Ezrachi’s “Competition Overdose,”¹²² Zephyr Teachout’s “Break ‘em Up,”¹²³ Sally Hubbard’s “Monopolies Suck,”¹²⁴ and David Dayan’s “Monopolized.”¹²⁵ On the academic side, there are a plethora of government and NGO studies of competition policy on digital competition¹²⁶ and new works are flourishing which explore the broader ramifications of antitrust and competition in society.¹²⁷

Long form and more mass-market journalism have also taken up the mantle of exploring the role of antitrust and competition policy. Such diverse

119. Senator Elizabeth Warren and Representative Alexandria Ocasio-Cortez, *Pandemic Anti-Monopoly Act*, ELIZABETH WARREN <https://www.warren.senate.gov/imo/media/doc/Merger%20Moratorium%20One%20Pager.pdf> (last visited Aug. 31, 2020).

120. TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

121. MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019).

122. MAURICE E. STUCKE & ARIEL EZRACHI, *COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS* (2020).

123. ZEPHYR TEACHOUT, *RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* (2020).

124. SALLY HUBBARD, *MONOPOLIES SUCK: 7 WAYS BIG CORPORATIONS RULE YOUR LIFE AND HOW TO TAKE BACK CONTROL* (2020).

125. DAVID DAYAN, *MONOPOLIZED: LIFE IN THE AGE OF CORPORATE POWER* (2020).

126. *See surveyed* Sean F. Ennis & Amelia Fletcher, *Developing International Perspectives On Digital Competition Policy* (Center for Competition Policy and Norwich Business School, Mar. 31, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565491.

127. RICHARD J. GILBERT, *INNOVATION MATTERS: COMPETITION POLICY FOR THE HIGH-TECHNOLOGY ECONOMY* (2020); JONATHAN A. BAKER, *THE ANTITRUST PARADIGM, RESTORING A COMPETITIVE ECONOMY* (2019); CHRIS SAGERS, *UNITED STATES V. APPLE, COMPETITION IN AMERICA* (2019); R. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016).

magazines as The Atlantic,¹²⁸ Time,¹²⁹ New Republic,¹³⁰ American Prospect,¹³¹ Rolling Stone,¹³² New York Times Magazine,¹³³ Variety,¹³⁴ National Review,¹³⁵ Foreign Policy,¹³⁶ and other policy and opinion

128. John Newman, *The U.S. Forgot What Antitrust Is For*, ATLANTIC (Sept. 11, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/how-antitrust-became-pro-pollution-tool/597712/>; Thomas Philippon, *The U.S. Only Pretends to Have Free Markets*, ATLANTIC (Oct. 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/europe-not-america-home-free-market/600859/>; Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, ATLANTIC (July/August 2018), <https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743/>.

129. Madeline Joung, *Google, Amazon, Facebook, and Apple Could Face Antitrust Investigations. How Do Those Work?*, TIME (June 5, 2019, 12:24 PM), <https://time.com/5601245/google-amazon-facebook-apple-antitrust/>; Alena Semuels, *This Legal Scholar Has Some Bold Ideas For How to Take on Major Companies Like Amazon*, TIME (Oct. 10, 2019), <https://time.com/collection-post/5692977/lina-khan-next-generation-leaders/>; Abigail Abrams, *Elizabeth Warren Wants to Break Up Amazon, Facebook, and Google. Experts Say That Won't Be Easy*, TIME (Mar. 8, 2019, 10:16 PM), <https://time.com/5548262/elizabeth-warren-antitrust-amazon-facebook-google/>.

130. Robin Kaiser-Schatzlein, *How to Break Up Corporate Giants*, THE NEW REPUBLIC (Nov. 19, 2019), <https://newrepublic.com/article/155769/break-corporate-giants>; Ganesh Sitaraman, *Unchecked Power*, THE NEW REPUBLIC (Nov. 29, 2018), <https://newrepublic.com/article/152294/unchecked-power>.

131. Sandeep Vaheesan, *Unleash the Existing Anti-Monopoly Arsenal*, AM. PROSPECT (Sept. 24, 2019), <https://prospect.org/day-one-agenda/unleash-anti-monopoly-arsenal/>; David Dayen, *Is Trump's Justice Department Trying to Discredit All Antitrust?*, AM. PROSPECT (Sept. 11, 2019), <https://prospect.org/justice/trump-s-justice-department-trying-discredit-antitrust/>; Sanjukta Paul, *The Double Standard of Antitrust Law*, AM. PROSPECT (June 24, 2019), <https://prospect.org/economy/double-standard-antitrust-law/#:~:text=But%20if%20the%20same%20truck,precisely%20to%20the%20same%20extent>.

132. Andy Kroll, *Facebook, Amazon, and Google Have a 2020 Problem*, ROLLING STONE (Mar. 12, 2019, 1:47 PM), <https://www.rollingstone.com/politics/politics-features/elizabeth-warren-big-tech-807109/>; Amy X. Wang, *Live Nation Halts Its War With the U.S. Government (For Now)*, ROLLING STONE (Dec. 19, 2019, 4:01 PM), <https://www.rollingstone.com/pro/news/live-nation-department-of-justice-settlement-927528/>; Althea Legaspi, *Ozzie Osborne Files Antitrust Suit Against AEG*, ROLLING STONE (Mar. 22, 2018), <https://www.rollingstone.com/music/music-news/ozzy-osbourne-files-antitrust-lawsuit-against-aeg-205052/>.

133. Kara Swisher, *The Immunity of Tech Giants*, N.Y. TIMES MAG. (May 1, 2020), <https://www.nytimes.com/2020/05/01/opinion/tech-companies-coronavirus.html>; Tim Wu, *A Corporate Merger Cost America Ventilators*, N.Y. TIMES MAG. (APR. 12, 2020), <https://www.nytimes.com/2020/04/12/opinion/ventilators-coronavirus.html>; David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>.

134. Gene Maddus, *Writers Guild Loses Bid to Toss Agencies' Antitrust Suit* [sic], VARIETY (Jan. 7, 2020, 10:27 AM), <https://variety.com/2020/biz/news/writers-guild-agency-antitrust-ruling-1203449009/>; Ted Johnson, *Justice Department Warns Academy Over Potential Oscar Rule Changes Threatening Netflix*, VARIETY (Apr. 2, 2019, 11:03 AM), <https://variety.com/2019/politics/news/doj-oscar-rules-changes-netflix-1203178413/>.

135. David L. Bahnsen, *Banning Mergers and Acquisitions: A Bad Idea at a Bad Time*, NAT'L REV. (Apr. 29, 2020, 8:00 PM), <https://www.nationalreview.com/2020/04/coronavirus-crisis-banning-mergers-and-acquisitions-bad-idea-at-a-bad-time/>; Iain Murray, *Breaking Up Platforms Has Sickening Implications*, NAT'L REV. (Mar. 12, 2019, 12:56 PM), <https://www.nationalreview.com/corner/breaking-up-platforms-has-sickening-implications/>.

136. John Handy, *The United States' Antitrust Laws Can't Match Saudi Aramco*, FOREIGN POL'Y (June 12, 2019, 11:31 AM), <https://foreignpolicy.com/2019/06/12/the-united-states-antitrust-laws-cant-match-saudi-aramco/>; Suzy Hansen, *Meet the Woman Leading Europe's War Against Google*,

magazines have all run recent stories or profiles of individuals involved in antitrust issues. Before the COVID-19 pandemic effectively monopolized press coverage in the United States, there were thirty-three antitrust related stories on the front page of the New York Times or the front page of its business section over a three-month period in late 2019.¹³⁷ A majority of the stories focused on tech giants such as Apple, Microsoft, Google, Amazon, and Facebook.¹³⁸ In addition, the New York Times also covered stories about mergers, merger policy, local issues such as the Chicago taxi market, and various smaller industries.¹³⁹ This is separate from coverage during the same period of campaign issues and candidate statements relating to the field.

A similar increase in coverage during this same period can be observed anecdotally in more business-oriented publications; more local newspapers; as well as radio and television.¹⁴⁰ Web pages and social media accounts on these issues have similarly proliferated on all ideological perspectives.¹⁴¹

Lobbying and public policy groups are growing in number and influence. Beyond the traditional trade associations and general think tanks, there are now a number of active groups with antitrust as a large part of their focus. These include the Open Markets Institute,¹⁴² American Antitrust Institute,¹⁴³ Anti-Monopoly Fund,¹⁴⁴ Institute for Self-Reliance,¹⁴⁵ Public Citizen,¹⁴⁶ Public Knowledge,¹⁴⁷ Demos,¹⁴⁸ and the International Center for Law and Economics.¹⁴⁹

Antitrust is similarly flourishing as a professional and academic field. One can see increased law school academic hiring in the field for the first time in decades. Academic institutes and centers abound with a wide variety of perspectives ranging from libertarian to enforcement oriented.¹⁵⁰ Most

Gazprom, and Apple, FOREIGN POL'Y (Mar. 18, 2016), <https://foreignpolicy.com/2016/03/18/the-face-of-justice-margrethe-vestager-eu-google-gazprom-antitrust/>.

137. Survey conducted by authors. Results available upon request.

138. *Id.*

139. *Id.*

140. *See, e.g.*, PBS Frontline, *Amazon Empire: The Rise and Reign of Jeff Bezos*, PBS (Feb. 18, 2020), <https://www.pbs.org/wgbh/frontline/film/amazon-empire/>.

141. *Compare* TRUTH ON THE MKT., <https://truthonthemarket.com/>, with OPEN MKT. INST., <https://openmarketsinstitute.org/>.

142. OPEN MKT. INST., <https://openmarketsinstitute.org/> (last visited May 7, 2020).

143. AM. ANTITRUST INST., <https://www.antitrustinstitute.org/> (last visited May 7, 2020).

144. The Anti-Monopoly Fund is a project sponsored by the Economic Security Project designed to fund organizations whose goal is to pursue anti-monopoly enforcement and policy. *See* Economic Security Project, *Introducing the Anti-Monopoly Fund*, MEDIUM (Oct. 17, 2019), <https://medium.com/economicsecproj/introducing-the-anti-monopoly-fund-306a82499ecf>.

145. INST. FOR SELF-RELIANCE, <https://ilsr.org/> (last visited May 7, 2020).

146. PUBLIC CITIZEN, <https://www.citizen.org/> (last visited May 7, 2020).

147. PUBLIC KNOWLEDGE, <https://www.publicknowledge.org/> (last visited May 7, 2020).

148. DEMOS, <https://www.demos.org/> (last visited May 7, 2020).

149. INT'L CTR. FOR L. AND ECON., <https://laweconcenter.org/> (last visited May 7, 2020).

150. THURMAN ARNOLD PROJECT, <https://som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale> (last visited Jan. 6, 2021); INTERNATIONAL CENTER FOR LAW & ECONOMICS, <https://laweconcenter.org/> (last visited Jan. 6, 2021); INSTITUTE FOR

major antitrust cases now feature multiple amicus briefs from legal and economic experts on both sides of an issue, both in the Supreme Court or the Courts of Appeals.¹⁵¹

CONCLUSION

Antitrust has always been political in nature. Antitrust law provides broad legal commands dealing with how governments and private individuals can challenge different types of market behavior. In this way, antitrust has not changed.

Antitrust will never take the place of sports, the Dow Jones index, or the weather for conversation at the breakfast table, but it has become a meaningful part of the political and policy debate for candidates, the legislature, and important segments of civil society. What has changed, however, is the degree that antitrust has reentered the political arena. Once mostly the domain of technocrats, antitrust issues have been proposed and debated by Presidential candidates, political parties, legislators, pundits, journalists, lobby groups, and voters alike. There are also a flurry of serious proposals and investigations that would make significant changes to the current system if adopted.

This is all to the good. Even if none of the current proposals come to fruition, the antitrust debate is part of a broader engagement with political economy issues dealing with fundamental concerns such as economic concentration, globalization, income inequality, social and racial justice, and even recently the proper response to the COVID-19 emergency. The many proposals, initiatives, and pressure groups represent, at a minimum, the return of antitrust as part of the progressive agenda.

CONSUMER ANTITRUST STUDIES, <https://www.luc.edu/law/academics/centersinstitutesandprograms/instituteforconsumerantitruststudies/> (last visited Jan. 6, 2021); GMU GLOBAL ANTITRUST INSTITUTE, <https://gai.gmu.edu/> (last visited Jan. 6, 2021); STIGLER CENTER, <https://www.chicagobooth.edu/research/stigler> (last visited Jan. 6, 2021).

151. In the recent Supreme Court litigation involving American Express merchant fees thirty-two amicus briefs were filed. Docket No. 16-1454. *Ohio, v American Express Company, et al.*, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-1454.html>.