RETHINKING BREAKUPS

Hiba Hafiz[*]

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

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

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

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INTRODUCTION

Trust-busting is once again a subject of national attention. And the attention is well-deserved: unprecedented levels of corporate concentration, firm dominance, and inequality demand robust debate about how antitrust solutions can ensure that our economy works for everyone.[1] Corporate power, including employer monopsony, or buyer, power as unilateral wage-setters, has contributed to higher prices to consumers, lower quality goods and services, stagnant wages, and the decline of labor's share of national income.[2] And consolidated private power has broader impacts on our political process, the marketplace of ideas, consumer choice and privacy.

How we *remedy* the problem of corporate power is just as important as our diagnosis of its sources. One single remedy to the problem of "bigness" has stolen the spotlight within our current debate—"breaking up" big firms into smaller ones by forcing them to divest business lines or assets to decrease corporate power and lower

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[1] On the rise of corporate concentration and firm dominance, *see, e.g.*, TIM WU, THE CURSE OF BIGNESS (2018); OPEN MARKETS INST., AMERICA'S CONCENTRATION CRISIS (Open Markets Inst. Rep. 2019), https://concentrationcrisis.openmarketsinstitute.org/; Joseph Stiglitz, *Market Concentration is Threatening the US Economy*, PROJECTSYNDICATE.ORG (Mar. 11, 2019), https://www.project-syndicate.org/commentary/united-states-economy-rising-market-power-by-joseph-e-stiglitz-2019-03; Org. for Econ. Co-operation & Dev., *Market Concentration - Note by the United States to the Directorate for Financial and Enterprise Affairs Competition*, OECD Doc. DAF/COMP/WD(2018)59 (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf. On the rise of income inequality, *see* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014); ESTELLE SOMEILLER ET AL., ECON. POL'Y INST., INCOME INEQUALITY IN THE U.S. (2016), https://files.epi.org/pdf/107100.pdf; Jae Song et al., *Firming Up Inequality*, 134 Q.J. ECON. 1 (2019); Raj Chetty et al., *The Fading American Dream*, 356 SCIENCE 398 (2017).

[2] On labor market concentration, the effects of employer monopsony, and the decline of labor's share of national income, *see, e.g.*, José Azar et al., *Labor Market Concentration*, 56 J. HUM. RESOURCES (2021); *Nonfarm Business Sector: Labor Share*, FRED (June 4, 2020), https://fred.stlouisfed.org/series/PRS85006173; Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, J. HUMAN RESOURCES 0219, 0219-10025R1 (2020); Arindrajit Dube et al., *Monopsony in Online Labor Markets*, 2 AER: INSIGHTS 33 (2020); Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation* (IZA Inst. of Lab. Econ., IZA DP No. 12089, 2019), http://ftp.iza.org/dp12089.pdf; David Berger et al., *Labor Market Power* (IZA Inst. of Lab. Econ., IZA DP No. 12276, 2019), http://ftp.iza.org/dp12276.pdf; Brad Hershbein et al., *Concentration in US Local Labor Markets* (Working Paper 2019), https://ideas.repec.org/p/red/sed019/1336.html; Yue Qiu & Aaron Sojourner, *Labor Market Concentration and Labor Compensation* (IZA No. 12089, 2019), https://www.iza.org/publications/dp/12089/labor-market-concentration-and-labor-compensation; Josh Bivens et al., ECON. POL'Y INST., IT'S NOT JUST MONOPOLY AND MONOPSONY: HOW MARKET POWER HAS AFFECTED AMERICAN WAGES (2018), https://files.epi.org/pdf/145564.pdf; David Card et al., *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON. S13 (2018); José Azar & Xavier Vives, *Oligopoly, Macroeconomic Performance, and Competition Policy*, IESE BLOG NETWORK (Dec. 18, 2018), https://blog.iese.edu/xvives/files/2018/12/Azar-Vives-Dec-2018.pdf; David Autor et al., *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. 180 (2017); Lijun Zhu, *Industrial Concentration and the Declining Labor Share*, WASH. U. (Nov. 10, 2017), https://cpbus-w2.wpmucdn.com/sites.wustl.edu/dist/7/815/files/2017/11/Job-Market-Paper_Lijun-Zhu-1pto4x7.pdf.

prices. But calls to break up firms from Big Tech to Big Ag have fixated exclusively on how breakups could benefit consumers and, in some cases, small businesses. Entirely absent from these debates is how breakups benefit or harm the workers and labor markets affected by firm dismantling.

This Article is the first to focus on how firm breakups—and antitrust remedial design more generally—can and have significantly impacted workers' countervailing power and earning potential. Firm structure matters for worker power. As many antitrust commentators have presumed, dismantling dominant firms can result in more firms competing for workers' services, which can lift their wages. But it can also dismantle structures of worker power that have arisen to successfully counter dominant employers. A leading example, as this Article documents, is the devastating effect of the breakup of the Bell System in the 1980s on the Communications Workers of America, gutting union density within the telecommunications industry from 56 percent pre-breakup to 24 percent by 2001.[3] Breakups, much like workplace "fissuring" through vertical integration and outsourcing,[4] can decimate labor market institutions that advocate on workers' behalf, but can also result in layoffs, increased obstacles for worker coordination, lower overall wage rates, and dramatic reductions in earned benefits, job security, and the quality of working conditions.

The role of workers in antitrust policy could not be more central to our current antitrust moment. For the first time in the history of American competition regulation, the importance of regulating employer power has taken center stage in antitrust enforcement, congressional debates about antitrust law reforms, and presidential administration.[5] In a monumental Executive Order on "Promoting Competition in the American Economy", the Biden Administration committed to extending antitrust policy to "promote the interests of American workers" held back by corporate consolidation from "bargain[ing] for higher wages and better working conditions".[6] The Order called for a "whole-of-government competition policy" extending beyond the antitrust agencies to assess how the lack of robust competition impacts labor markets.[7] But as of yet, no scholarship has studied how the antitrust remedies being

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[3] U.S. Census Bureau, Current Population Survey (CPS) (2001).

[4] For workplace fissuring, *see* DAVID WEIL, THE FISSURED WORKPLACE (2014).

[5] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), https://www.justice.gov/atr/file/903511/download; *Testimony Before House Subcommittee on Antitrust, Commercial, and Administrative Law, "Antitrust and Economic Opportunity: Competition in Labor Markets," Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 116th Cong. (2019) (statement by Doha Mekki); *"Oversight of the Enforcement of the Antitrust Laws," Senate Comm. on the Judiciary*, 115th Cong. 20-23 (2018) (statement of Joseph Simons); Jonathan Eiden & Devin Hayes, *Criminal Prosecutions Have Begun for No-Poach Agreements and Wage-Fixing Violations*, NAT'L. L. REV. (Feb. 3, 2021), https://www.natlawreview.com/article/criminal-prosecutions-have-begun-no-poach-agreements-and-wage-fixing-violations.

[6] Exec. Order No. 14,036, 86 C.F.R. 36987, § 1 (July 9, 2021) (hereinafter, EO 14,036).

[7] *Id.* at §§ 2, 5(v)(i).

proposed to address corporate consolidation and market power actually will affect labor markets and worker power.

This Article fills that gap. It offers the first comprehensive scholarly treatment of those effects and lays the groundwork for a theoretical and empirical understanding of how structural and behavioral remedies impact employer power relative to worker power. It argues that antitrust enforcers and scholars must move beyond the unstudied presumption that breakups will always benefit workers to ensure that antitrust remedies do not perpetuate the long history of antitrust's alternating hostility or disregard for worker welfare. And it provides the first guidance yet to enforcement agencies and courts on how to ensure robust labor market competition when devising and implementing antitrust remedies.

Antitrust remedial debates go to the heart of the role of government enforcers and the courts in economic regulation. The Article begins by situating the current breakup debates within this broader historical context. Part I argues that, between the passage of the Sherman Act in 1890 and World War II, policymakers and administrative officials viewed competition and labor policy as integrally connected components of domestic economic policy, even if they alternately favored and disfavored collective worker power. But the post-war intellectual consensus predominantly ignored and continues to ignore the ways in which the antitrust remedies sought by enforcers and approved by the courts impact labor market competition and worker power even though our antitrust laws allow and even require consideration of those impacts.

The Article then seeks to fill that lapse in attention by offering a set of theoretical and empirical approaches that can be used to evaluate how antitrust remedies such as breaking up firms can benefit or harm labor markets and workers (Part II). Part II begins with an illuminating case study at the center of the breakup debates: the breakup of the Bell System through court-ordered divestiture. Drawing lessons from that case study as well as theoretical and empirical approaches from a variety of economic and social scientific traditions, it parses how the effects of antitrust remedies on workers depend critically on both traditional economic analyses of concentration levels and barriers to entry, but also, and importantly, on the labor market institutions workers form to respond to pre-remedial firm structures and the labor market realities and histories of employment bargaining that have shaped their ability to effectively bargain.

Finally, the Article concludes by proposing a series of reforms and best practices for agencies, courts, and government administration to incorporate labor market effects analysis into remedial design and compliance measures. It details the authority and mechanisms by which agencies and the courts can better solicit, incorporate, and consider the interests of workers in their attempts to regulate

dominant firm conduct and draws from broader innovations in administrative state governance to ensure stakeholder participation in remedial design and monitoring.

I. THE BREAKUP DEBATES

The call to "break up" dominant firms has elicited heated scholarly and popular debates about the scope and limitations of our current antitrust laws and about the effectiveness of agency and judicial remedies to "bigness". This Part seeks to situate those debates within the broader context of their emergence, beginning with describing the problem that has elicited them: increased corporate concentration and firm dominance (Section A). It then offers an overview of the types of remedies available to antitrust agencies to rectify that problem (Section B) and the law governing breakups and their labor market effects (Section C) before contextualizing the breakup debates within their historical setting (Section D). It argues that, while early antitrust policy and administration was conceptually intertwined with labor market regulation, that linkage—and, as a result, analysis of competition regulation's effects on workers—has since disappeared from antitrust enforcement, remedial design, and scholarly commentary about appropriate remedies. It ends by calling for restoring labor market analysis to remedial debates (Section E).

A. Increased Corporate Concentration and Firm Dominance

The breakup debates are a response to mounting evidence, from Big Tech to Big Ag, of increased corporate concentration and firm dominance.[8] Between 1982 and 2012, three-quarters of American industries have become more concentrated, and since 2000, market concentration (as measured by the Herfindahl-Hirschman Index, or HHI) has increased in over 75 percent of industries.[9] As firms' market power has grown, so have corporate profits and markups on goods—or the difference between the product's price and the marginal cost it takes to produce a single additional unit—which have as much as tripled since 1980 from 21 percent above firms' marginal costs to 61 percent, higher than anywhere else in the world.[10]

Firms' increased market power across American industries has a range of adverse economic effects. Most directly, and most squarely within the ambit of

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[8] *See, e.g.*, ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020); WU, *supra* note 1, at 14-23, 132-33.

[9] *See generally* Autor et al., *supra* note 2, at 180; Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications* (NBER Working Paper No. 23687, 2018), http://www.janeeckhout.com/wp-content/uploads/RMP.pdf; Gustavo Grullon et al., *Are U.S. Industries Becoming More Concentrated?*, 23 REV. FINANCE 697 (2019).

[10] De Loecker et al., *supra* note 9; *see also* Robert Hall, *Using Empirical Marginal Cost to Measure Market Power in the U.S. Economy* (NBER Working Paper No. 25251, 2018), https://www.nber.org/papers/w25251; James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements*, SSRN (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120849.

traditional antitrust law, firms' market power—their economic "bigness" allowing them to unilaterally control the scarcity of goods and services they purvey—harms consumers in the form of higher prices, lower quality, and less innovation and choice in the products and services they consume. Market power also allows firms to profitably set unilateral conditions for consumer use of their goods and services without too many consumers switching to other products.

But the effects of corporate concentration and firm dominance are not limited to markets in which firms sell products to consumers. Those effects extend to markets in which firms have market power as *buyers*, or "monopsony" power, including markets of employers as "buyers" of labor services. Empirical studies have found high levels of corporate concentration among employers in American labor markets, increasing employers' wage-setting power and reducing workers' wages, quality of work, and hiring rates.[11] Labor market concentration and employer monopsony are highest and most impactful on wage bargains and hiring in local labor markets.[12] Wage-setting by powerful employers in local markets can have spillover effects for other employers because powerful employers' wage floors and ceilings establish local standards against which smaller employers benchmark their own wage offers.[13]

While the most immediate effects of employer monopsony are in reduced worker earnings and employment levels, reduced labor market competition more deeply entrenches already high levels of inequality and labor's declining share of income relative to capital.[14] And because firm market power allows firms to collect monopoly rents and transfers wealth from consumers and workers to firm owners and shareholders, it can aggravate economic inequality and give firms outsize influence

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[11] *See, e.g.*, Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 56 J. HUMAN RESOURCES (forthcoming 2021), http://jhr.uwpress.org/content/early/2020/10/02/jhr.monopsony.0219-10025R1.abstract; Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation* (IZA Inst. of Lab. Econ., IZA DP No. 12089, 2019), http://ftp.iza.org/dp12089.pdf; Arindrajit Dube et al., *Monopsony in Online Labor Markets*, 2 AER: INSIGHTS 33 (2020); Brad Hershbein et al., *Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data* (Soc'y for Econ. Dynamics, Meeting Paper No. 1136, 2019), https://economicdynamics.org/meetpapers/2019/paper_1336.pdf; José Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* (IZA Inst. of Lab. Econ., IZA DP No. 11379, 2018), http://ftp.iza.org/dp11379.pdf.

[12] *See, e.g.*, ENRICO MORETTI, THE NEW GEOGRAPHY OF JOBS (2012); Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, J. HUMAN RESOURCES (2020); Raven Molloy et al., *Declining Migration Within the US: The Role of the Labor Market* (Fin. & Econ. Series, Divs. Research & Stats. & Monetary Affairs, Fed. Reserve Bd. Apr. 2014), https://www.federalreserve.gov/pubs/feds/2013/201327/201327pap.pdf.

[13] *See, e.g.*, Ellora Derenoncourt et al., *Spillover Effects From Voluntary Employer Minimum Wages*, SSRN (Mar. 9, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793677.

[14] On income inequality, *see infra* note 1; Simcha Barkai, *Declining Labor and Capital Shares* (Working Paper, London Business School, 2017), http://facultyresearch.london.edu/docs/BarkaiDecliningLaborCapital.pdf; Josh Bivens et al., ECON. POL'Y INST., IT'S NOT JUST MONOPOLY AND MONOPSONY: HOW MARKET POWER HAS AFFECTED AMERICAN WAGES (2018), https://files.epi.org/pdf/145564.pdf; *Nonfarm Business Sector: Labor Share*, FRED (June 4, 2020), https://fred.stlouisfed.org/series/PRS85006173; Autor et al., *supra* note 2.

over commercial relationships, the news and public debates, private information, and perhaps most importantly, the political process.[15]

These economic and socio-political effects of firm dominance have contributed to a growing consensus around the need for antitrust reforms and have prompted more aggressive government enforcement. Current law regulates firm dominance under three core antitrust statutes.[16] First, Section 7 of the Clayton Act prohibits firms from merging with or acquiring other firms if the effect "may be to substantially to lessen competition, or tend to create a monopoly."[17] Prohibiting or conditioning mergers and acquisitions is a means of "arrest[ing] in its incipiency" the adverse effects of "bigness" before they have taken hold in an industry.[18] Second, Section 2 of the Sherman Act prohibits firms from unlawfully acquiring, maintaining, or attempting or conspiring to acquire or maintain monopoly or monopsony power.[19] Section 2 has both a monopoly or monopsony power element as well as a conduct element: a firm must have engaged in some kind of exclusionary or predatory anticompetitive conduct in acquiring or maintaining its power to be held liable.[20] And, finally, Section 5 of the Federal Trade Commission Act, enforceable only by the Federal Trade Commission (FTC), prohibits "unfair methods of competition", including by dominant firms.[21]

The U.S. Department of Justice (DOJ) and FTC have leveraged these core antitrust statutes to investigate and challenge Big Tech firms like Google, Facebook, and Amazon, and the Biden Administration has appointed leading progressive antitrust advocates in the White House, DOJ, and FTC to preside over the "Trust-Busting Biden Presidency".[22] In addition, Congress has sought to buttress current law with proposals to expand this arsenal through reform legislation strengthening merger policy, antitrust agency authority, and expanding the range of prohibited conduct

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[15] *See, e.g.*, WU, *supra* note 8, at 15; Erika Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. FORUM 647 (2021); Niels J. Rosenquist et al., *Addictive Technology and its Implications for Antitrust Enforcement*, SSRN (Mar. 22, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787822; Joshua Gans et al., *Inequality and Market Concentration* (NBER Working Paper No. 25395, 2018), https://www.nber.org/papers/w25395; Sean Ennis et al., *Inequality: A Hidden Cost of Market Power* (OECD Discussion Paper, 2017), https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf.

[16] *See also* Robinson-Patman Act, 15 U.S.C. § 13 (1936) (prohibiting price discrimination).

[17] 15 U.S.C. § 18.

[18] *See, e.g.*, *United States v. E.I. DuPont de Nemours, & Co.*, 353 U.S. 586, 588 (1957).

[19] 15 U.S.C. § 2. Section 2 prohibits unlawful monopolization on the *buy*-side as well as on the sell-side. *See*, *e.g.*, see also *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312 (2007).

[20] See, e.g., Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2003).

[21] 15 U.S.C. § 45.

[22] *See, e.g.*, Shirin Ghaffary, *Biden Stacks His Administration With Yet Another Tech Foe*, VOX.COM (Jul. 20, 2021), https://www.vox.com/recode/22585851/jonathen-kanter-biden-google-facebook-tech-antitrust-department-justice-tim-wu-lina-khan-apple; Zephyr Teachout, *A Blueprint for a Trust-Busting Biden Presidency*, NEWREPUBLIC.COM (Dec. 18, 2020), https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting; .

under Section 2 beyond current judicial interpretations of its scope.[23] States have joined the anti-monopoly movement with abuse of dominance legislation that goes beyond federal antitrust law, prohibiting a wider spectrum of dominant firm conduct and even firm dominance itself.[24]

But while there has been significant movement in the executive and legislative branches to tackle the problem of "bigness" through more robust agency practice and more expansive substantive law extending the scope of firm antitrust liability, exactly how to *remedy* the problem once firms are found to contravene the law is the subject of considerable debate.

B. Antitrust Remedies to Concentration and Dominance

The Sherman and Clayton Acts grant government and private enforcers a number of remedies for found violations of antitrust law, including criminal penalties (fines or imprisonment),[25] civil penalties (treble damages and attorney's fees),[26] and injunctive or other equitable relief.[27] The focus of the breakup debates—and of this Article—is on injunctive or equitable remedies, which include breakups and other forms of divestiture. Antitrust enforcers and the courts seek and impose these remedies to achieve the purposes of the antitrust laws—restoring competition and deterring anticompetitive conduct—in a manner that is both administrable and avoids externalities or conflicts with federal policy in other regulated areas.[28]

Equitable antitrust remedies are generally divided into two categories: structural and behavioral, or conduct, remedies.[29] Structural remedies seek to restore competition through firm restructuring—"breaking up" firms to create new market actors or to aid existing market actors in their ability to compete with dominant firms. Structural remedies include divestiture through transfer or sale of a firm's assets or of

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[23] *See, e.g.*, Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (2021); Tougher Enforcement Against Monopolists (TEAM) Act, S. 2039, 117th Cong. (2021); American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021).

[24] *See, e.g.*, Senate Bill S933A, 2021-2022 N.Y. Leg. Sess., www.nysenate.gov/legislation/bills/2021/s933; *see also* Assembly Bill A1812A, 2021-2022 N.Y. Leg. Sess., www.nysenate.gov/legislation/bills/2021/a1812/amendment/a; Senate Bill 20-064, 2020 Colo. Sess. Laws, https://leg.colorado.gov/sites/default/files/2020a_064_signed.pdf.

[25] 15 U.S.C. § 2.

[26] 15 U.S.C. § 15(a).

[27] 15 U.S.C. § 4.

[28] *See, e.g., Trinko*, 540 U.S. at 415; U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 20 (2011) [hereinafter, 2011 REMEDY POLICY GUIDE], https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf; Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 12 (2009). Courts defer to the Government and resolve "all doubts as to the remedy . . . in its favor" once the Government establishes an antitrust violation. *Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972).

[29] *See, e.g.*, 2011 REMEDY POLICY GUIDE, *supra* note 28, at 6-18.

an existing, intact business entity or unit (a single division of a firm or spinning off an acquired business line from a merged firm) to a purchaser that could become an "effective, long-term competitor".[30] Divestitures are routinely imposed in the merger setting to require sales of product lines, intellectual property rights, and retail stores or plants in local geographic markets, for example. Wholesale firm "break ups" on the scale of the 1982 Bell System divestiture or the 1911 divestitures of Standard Oil and American Tobacco in the Section 2 context are more rare.

Behavioral, or conduct, remedies impose duties and obligations on firms to engage in conduct that antitrust enforcers and the courts believe will restore or preserve competition in the market or markets in which the firms operated. Conduct remedies include, but are not limited to, firewall provisions to prevent information-sharing that could facilitate anticompetitive behavior, non-discrimination provisions that prohibit self-preferencing or favoring non-rival firms, mandatory intellectual property licensing requirements, transparency requirements with regulatory agencies, prohibitions against retaliation against upstream or downstream purchasers and suppliers for dealing with competitors, and prohibitions on certain exclusive contracting practices.[31] Conduct remedies can be combined with structural remedies to ensure competition, particularly to remedy mergers of horizontal competitors.[32]

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

C. The Law Governing Breakups and Their Labor Market Effects

The antitrust laws and the Tunney Act—mandating judicial review of antitrust consent decrees to ensure they are in the public interest—allow and even require agencies and the courts to evaluate the labor market effects of antitrust remedies.

First, and most generally, courts impose structural remedies to antitrust violations under their equitable power to remedy harms for which no remedy at law—primarily, money damages—is sufficient or adequate.[33] Federal courts have significant and broad discretion to craft their own standards for equitable relief, including for

[30] *Id.* at 7-12.
[31] *Id.* at 12-17.
[32] *Id.* at 17-19.
[33] 15 U.S.C. §4 (2018).

unlawful conduct under antitrust law.[34] Antitrust courts impose equitable relief to deprive antitrust defendants of the "fruits of [their] statutory violation".[35] This requires providing an "adequate explanation" that the remedy would "unfetter a market from anticompetitive conduct" and "ensure that there remain no practices likely to result in monopolization in the future."[36] Beyond providing compensation to victims of unlawful conduct, equitable antitrust remedies are imposed to punish and deter, terminate and prevent the recurrence of, and restore competitive conditions to the market or markets harmed by unlawful conduct.[37] It is "well-settled law" that antitrust courts can impose equitable remedies that extend beyond the "narrow limits of the proven violation", including prohibiting lawful conduct if that prohibition "represents a reasonable method of eliminating the consequences of the illegal conduct."[38] As the Supreme Court has stated, "[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the traveled roads to that end be left open and that only the worn one be closed."[39]

In imposing equitable remedies like breakups for dominance violations under Section 2 of the Sherman Act or Section 5 of the FTC Act, courts can consider how those remedies could trigger anticompetitive effects in labor markets. Both statutes prohibit unlawful buyer monopsony in labor markets just as they prohibit unlawful seller monopoly in product markets.[40] While very few Section 2 or Section 5 cases have directly targeted employer monopsony—targeting instead dominant firm conduct in *product* markets—if a court's imposition of equitable relief in a product market would cause anticompetitive harm in a labor market, it would be within courts' equitable discretion to consider evidence of that harm before ordering that relief and seek to obviate that harm in imposing its remedy. For example, if a divestiture could result in less labor market competition because it would restructure a firm into two competitor firms in a product market but increase concentration in local labor markets, the court's

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[34] *See, e.g.*, *Ford Motor Co.*, 405 U.S. at 573; *United States v. Microsoft*, 253 F.3d 34, 105 (D.C. Cir. 2001) (en banc).

[35] *See, e.g.*, *United States v. Grinnell*, 384 U.S. 563, 577 (1966); *Schine Chain Theatres v. United States*, 334 U.S. 110, 128-29 (1948); *Microsoft*, 253 F.3d at 103.

[36] *Microsoft*, 253 F.3d at 184-85.

[37] *See* Douglas Melamed, *Afterword: The Purposes of Antitrust Remedies*, 76 ANTITRUST L.J. 359, 359-67 (2009).

[38] *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978); *Trabert & Hoeffer v. Piaget Watch Corp.*, 633 F.2d 477, 485 (7th Cir. 1980); PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶325c (4th ed. 2020).

[39] *Prof'l Eng'rs*, 435 U.S. at 698 (quoting *Int'l Salt v. United States*, 332 U.S. 392, 400 (1947)).

[40] *See, generally*, *Weyerhaeuser v. Russ-Simmons Hardwood Lumber*, 549 U.S. 312 (2007); *Le v. Zuffa*, 216 F. Supp. 3d 1154 (D. Nev. 2016); Fed. Trade Comm'n, Oversight of the Enforcement of the Antitrust Laws, Responses from Joseph Simons, Chairman, Fed. Trade Comm'n, Fed. Trade Comm'n (Nov. 6, 2018); Fed Trade Comm'n & Dep't of Justice, https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs.pdf; Fed. Trade Comm'n, FTC Hearing #2: Monopsony and the State of U.S. Antitrust Law (Sept. 18, 2020), https://www.ftc.gov/news-events/eventscalendar/2018/09/ftc-hearing-2-competition-consumer-protection-21st-century.

imposition of the remedy would itself be generating labor market competition harms that contravene antitrust policy.[41] No case law has yet addressed labor market effects in remedial design in Section 2 or Section 5 product market cases on the merits; courts have only yet addressed such effects in Tunney Act proceedings, which is more fully discussed below.

In reviewing and crafting equitable remedies to unlawful mergers under Clayton Act Section 7, courts must consider the labor market effects of those remedies. This is obviously true, of course, if a merger is challenged on grounds that it may decrease competition in a labor market. Mergers and acquisitions are unlawful whenever their effects "may be substantially to lessen competition, or . . . tend to create a monopoly" in "any line of commerce," including labor markets.[42] But effects on labor markets can also be considered in crafting remedies for mergers challenged as having anticompetitive effects in product markets. The antitrust agencies have clarified in their Merger Guidelines that they will challenge transactions if "likely to be anticompetitive in *any* relevant market," including labor markets affected by the transaction.[43] Thus, even where mergers are successfully challenged in product markets under Section 7, the imposition of any remedy for found violations would contravene the statute were it to result in the lessening of competition in a labor market. Where consideration of remedial effects on labor markets may be most challenging is where merging parties or enforcers claim that the remedies imposed would reduce labor costs and the court must determine whether to credit those purported reduced costs as procompetitive efficiency gains or as instead increasing buyer power in the relevant labor market. But just as courts should not credit cross-market efficiencies in one market at the expense of anticompetitive effects in another market on the merits of a Section 7 claim, so should they not when assessing the effects of imposed remedies in separate markets—"purported . . . benefits premised on reductions in competition are not cognizable."[44] While in many cases lower labor costs may reduce output—thus resulting in harms to *both* labor and product markets—even where that may not be the case, courts must consider and ensure that any remedies they impose do not lessen competition in labor markets to avoid contravening Section 7.[45]

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[41] Such a remedy would also conflict with federal labor policy under the National Labor Relations Act seeking to ensure equal bargaining power between employers and employees. *See* 29 U.S.C. § 151; Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 664-73 (2021).

[42] 15 U.S.C. § 18; DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010) (hereinafter, HORIZONTAL MERGER GUIDELINES); Marinescu & Hovenkamp, *supra* note 95, at 1033-37; Hemphill & Rose, *supra* note 95, at 2079-82.

[43] 15 U.S.C. § 18; HORIZONTAL MERGER GUIDELINES, *supra* note 42, § 10 & n.14.

[44] *See* 15 U.S.C. § 18; HORIZONTAL MERGER GUIDELINES, *supra* note 42, at § 10 & n.14; Carl Shapiro, *Protecting Competition in the American Economy*, 33 J. ECON. PERSPECTIVES 69, 88 (2019); Hafiz, *Labor Antitrust's Paradox*, *supra* note 95, at 404-05; Hemphill & Rose, *supra* note 95, at 2108-9; *see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963); *United States v. Anthem*, 855 F.3d 345 (2017) (rejecting defendant Anthem's claimed purchasing efficiencies).

[45] Hafiz, *Labor Antitrust's Paradox*, *supra* note 95, at 389-91; Hemphill & Rose, *supra* note 95, at 2106.

Finally, and perhaps most importantly, courts must consider the labor market effects of proposed antitrust remedies upon review of consent decrees reached between the antitrust agencies and antitrust defendants in Tunney Act proceedings.[46] Because the vast majority of government enforcement actions result in settlements with consent decrees, nearly all remedies imposed for government-challenged antitrust violations are reviewed in Tunney Act proceedings subject to a "public interest" standard.[47] The Tunney Act was passed in 1974 and amended in 2004, and it requires federal judges to review antitrust consent decrees and only enter judgment approving them when found "in the public interest."[48] Specifically, Congress required courts to consider the following enumerated factors in conducting their "public interest" review and entering judgment:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, . . . and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgments upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[49]

In conducting "public interest" reviews, courts can solicit testimony from Government officials or experts (either upon the motion of any party or participant in the Tunney Act proceedings or upon its own motion) and may appoint a special master or outside experts regarding any aspect of the proposed consent decree.[50] Courts may also hold trial-like proceedings with full or limited participation by interested parties, including workers' organizations or unions affected by the remedial structure proposed by the consent decree, and may solicit comments from affected parties.[51]

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[46] *See generally* Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 96 CHI.-KENT L. REV. 37 (2020).

[47] Douglas Ginsburg & Joshua Wright, *Antitrust Settlements*, in 1 WILLIAM KOVACIC: AN ANTITRUST TRIBUTE 177 (Charbit et al. eds. 2013) ("the [Antitrust] Division resolv[es] nearly its entire antitrust civil enforcement docket by consent decree . . . . Since 1995, the FTC has settled 93 percent of its competition cases."); Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 14 (1995) (describing antitrust enforcement as moving "from the Law Enforcement Model toward the Regulatory Model"); Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, 9 (1995) (noting "shift on the policy continuum toward bureaucratic regulation").

[48] 15 U.S.C. § 16(e)-(f) (2004). For the Tunney Act's legislative history, *see* Darren Bush, *The Death of the Tunney Act*, 63 ANTITRUST BULL. 113 (2018).

[49] 15 U.S.C. § 16(e)(1). The 2004 Amendments were intended "to explicitly restate the original and intended role of district courts . . . by mandating that the court make an independent judgment based on a series of enumerated factors." 150 Cong. Rec. S3615 (Apr. 2, 2004) (Sen. Leahy).

[50] 15 U.S.C. § 16(f)(1)-(2).

[51] 15 U.S.C. § 16(f)(3)-(4).

For example, in the canonical Tunney Act decision ordering the divestiture of the Bell System, *United States v. AT&T*, the court explicitly sought AT&T employees' expertise on remedial effects: "The increasing expertise of so-called public interest advocates and for that matter the more immediate concern of a defendant's competitors, employees, or antitrust victims may well serve to provide additional data, analysis, or alternatives which would improve the outcome."[52] The *AT&T* decision also established the core standard for approving consent decrees reached between the government and antitrust defendants:

> After giving due weight to the decisions of the parties as expressed in the proposed decree, the Court will attempt to harmonize competitive values with other legitimate public interest factors. If the decree meets the requirements for an antitrust remedy—that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest—it will be approved. If the proposed decree does not meet this standard, the Court will. . . require modifications which would bring the decree within the public interest standard . . .[53]

A component of the court's analysis includes consideration of whether the relief impinges on other public policies under federal law.[54] One such policy is that established by federal labor law in ensuring equal bargaining power between workers and their employers.[55] Thus, antitrust law's substantive and remedial provisions allow and even require judicial consideration of the labor market effects of antitrust remedies in found violations or in resolving enforcement actions.

The following Section provides a historical overview of antitrust remedial debates regarding breakups, explaining how, despite disagreements on the relative merits of structural over conduct remedies, recent commentators have ignored worker welfare in favor of a singular focus: how remedies impact product markets and downstream consumers. In the rare commentary that considers worker welfare, breakups are merely assumed to benefit workers without robust analysis.

D. The Breakup Debates: A Historical Trajectory

Early antitrust enforcers and scholars shared a general consensus supporting the use of structural remedies to break up proposed and consummated mergers, and, in more rare circumstances, monopolies. This consensus was initially informed by institutional economic thought (1900s to 1950s) and then by the "structure-conduct-performance" (SCP) model developed by early Industrial Organization (IO) economists like Joe Bain and others starting in the late 1950s.[56]

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[52] *AT&T*, 552 F. Supp. at 148 n. 70 (quoting 119 Cong. Rec. 3452 (1973) (Sen. Tunney)).
[53] *AT&T*, 552 F. Supp. at 153.
[54] *See, e.g.*, *United States v. Airline Tariff Pub. Co.*, 836 F. Supp. 9, 11-12 (D.D.C. 1993).
[55] *See* 29 U.S.C. § 151; Hafiz, *Structural Labor Rights*, *supra* note 41.
[56] On institutional economics and remedies, *see, e.g.*, JOHN COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 108-14 (1924). For the SCP model, *see* JOE BAIN, INDUSTRIAL ORGANIZATION (2d ed.

Institutional economists viewed structural remedies, accompanied by government regulation, as essential for equalizing bargaining power and ensuring competition.[57] Antitrust enforcers and commentators were deeply influenced and guided by institutional economics and viewed divestiture as a fundamental component of market regulation—by far the "most extensive use of divestiture as a remedy . . . occurred between 1904 and 1920 following an intense period of merger activity at the turn of the century".[58] It was during this period that the DOJ requested, and courts granted, divestiture remedies to restructure American Tobacco, the Standard Oil Trust, various railroad interests, and more.[59] Even when, as in *American Tobacco*, lower courts had opted for conduct remedies controlling how trusts dealt with customers, competitors, and suppliers, the Supreme Court rejected those remedies as insufficient, ordering firm restructuring instead into smaller groups of competitive enterprises.[60]

But the DOJ's defeats before the Supreme Court in the *United States Steel* (1920) and *International Harvester* (1927) monopolization cases chilled antitrust enforcers from seeking divestiture remedies based on firm size.[61] Antitrust enforcement under the Harding and Coolidge Administrations took a decidedly deregulatory turn until the Roosevelt Administration revived industrial planning and more aggressive antitrust enforcement during the Depression under Assistant Attorney Generals Robert Jackson and Thurman Arnold.[62] The formation and supervision of a separate Antitrust Division within the DOJ in the late 1930s and 1940s strengthened antitrust enforcement and agency expertise with the hiring of a "brain trust" to guide antitrust policy and remedial design.[63] By 1948, in a high-profile effort by the DOJ to rein in the Hollywood studio system, the Supreme Court reiterated its support of divestiture

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1968); DONALD TURNER & CARL KAYSEN, ANTITRUST POLICY (1959); Joe Bain, *Workable Competition in Oligopoly*, 40 AM. ECON. REV. 35, 36-38 (1950). For approaches to divestiture in Section 7 versus Section 2 cases, *see* Waller, *Monopolization Remedies*, *supra* note 28, at 15.

[57] *See, e.g.*, JOHN COMMONS, INSTITUTIONAL ECONOMICS 338-39 (1934); WALTON HAMILTON & IRENE TILL, ANTITRUST IN ACTION (1940); Walton Hamilton, *The Anti-Trust Laws and the Social Control of Business*, *in* THE FEDERAL ANTI-TRUST LAWS 11-12 (Milton Handler, ed. 1932); Walton Hamilton, Hearings Before the Committee on Finance, U.S. Sen. 74th Cong., 1st Sess. (1935). For overview of institutional economists' thought on monopoly, *see, e.g.*, MALCOLM RUTHERFORD, THE INSTITUTIONALIST MOVEMENT IN AMERICAN ECONOMICS, 1918-1947 (2011).

[58] William Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1295 (1999); *see also, e.g.*, Edward Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 182-83 (1947).

[59] *See, e.g., Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 105 (1911); *United States v. Union Pacific Railroad Co.*, 226 U.S. 470 (1913); William Kovacic, *Failed Expectations*, 74 IOWA L. REV. 1105, 1114-15 & nn. 52-64 (1989) (collecting cases).

[60] *American Tobacco*, 221 U.S. at 184-88; Kovacic, *Antitrust Remedies*, *supra* note 58, at 823.

[61] *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offense, or the existence of unexerted power an offense"; *United States v. Int'l Harvester Co.*, 274 U.S. 693, 708 (1927) ("[T]he law . . . does not make the mere size of a corporation . . . an offense, when unaccompanied by unlawful conduct in the exercise of its power.").

[62] *See generally* Kovacic, *Failed Expectations*, *supra* note 59, at 1115-19; Walter Adams, *Dissolution, Divorcement, Divestiture*, IND. L.J. , 1, 2-13 (1951).

[63] *See generally* SPENCER WEBER WALLER, THURMAN ARNOLD 78-110 (2005).

remedies as stated in *American Tobacco*, finding that a district court's remedial order imposing only conduct remedies was insufficient.[64]

Starting in the 1950s, antitrust enforcers' approach to both policy and remedial design was increasingly informed by the rise of Industrial Organizations (IO) economics and the SCP paradigm crafted by its "undisputed father," Joe Bain.[65] Under the SCP paradigm, industry market *structure*, which was believed to enable antitrust defendants' anticompetitive conduct and the resulting economic performance of markets, governed remedial design.[66] Divestiture, and structural remedies more generally, were considered especially important where dominant firms' conduct could not be effectively enjoined. In those cases, restructuring the market to decrease market concentration—increasing the number of firms in the market—could benefit competition by altering firm behavior and competition outcomes.[67]

A capstone case successfully pursued under this new approach was the DOJ's suit against DuPont for its acquisitions of General Motors and United States Rubber stock.[68] After finding DuPont liable under the Sherman and Clayton Acts, the district court rejected the DOJ's proposed full divestiture remedy in favor of stripping the voting power of DuPont's stock.[69] But the Supreme Court reversed, establishing divestiture as the preferred remedy that ought "always be in the forefront of a court's mind" in Section 7 cases, not only because "*[t]he very words of § 7 suggest that an undoing of the acquisition is a natural remedy*", but because divestiture "is simple, relatively easy to administer, and sure."[70]

Until the breakup of AT&T,[71] the antitrust agencies were less successful in securing divestiture in Section 2 monopolization cases, including in the DOJ's decades-long investigations and inconclusive prosecutions of leading petroleum refiners and IBM (described by Robert Bork as "the Antitrust Division's Vietnam").[72]

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[64] *United States v. Paramount Pictures*, 334 U.S. 131, 166-76 (1948).

[65] *Joe Bain – Distinguished Fellow, 1982*, 73 AM. ECON. REV. (1983). *See also* JOHN BAIN, BARRIERS TO NEW COMPETITION (1956); JOHN BAIN, INDUSTRIAL ORGANIZATION (1959); RICHARD CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, AND PERFORMANCE (1972); Charles Mueller, *The New Antitrust: A "Structural" Approach*, 1 ANTITRUST L. & ECON. REV. 87 (1967).

[66] *Id.*

[67] *See generally* Daniel Crane, *A Premature Postmortem on the Chicago School of Antitrust*, 93 BUS. HIST. REV. 759, 764 (2020); Kevin O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV. J. LEGIS. 687 (1976).

[68] See *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

[69] *Du Pont*, 366 U.S. at 320.

[70] *Du Pont*, 366 U.S. at 330-31.

[71] *See infra* Part II.A.

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

The AT&T divestiture ruling was itself viewed in its time as a coda to the earlier days of more aggressive enforcement. Despite its momentous nature, Ralph Nader prophetically declared the "era of the big antitrust case . . . over, leaving a legacy of frustration and defeat for the Government's antitrust lawyers."[73]

Nader's prediction proved so accurate because of a building ideological consensus behind the Chicago School's laissez-faire aversion to the use of structural remedies and its increasing influence on the courts and in the antitrust agencies in the late 1970s and early 1980s.[74] While antitrust enforcers did not abandon the threat of structural remedies on paper and in guidance documents after the Bell breakup, in practice, they have rarely sought or achieved structural separations in merger and monopolization cases since the 1980s.[75] Instead, antitrust enforcement shifted to imposing complex conduct remedies focused on competitor access to intellectual property and networks on fair and non-discriminatory terms, information controls to limit information-sharing between dominant or merging firms, and establishing special dispute resolution procedures to handle disputes between dominant or merging firms and their competitors.[76]

This "second phase"—the Chicago School consensus against the use of divestiture remedies—was grounded in two primary concerns. The first was that court-imposed divestitures might reduce efficiencies in production and increase firm costs, leading to higher prices to consumers.[77] Scholars and, later, enforcers viewed the courts' comparative expertise as deficient relative to private market actors when it came to firm and industry structure as well as day-to-day "business decisions about questions such as pricing, product introduction, and investment in risky ventures" that could achieve the best economic outcomes through competition.[78] Second, critics of divestiture argued that courts were very limited in their ability to evaluate the costs of imposing structural remedies on firms, downstream consumers, and court resources in monitoring and overseeing firm breakups. Courts were viewed as particularly limited in their ability to anticipate the potential costs of divestiture on the operating expenses and transition costs of divested firms (moving expenses, reorganization specialists, employee time managing and implementing reorganization, etc.).[79] Even worse, imposing divestitures after mergers were consummated created an "unscrambling"

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[73] Ralph Nader, *Ended: Big Antitrust*, N.Y. TIMES A23, col. 1 (Mar. 4, 1982).

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

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

[76] Waller, *Access, supra* note 75, at 576.

[77] *See, e.g.*, Peltzman, *supra* note 74, at 262-63; Demsetz, *supra* note 74, at 5.

[78] Howard Shelanski & Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 34 (2001).

[79] William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 953 (1981).

problem that could disrupt integration efficiencies and require complex decisions about which assets should constitute a new firm.[80] IO economists supported these criticisms, labeling the agency-instigated divestitures of the 1960s and 1970s failures, and offering empirical evidence that divestitures failed to viably reestablish acquiring firms as effective competitors.[81] Overall, then, breakup remedies could cause more harm than good and produce more inefficiencies than they eliminate.[82]

The scholarly turn against breakups significantly impacted agency practice and judicial analysis. The DOJ Antitrust Division's *Policy Guide to Merger Remedies* became increasingly more partial to conduct remedies. In 2004, it maintained the historical preference for structural remedies as "relatively clean and certain, and . . . avoid[ing] costly government entanglement in the market" as compared to conduct remedies, which were "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent." By 2011, the DOJ shifted to emphasizing its view that conduct remedies were a "valuable tool" in reinvigorating merger enforcement.[83] The Bush and Obama Administrations were very reluctant to pursue divestiture remedies in Section 2 and Section 7 cases, likely in part due to court hostility to imposing them.[84] A prominent, high-profile example is the *Microsoft* case, where the D.C. Circuit rejected the district court's order of Microsoft's divestiture into two companies: one for its operating system, Windows, and another for its Internet Explorer web browser and applications like Microsoft Word.[85] In overturning the divestiture remedy, the D.C. Circuit stated that "wisdom counsels against adopting

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

[81] Elzinga, *supra* note 80, at 47-53; Robert Rogowsky, *The Economic Effectiveness of Section 7 Relief*, 31 ANTITRUST BULL. 187, 189, 196, 212 (1986) (classifying 75% of divestitures as deficient or unsuccessful); James Ellert, *Mergers, Antitrust Law Enforcement and Stockholder Returns*, 31 J. FIN. 715, 175 (1976) (examining divestiture success of firms challenged between 1950 and 1972 based on shareholder returns before and after divestiture, finding no significant difference in returns of divesting companies compared to returns of companies with different outcomes); Malcolm Pfunder et al., *Compliance with Divestiture Orders Under Section 7*, 17 ANTITRUST BULL. 19, 20-21 (1972); *but see* Rory Van Loo, *In Defense of Breakups*, 105 CORNELL L. REV. 1955, 1976-81 (2020) (challenging Rogowsky and Ellert's methodologies and findings as deficient and irrelevant based on more recent quantitative studies showing higher success rates).

[82] *See, generally*, Demsetz, *supra* note 74, at 2-9; Frank Easterbrook & Daniel Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1163 (1982) (arguing that "we may as well forget about attempting to disestablish" integrated firms); Menesh Patel, *Merger Breakups*, 2020 WIS. L. REV. 975, 1007 (2020) (warning of the "fundamental difficulties of unwinding consummated mergers" and collecting sources).

[83] *Compare* U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* 7 (2004) *and* U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* 6-7 (2011).

[84] *See generally* Van Loo, *supra* note 81, at 1970; Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture*, 86 MINN. L. REV. 565 (2002).

[85] *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

radical structural relief", and argued that, because Microsoft had not obtained its monopoly through mergers, the "logistical difficulty" of splitting the company weighed against it.[86]

But political alignments have now primed a pendulum swing back in favor of divestiture remedies, at least in scholarly and public discourse. A new "third phase" of the breakup debates evinces a fragile consensus between progressive, centrist, and conservative policymakers and scholars on firm dominance. In arguing for breakups, progressives—often dubbed the "Neo-Brandeisians"—have emphasized the urgent need to combat "bigness" not only to restore competition and access to economic opportunity by smaller businesses, but also to protect democratic values, the political process, and underrepresented stakeholders, including workers. For example, Tim Wu has sought a return to Louis Brandeis' vision of economic policy, where the government uses its antitrust authority to secure a "commitment to the protection of workers, and an open economy composed of smaller firms—along with the measures to break or limit the power of monopolies" that grant them "a clear bargaining advantage over [their] workers," enabling them "to drive workers harder and longer, for less money", use their monopoly rents as "resources to break unions with violent attacks", "avoid raising wages, . . . insist on intense conditions of employment, . . . abuse 'non-compete' agreements, and . . . hire part-timers instead of full-time employees."[87] Zephyr Teachout has similarly pointed to the need for more aggressive structural relief on grounds that big firms are both bad for consumers as well as workers in depressing wage rates and increasing economic inequality.[88]

This Progressive position has coincided with a more centrist Democratic consensus on the need for antitrust reforms, prompted by evidence of firm dominance, corporate concentration, and the limited efficacy of conduct remedies in preventing traditional antitrust harms like higher consumer prices.[89] Antitrust scholars and advocates who favor structural remedies have received recent empirical support not only from the FTC's own remedial retrospectives, but also from independent economic experts who have found that behavioral remedies are significantly less effective than structural remedies in preventing future price increases.[90] These

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[86] 253 F.3d at 80, 98, 106-07.

[87] WU, *supra* note 8, at 42, 72-73.

[88] *See, e.g.*, TEACHOUT, *supra* note 8, at 145-62.

[89] *See, e.g.*, Anna Edgerton, *Unlikely Senate Alliance of Klobuchar, Lee Paints a Bull's-Eye on Big Tech*, BLOOMBERG.COM (May 10, 2021), https://www.bloomberg.com/news/articles/2021-05-10/left-right-odd-couple-in-senate-paints-a-bull-s-eye-on-big-tech. For progressive advocacy of breakups, *see, e.g.*, TEACHOUT, *supra* note 8; WU, *supra* note 8; Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985-86, 1063-64, 1074-75 (2019) (arguing that structural remedies are preferable to behavioral ones because they are "highly administrable" and require less ongoing monitoring); Naomi Lamoreaux, *The Problem of Bigness*, 33 J. ECON. PERSP. 94, 94-117 (2019) (arguing that divestitures can increase competition and innovation while reducing monopolists' impact in politics).

[90] *See, e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014); Steven Salop, *Modifying Merger Consent Decrees to Improve Merger*

observed post-merger price increases were twice as large when behavioral remedies were used relative to divestitures.[91] Pro-divestiture scholars have also pushed back on the Chicago School's administrability concerns regarding breakups by pointing to the comparatively high administrability costs of behavioral remedies that require post-merger monitoring and discounting the purported unworkability of divestiture remedies given their consumer welfare benefits, deterrence value, and common voluntary use by firms as a form of private ordering that increases firm efficiencies.[92]

Even conservative policymakers have increasingly called for more breakups, motivated in part by perceptions of liberal bias and censorship of conservative viewpoints by dominant media and internet platforms. Since the Trump Administration, Republicans have converged on the need for antitrust reforms to "break up" Big Tech, favoring structural remedies as the best means of doing so while also avoiding long-term government involvement in markets.[93] In 2017, the Trump FTC released the results of its retrospective review of its use of merger remedies between 2006 and 2012 and estimated an 80 percent success rate of restoring competition where structural remedies were imposed on antitrust defendants.[94]

This emerging consensus across the political spectrum in favor of breakups portends meaningful changes in remedial antitrust policy, whether through legislation, agency enforcement and remedial choices, or the courts, making it all the more important that current breakup debates squarely address the effects of such remedies on crucial recipients of antitrust protection: workers.

D. Restoring Labor Market Analysis in Remedial Debates

Policymakers, the antitrust agencies, and scholars have only recently turned their attention to antitrust law's role in ensuring labor market competition.[95] Thus, it

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Enforcement Policy, 31 ANTITRUST 15, 18 (2016); Waller, *supra* note 28, at 15; Kovacic, *Antitrust Remedies*, *supra* note 58, at 1303.

[91] John Kwoka, *Does Merger Control Work?*, 78 ANTITRUST L.J. 619, 636, 641 (2013).

[92] *See, e.g.*, Van Loo, *supra* note 81, at 1959, 1980.

[93] *See, e.g.*, Ben Brody, *Republican Senator Slams Conservative Tech Lobbyists to Their Faces*, PROTOCOL.COM (June 22, 2021), https://www.protocol.com/mike-lee-netchoice-antitrust; Rob Copeland, *Breakup of Tech Giants 'on the Table,' U.S. Antitrust Chief Says*, WALL ST. J. (Oct. 22, 2019), https://www.wsj.com/articles/breakup-of-tech-giants-on-the-table-u-s-antitrustchief-says-11571765689 (quoting Makan Delrahim, former head of the DOJ Antitrust Division); Makan Delrahim, *Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum*, U.S. DEP'T OF JUSTICE NEWS (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar; David Osinksi, *Merger Remedies and the Undersupply of Economic Research*, 18 ABA ANTITRUST L. SEC. ECON. COMMITTEE NEWSL. 5, 7 (2017).

[94] Bureau of Competition & Bureau of Econ., Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012 2 (2017).

[95] *See, generally*, Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. LAB. & EMPL. L. (forthcoming 2021); Suresh Naidu & Eric Posner, *Labor Monopsony and the Limits of Law*, 56 J. HUMAN RESOURCES

is not surprising that analysis of the effects of antitrust remedies on workers and labor market competition have been largely ignored, not only by Chicago School opponents of divestiture in the "second phase", but by proponents of divestiture in the recent "third phase". Even the Neo-Brandeisians, who have led the call to break firms up in part based on worker welfare concerns, have largely assumed that such breakups would benefit rather than harm workers.

This Section first revives the forgotten history of New Deal enforcement that placed the labor market effects of antitrust remedies as a central component of economic policy and agency analysis in enforcement. It then details how the breakup debates and enforcers' remedial design in the postwar period have either ignored or actively worsened antitrust remedies' effects on workers and labor market competition. It offers the first comprehensive review in the literature of existing court decisions and antitrust agencies' approved consent decrees resolving enforcement actions against mergers and dominant firms between 1992 to the present to document, at best, their failure to include labor market competition protections as a component of their remedial design and, at worst, their imposition of remedial provisions that *reduce* labor market competition.

1. Early Labor Market Effects Analysis in Antitrust Remedial Design and Enforcement

While analysis of the labor market effects of antitrust remedies has been largely absent in judicial opinions as well as scholarly discussions of remedial design—including the most recent "breakup debates"—it was not alien to earlier antitrust policy enforcement between the 1930s through the 1950s. In fact, antitrust agencies' remedial design was deeply intertwined with labor market regulation between the Depression and the Nixon Administration, where aggressive regulation of industry occurred in tandem with industry-wide wage regulation through labor boards and wage stabilization boards, beginning with the National Industrial Recovery Act (NIRA) of 1933, extending into the War Labor Boards of the First and Second World Wars and the Wage Stabilization Board during the Korean War, and culminating in the Price Commission and Pay Boards of the Nixon Administration. New Deal government regulators and experts that first administered industry-wide "codes of fair competition" and wage standards were trained in the Institutional Economics of John Commons, Thorstein Veblen, and Wesley Mitchell, and were recruited to both the

(forthcoming 2021); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?,* 105 CORNELL L. REV. 1343 (2020); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 4 (2020); Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381 (2019); Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. SOC. PROBLEMS 65 (2019); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2019); Scott Hemphill & Nancy Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Sanjukta Paul, *Uber as For-Profit Hiring Hall*, 38 BERKELEY J. LAB. & EMPL. L. 233 (2017).

Department of Justice's Antitrust Division as well as various labor agencies based on that expertise.[96]

When the Antitrust Division of the Department of Justice was first formed as a separate division in 1933, it primarily enforced NIRA's industry price-fixing codes, which were drafted by industry to control prices and production during the Depression.[97] Even though the Division was highly underresourced, by the late 1930s, it became the central hub of industry regulation, defending or enforcing orders of administrative agencies like the Interstate Commerce Commission, FTC, Federal Communications Commission (FCC), and perhaps most importantly for our purposes, labor regulations.[98] Violations of labor codes established through the NIRA were also enforced by the Department of Justice to ensure that "competitive conditions" were maintained in labor markets.[99]

Early institutional economic approaches to antitrust remedies were highly contextual: equitable remedies were viewed as having differential effects depending on broader regulation that shaped the industry, including the extent of labor market regulation and the existence of labor market and other institutions that could function as countervailing power against dominant firms. For example, Walton Hamilton, a leading institutional economist who served under Thurman Arnold in the Antitrust Division as a Special Assistant to the Attorney General between 1938 and 1945,[100] viewed the Sherman Act as an "elementary ordinance" whose regulatory impact needed to be assessed within a larger "pattern of the public control of business",[101] and insisted on an interdisciplinary approach to antimonopoly law that contextualized it within broader legal institutions, forms of business control, and history:

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[96] For a general account of the relationship between institutional economics and business as well as labor market regulation, *see* JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1918-1933 425-37 (1959); Matthew Panhans & Reinhard Schumacher, *Theory in Closer Contact with Industrial Life: American Institutional Economists on Competition Theory and Policy*, J. INSTITUTIONAL ECON. 1 (2021); William Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business*, 93 BUS. HIST. REV. 665 (2019); Malcolm Rutherford, *Walton Hamilton and the Public Control of Business*, 37 HIST. POL. ECON. 234 (2005); Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990). *See also* Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115, 1121-29 (2017).

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

[98] *Id.* at 573-74; *see also* SELECTED PAPERS OF HOMER CUMMINGS 17 (Carl Swisher ed., 1972) (1939).

[99] CUMMINGS, *supra* note 98, at 122. The Antitrust Division's labor market regulation took a dark turn, of course, when, primarily under the direction of Thurman Arnold in the late 1930s and early 1940s, it prosecuted labor unions for conspiring with manufacturers and contractors in the housing and construction markets, eventually motivating a second Congressional rebuke immunizing labor unions from the antitrust laws with the passage of the Norris-LaGuardia Act immunizing labor unions (following the original statutory labor exemption in the Clayton Act of 1914). *See* Waller, *Antitrust Legacy*, *supra* note 97, at 600-03; 15 U.S.C. § 17; 29 U.S.C. § 52.

[100] *See* THURMAN ARNOLD, FOLKLORE OF CAPITALISM (1964); Waller, *Antitrust Legacy*, *supra* note 97, at 608.

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

> Competition, property, the price structure, the wage system, and like institutions refuse to retain a definite content. Not only are things happening to them, but changes are going on within them. A law, a court decision, . . . a change in popular habits of thought, and the content of property rights is affected. An increased demand for labor, a refusal of the nation to allow strikes, an enforced recognition of unionism, an establishment of wages upon living costs, and the wage system becomes different. Both by a change in its relation to other things and by subtle changes going on within, each of these institutions is in a process of development. And, if this is true of particular institutions, it is likewise true of the complex of institutions which together make up the economic order. We need constantly to remember that in studying the organization of economic activity in general as well as in the particular, we are dealing with a unified whole which is in the process of development.[102]

Before joining the Antitrust Division, Hamilton had served on the War Labor Policies Board during World War I, published a treatise, *The Control of Wages* (1923), on issues of wage determination based on his research and experience, served as a member of the National Recovery Administration Board, and was the Director of the Bureau of Research and Statistics of the Social Security Board.[103] Hamilton and other institutionalists were critical in developing the infrastructure for labor economic research that served administrative governance, establishing the National Bureau of Economic Research (NBER) as well as the (Brookings) Institute of Economics, and actively working to improve the statistical work of government agencies, including the Bureau of Labor Statistics in the Department of Labor.[104]

Upon joining the Antitrust Division, Hamilton viewed antitrust policy as a means of stabilizing industry and serving the public interest, and understood the execution of that policy as requiring significant coordination within the administrative state: "If industries are to become orderly, . . . if laborers are to enjoy steady employment and living wages, there must be a measure of central direction."[105] Hamilton even viewed processes of production within an industry, like the routinization of assembly line production in auto manufacturing, as reducing labor's bargaining power with concentration in the same industry giving manufacturers buyer power over auto dealers.[106] Thus, he believed that a successful competition policy would have to involve aggressive government regulation to "take up the shock of competition," including regulating work hours, labor conditions, minimum wages laws, and regulating monopolistic industries by commissions to control prices.[107] And, ultimately, he believed industries could become self-regulatory to the extent

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[102] Walton Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 314, 315 (1919); *see also* Edward Adler, *Labor, Capital, and Business at Common Law*, 29 HARV. L. REV. 241 (1916).
[103] *See* WALTON HAMILTON & STACY MAY, THE CONTROL OF WAGES (1923); Malcolm Rutherford, *Institutional Economics: Then and Now*, 15 J. ECON. PERSP. 173, 181-82 (2001).
[104] *See* Malcolm Rutherford, *Institutional Economics: Then and Now*, 15 J. ECON. PERSP. 173, 179-80 (2001).
[105] Walton Hamilton, *The Problem of Anti-Trust Reform*, 32 COLUM. L. REV. 173, 177 (1932).
[106] WALTON HAMILTON, THE PATTERN OF COMPETITION 38 (1940).
[107] Hamilton, *Problem of Anti-Trust Reform*, *supra* note 105, at 177-78.

stakeholders, like workers and consumers, were members of controlling bodies that governed industry production.[108]

While Hamilton failed to thoroughly implement this aggressive regulatory vision during his service in the Antitrust Division, his views present an important precedent from early antitrust enforcement policy and thinking on how to integrate analysis of the labor market effects of antitrust enforcement into remedial design. More generally, the early shared enforcement authority of the Antitrust Division as between enforcement against dominant firms and ensuring labor market competition is a foundational reference point for current enforcement and the breakup debates that have entirely ignored the ways in which remedial design can impact labor markets.

2. Absence of Labor Market Analysis in Current Remedial Debates and Enforcement

The breakup debates' current "third wave" favoring reinvigorated use of structural remedies has left entirely unaddressed the ways in which those remedies can themselves have labor market effects. Nor have they yet attempted to assess how structural remedies can best avoid adverse labor market effects that can impact workers' jobs, earnings, and benefits.

First, while pro-breakup advocates have been key in highlighting the harms of market concentration and firm dominance on workers' bargaining leverage, wage rates, and employment, they have neither studied nor detailed under what circumstances structural relief as a remedy would be likely to benefit or harm workers.[109] While some allude to the beneficial effects of structural remedies for labor markets, they simply assume that breakups will be good for workers.[110] Presumably—while the argument is never explicitly stated—they are relying on the theoretical Industrial Organizations (IO) intuition that, because breakups split dominant firms into two or more firms that compete in their product lines, breakups will also create two or more employers to compete for increased competition on wage offers and benefits in the labor markets affected by the breakup.[111] Yet, as Part II explains, this intuition is highly

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[108] Hamilton, *Anti-Trust Laws*, *supra* note 57, at 12.

[109] *See, e.g.*, WU, *supra* note 8, at 132-33 (discussing the value of structural relief for competition without discussing its effects on labor markets); Mike Pesca, *Why Zephyr Teachout Wants to Break Up Big Tech: Interview*, SLATE.COM (July 30, 2020), https://slate.com/technology/2020/07/zephyr-teachout-book-antitrust-monopolies-big-tech-facebook-amazon-google.html.

[110] *See, e.g.*, WU, *supra* note 8, at 42 (describing favorably Brandeis' view that ideal economic policy means a government "commitment to the protection of workers, and an open economy composed of smaller firms—along with measures to break or limit the power of monopolies"); Andy Fitch, *Maximum Profits and Maximum Power: Talking to Zephry Teachout*, LOS ANGELES REVIEW OF BOOKS (Aug. 7, 2020) (quoting Teachout arguing for "structural responses," including "breaking up dominant firms", because "once you have today's kinds of power asymmetries (either in data or other workplace conditions), workers basically need to line up and hope at best for feudal relationships.").

[111] *See, e.g.*, WU, *supra* note 8, at 42.

underdetermined and is sometimes wrong. Remedies imposed in product markets may or may not decrease *labor* market concentration, and labor market realities—and labor market institutions developed to establish countervailing leverage against employers—are highly complex, rarely tracking IO economics' theoretical assumptions.[112]

The antitrust agencies have done no better. In fact, a comprehensive review of the remedies the agencies have sought and imposed through consent decrees with dominant firms and in the merger context between December 1992 and June 2021 shows a record of either utter indifference to labor market effects, or, even worse, remedial orders that harm labor market competition.[113] A full review of the case dockets and Competitive Impact Statements filed by the agencies along with their proposed consent decrees made no mention of the labor market effects of those decrees in any labor market, even while many of the remedies themselves imposed restrictions on employee movement between divesting and acquiring firms.[114]

Agencies' primary focus has been in ensuring that any structural relief requested—in most cases, divestitures—resulted in a viable competitor in the relevant *product* market in which the conduct or merger was challenged, securing the success of that competitor even at the expense of labor market competition.[115] For example, when agencies sought and achieved divestitures, they restricted worker movement between the divested and acquiring firms by establishing or lengthening employee non-compete agreements to lock in talent at the firm acquiring the divested assets or line of business.[116] A number of cases explicitly included worker mobility restrictions ranging from six months to two years following divestiture, but only a subset of those explicitly prohibited divesting firms from hiring interference. Three consent decrees since 2017 added protections for workers by requiring divesting firms to reduce employees' mobility costs to the acquiring firm by, for example, vesting all unvested

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[112] For a rejoinder to the assumption that divestitures' effects on competition in product and labor markets are identical, *see* Randy Stutz, *The Evolving Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. WHITE PAPER (July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0.pdf.

[113] *See* App. A, "Tunney Act Docket Search Results". The author collected these cases by performing a Bloomberg docket search of federal dockets for antitrust proceedings brought by the DOJ or FTC in which the term "Tunney Act" appeared between December 21, 1992, and June 1, 2021, a search which yielded 137 cases.

[114] Under the Tunney Act, the DOJ and FTC must file before the district court and publish in the Federal Register "Competitive Impact Statements" stating: the nature and purpose of the Tunney Act proceeding; a description of the practices or events giving rise to the alleged antitrust violation; an explanation of the proposal for a consent judgment, including "an explanation of any unusual circumstances giving rise to such proposal, . . . relief to be obtained thereby, and the anticipated effects on competition of such relief; the remedies available to potential private plaintiffs damaged by the alleged violation; a description of the procedures available for modification of the proposal; and a description and evaluation of alternatives to the proposal actually considered by the United States. 15 U.S.C. § 16(b).

[115] *See* App. A.

[116] *See* App. A.

pension and other equity rights and providing any pay pro rata as well as all other compensation and benefits accrued by those employees or other benefits they would have been provided had they continued employment with the divesting firm (such as retention bonuses and payments).[117] However, no consent decrees or competitive impact statements analyze the broader worker bargaining leverage within the relevant labor markets impacted by the remedy requested.

Unions were listed as amicus or filed comments in Tunney Act proceedings in only six cases, each at the union's initiation.[118] Because no court allowed unions or workers to formally intervene in the merits proceedings under Federal Rule of Civil Procedure 24, the unions lacked access to discovery from the antitrust defendants to collect labor market data, labor costs, or deal estimates pertaining to the antitrust defendants' labor and employment policies—including on employee pay or downsizing—to either strengthen their filings and objections or conduct their own analyses of the effects of the divestiture on labor market competition. Since such labor market data is nearly impossible to obtain from other sources, workers and unions have very limited ability to actively participate in shaping the agencies' and the courts' understandings of the labor market effects of proposed remedies.

Most unions' objections to relief sought through consent decrees focused on the decrees' failure to restore product market competition, with two exceptions: (1) unions' challenge to the parties' consent decree in a government challenge to the Sprint/T-Mobile merger, which imposed a partial divestiture to Dish Network; and (2) the Service Employee International (SEIU)'s challenge of the merger of UnitedHealth Group and Sierra Health Services, two insurance companies in Clark County, Nevada. In *Sprint/T-Mobile*, a coalition of unions coordinated a broad amicus campaign with worker advocacy groups and labor economists and filed submissions before the district court detailing their assessments of the labor market effects of the

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[117] *See, e.g.*, Competitive Impact Statement by the United States, *United States v. Stone Canyon Industries Holding et al.*, Docket No. 1:21-cv-01067 (D.D.C. Apr. 19, 2021), ECF No. 5.

[118] Those cases were: *United States v. UnitedHealth Group et al.*, Civ. No. 1:08-cv-00322 (D.D.C. filed Feb. 25, 2008) (challenging United Health Group's acquisition of Sierra Health Services, SEIU, Local 1107 filing Tunney Act comments); *United States et al. v. US Airways Group et al.*, Civ. No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013) (challenging US Airways/American Airlines merger, Allied Pilots Association, Association of Professional Flight Attendants, Association of Flight Attendants-CWA, and Transport Workers Union of America filing amicus brief); *United States v. Verso Paper Corp. et al.*, Civ. No. 1:14-cv-02216 (D.D.C. filed Dec. 31, 2014) (challenging Verso Paper's acquisition of NewPage Holdings, International Association of Machinists and Aerospace Workers filing Tunney Act comments and opposition briefs to final judgment); and *United States v. Anheuser-Busch et al.*, Civ. No. 1:16-cv-01483 (D.D.C. filed July 20, 2016) (challenging Anheuser-Busch's acquisition of SABMiller, International Brotherhood of Teamsters filing Tunney Act comments and amicus brief); *United States et al. v. Deutsche Telekom AG, et al.*, Civ. No.1:19-cv-02232 (D.D.C. filed July 26, 2019) (challenging Sprint/T-Mobile merger, AFL-CIO and Communications Workers of America filing Tunney Act comments); *In the Matter of Abbvie Inc. and Allergan PLC*, Docket No. C-4713 (FTC filed Sept. 4, 2020) (challenging AbbVie/Allergan merger, AFT, Iowa Federation of Labor, AFL-CIO, SEIU, UNITE HERE, AFSCME filing Tunney Act comments).

merger in the market for retail mobile wireless service.[119] In *UnitedHealth*, the SEIU teamed up with the American Medical Association and other physicians' groups to argue that the DOJ's failure to seek any relief in its consent decree for the concentration effects of the merger in the market for physicians', nurses', health care workers', and public employees' services was inadequate and required denial of the parties' proposed consent decree.[120]

In one case, *Anheuser-Busch*, the DOJ sought only behavioral remedies in its proposed consent decree and the union requested divestiture, justifying the divestiture in the product market as opposed to highlighting the merger's effects (layoffs and reduced labor market competition) in the labor market. In another case, *Verso Paper*, the DOJ sought divestitures of two paper mills but allowed the antitrust defendants to close a third, resulting in worker layoffs.[121] The union argued that the two divestitures were acquired by defendants' "dancing partner" and would facilitate collusion, and the closure of the third mill and its sale for scrap was intended to reduce capacity of a profitable and productive asset.[122] In these cases, the unions were primarily intervening to highlight how plant or facility closures surrounding the mergers would reduce capacity and facilitate collusion without mentioning any impacts of those closures on labor markets. In one case, *AbbVie*, the union argued that the divestitures sought in the consent decree were insufficient to restore competition in the product market and required additional behavioral or conduct remedies. Unions only directly supported merger consummation and proposed remedies sought by the DOJ in one case: the US Airways/American Airlines merger.[123] In the five cases where unions objected to proposed consent decrees and requested alternative relief in

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[119] *See, e.g.*, AFL-CIO Reply; CWA Comment, *United States et al. v. Deutsche Telekom AG, et al.* (https://www.justice.gov/atr/us-and-plaintiff-states-v-deutsche-telekom-ag-et-al-index-comments).

[120] American Medical Association, Nevada State Medical Association, and Clark County Medical Society Comment, *United States v. UnitedHealth Group, Inc. and Sierra Health Services, Inc.* (D.D.C. filed Sept. 18, 2008); SEIU, Local 1107 Comment, *United States v. UnitedHealth Group, Inc. and Sierra Health Services, Inc.* (D.D.C. filed Sept. 18, 2008);

[121] *United States v. Verso Paper Corp. and NewPage Holdings Inc.* (https://www.justice.gov/atr/case-document/response-plaintiff-united-states-public-comments-proposed-final-judgment-exhibit-1).

[122] *Id.*

[123] Allied Pilots Ass'n, Ass'n of Prof. Flight Attendants, Ass'n of Flight Attendants-CWA & Transport Workers Union of America Amicus Brief in Support Defendant's Motion to Set Trial Date, *United States et al. v. US Airways and AMR Corp.,* Civ. No. No. 1:13-cv-01236, ECF No. 11 (D.D.C. filed Aug. 23, 2013). The strength of the unions and their involvement in American Airlines' Chapter 11 bankruptcy proceedings as creditors in this instance meant that the unions were actively involved in and were able to negotiate substantial demands from their merging employers. The unions' long history with the airlines as well as access to key financials as creditors (American Airlines' business plan, projections, financial statements, reports, and other information) enabled them to do a fulsome analysis of the labor market effects of the merger to place them in a stronger negotiating position for collective bargaining.

Tunney Act proceedings, none were successful in modifying the consent decrees or achieving their requested relief.[124]

In none of these cases did the courts engage in analysis of the labor market effects of remedies sought through consent decrees, nor did they deploy experts or special masters to analyze such effects or even solicit testimony or information from workers or unions affected by imposed breakups.

In sum, antitrust agencies and the courts are implementing divestitures in antitrust cases without considering the potential impacts of those divestitures on labor market competition. And commentators across the political spectrum are calling for additional breakups without analysis of how those divestitures may impact workers and labor markets. The following Section seeks to provide the analysis that the current breakup debates have ignored by assessing the myriad ways in which structural relief can benefit and harm workers. It establishes an overarching framework and set of metrics for agencies and courts to consider when evaluating remedial design questions, including analysis of firm structure, industry characteristics, union density within labor markets affected by the anticompetitive conduct, and the history of wage-and-benefit bargaining within the industry, among other considerations, to ensure that remedies for antitrust violations do not strengthen employer buyer power in labor markets or worsen workers' bargaining leverage.

II. ANALYZING EFFECTS OF BREAKUPS ON WORKERS

From a basic Industrial Organizations perspective—the dominant economic perspective deployed by agencies and the courts to analyze employer buyer power over workers—divestiture and other structural remedies would be expected to *decrease* a single employer's wage-setting power over workers in a relevant labor market: creating two or more employers where there used to be one increases competition for workers' labor services, allowing workers to play those employers off of each other to get better employment terms on wages, benefits, or other terms and conditions of work.[125] But it turns out that this simple story is not categorically true, and certainly was not true in the most prominent example of divestiture in modern antitrust history: the breakup of the Bell System. There, the breakup contributed to destroying the telecommunication workers' union and bargaining leverage where workers had once been able to collectively bargain industry-wide wage premiums within a national market.

The Bell System breakup is not an isolated example of basic IO predictions failing to match labor market realities. As this Article documents for the first time,

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[124] See, e.g., Order, *United States v. Anheuser-Busch InBev SA/NV, et al.*, Civ. No. 1:16-cv-01483, Docket No. 42 (D.D.C. Oct. 22, 2018); Order, *United States v. UnitedHealth Group, Inc. and Sierra Health Services, Inc.* (D.D.C. Sept. 24, 2008).

[125] *See, e.g.*, ALAN MANNING, MONOPSONY IN MOTION 29-52 (2003); Posner & Marinescu, *supra* note 95, at 1357.

workers have intervened and commented on antitrust remedies to oppose the exclusive use of structural remedies to antitrust violations, suggesting that the basic IO predictions miss unique characteristics of labor markets. This Part explores why: market concentration levels and other indicators of firm buyer power do not alone determine an employer's power to set wages because other labor market realities (workers' search costs, mobility costs, employer-worker preferences), labor market institutions (union density rates, the history of employer-worker bargaining, workers' status and protections under law), and the impact of firm structure and internal labor market (ILM) dynamics (voluntary divestitures with layoffs, firm labor policies, equity and fairness considerations in a firm's internal wage structures, seniority premiums and other incentives against shirking) also impact employers' wage-setting power in ways that can affect whether a breakup will harm or benefit workers.[126]

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

A. Case Study: The Breakup of the Bell System

While many antitrust scholars and commentators have pointed to the breakup of the Bell System as a successful example of how structural remedies can increase competition and encourage innovation, no one within the breakup debates has analyzed its effects on telecommunications *workers*.[127] In fact, the post-breakup world

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

[127] *See, e.g.*, Pesca, *supra* note 109 (quoting Zephyr Teachout: "I think we're going to have more innovation after we break up these companies, not less. And when you look at history, there's a lot of evidence that's exactly what happens. Look at the breakup of AT&T and the incredible flowering that

for telecommunications workers saw dramatic declines in worker bargaining leverage, with union density plummeting from 56 percent before the breakup in 1983 to 24 percent in 2001.[128] This Section offers a case study of how the Bell breakup impacted workers' countervailing power and harmed workers in a highly-regulated, high union-density industry where workers had achieved industry-wide bargaining. While the conditions that led to the breakup's harm to workers are complex and not unidirectional, the case study provides a concrete example of how the dynamics that can operate in labor markets following the imposition of structural remedies can serve violate basic IO intuitions. The case study thus serves as a reference point for further analysis of the effects of antitrust remedies on worker welfare.[129]

1. Telecommunication Workers: From a Nonunion Workforce to Pattern Bargaining

The Bell System arose as a centrally-organized network of firms—Bell regional corporations (providing local service), AT&T Long Lines (providing long-distance service), Western Electric (providing telephone equipment), and Bell Telephone Laboratories ("Bell Labs") (performing industrial and scientific research)—all coordinated by parent American Telephone and Telegraph Company (AT&T). Before the 1930s, the main international union organizing telecommunications workers, the International Brotherhood of Electrical Workers (IBEW), did not seek to establish an

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led to. We don't know what the flowering will be after we break up Amazon, but I promise you it's coming."); Kovacic, *Antitrust Remedies*, *supra* note 58; Van Loo, *supra* note 81, at 1974-76. For commentary on the Bell divestiture focusing on product rather than labor market effects, *see, e.g.*, ALVIN VON AUW, HERITAGE AND DESTINY: REFLECTIONS ON THE BELL SYSTEM (1983); BREAKING UP BELL (David Evans ed., 1982); STEVE COLL, THE DEAL OF THE CENTURY: THE BREAK-UP OF AT&T (1986); DISCONNECTING BELL: THE IMPACT OF THE AT&T DIVESTITURE (Harry M. Shooshan III ed., 1984); LEONARD SCHLESINGER ET AL., CHRONICLES OF CORPORATE CHANGE: MANAGEMENT LESSONS FROM AT&T (1987); FRED HENCK & BERNARD STRASSBURG, A SLIPPERY SLOPE: THE LONG ROAD TO THE BREAKUP OF AT&T (1988); ALAN STONE, WRONG NUMBER: THE BREAK-UP OF AT&T (1989); AFTER THE BREAKUP: ASSESSING THE NEW POST-AT&T DIVESTITURE ERA (Barry G. Cole ed., 1991); PETER TEMIN, THE FALL OF THE BELL SYSTEM (1989); Paul MacAvoy & Kenneth Robinson, *Losing by Judicial Policymaking: The First Year of the AT&T Divestiture*, 2 YALE J. REG. 225 (1985); Robert Crandall, *Surprises from Telephone Deregulation and the AT&T Divestiture*, 78 AM. ECON. REV. 323 (1988); Roger Noll & Bruce Owen, *The Anticompetitive Uses of Regulation*: United States v. AT&T, *in* THE ANTITRUST REVOLUTION 290 (John Kwoka & Lawrence White eds., 1989); Joseph Kearney, *From the Fall of the Bell System to the Telecommunications Act*, 50 HASTINGS L.J. 1395 (1999); Clement Krouse et al., *The Bell System Divestiture/Deregulation and the Efficiency of the Operating Companies*, 42 J. LAW & ECON. 61 (1999); Shelanski & Sidak, *supra* note 78; Robert Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109 (2001); Richard Epstein, *The AT&T Consent Decree*, 61 FED. COMM. L.J. 149 (2008); Christopher Yoo, *The Enduring Lessons of the Breakup of AT&T*, 61 FED. COMM. L.J. 1, 2-3 (2008).

[128] U.S. Census Bureau, Current Population Survey (CPS) (2001). Current union density in the among employees in the telecommunications industry is 14.3 percent. U.S. Census Bureau, Current Population Survey (CPS) (2021).

[129] As Part II.D explains, there are broader circumstances, beyond circumstances analogous to the Bell System divestiture, that can result in structural remedies harming workers.

industry-wide union, in part because they adopted a craft- rather than industry-approach to organizing workers and viewed workers "in every way . . . *except* as telephone workers working in an industry dominated by an industry-conscious employer—[AT&T]."[130] The push for a national federation and coordination among unionizing workers, independent unions, and employee organizations was motivated first in the 1930s by the need for pension and benefit plan uniformity and advocacy. Beginning in the 1910s, AT&T had adopted a "corporate welfarist" approach to its workers, developing its Bell Employees' Benefit Plan alongside "employee representation plans" to manage employee relations in the wake of strike waves and violent worker suppression in the oil and coal industries that culminated in the 1914 Ludlow massacre.[131] AT&T's pension and benefit plans "demonstrated in a concrete way the oneness of the companies making up the Bell System", "managed and controlled by" AT&T; the "inability of the individual employee groups to deal decisively with the pension issue with their managements . . . was a potent motive in bringing together the . . . workers' groups in a national union."[132]

By 1938, the network of unionizing and unionized workers formed the National Federation of Telephone Workers (NFTW), and while AT&T initially refused to recognize and collectively bargain with the NFTW, the union's aggressive involvement in securing itself a seat at the table in the War Labor Board during World War II unified and consolidated efforts to strengthen and nationalize the union, aided in displacing the dominance of "company unions"[133], and solidified the union's role as an expert representative of worker interests both with AT&T and in the "inner councils of government."[134]

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[130] JACK BARBASH, UNIONS AND TELEPHONES: THE STORY OF THE COMMUNICATIONS WORKERS OF AMERICA 16-18 (1952).

[131] THOMAS BROOKS, COMMUNICATIONS WORKERS OF AMERICA 20-21 (1977). In addition to AT&T's "corporate welfarist" approach to quelling worker strife, AT&T was a pioneer in human resource management (HRM) on the "shop floor". It commissioned the famous "Hawthorne experiments" in its Western Electric manufacturing plant to determine how lighting conditions, line speeds, active and passive supervision, and other mechanisms of incentivizing and punishing worker performance through establishing "psychosocial interactions among workers and between superiors and subordinates" could better control worker productivity. *See id.* at 29; CYNTHIA ESTLUND, WORKING TOGETHER 43–44 (2003); Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1566–77 (1981).

[132] BARBASH, *supra* note 130, at 22, 27-30.

[133] Both before and after the National Labor Relations Act of 1935's prohibition of "company unions", employee associations paid for and directed by AT&T and its subsidiaries were prevalent within the industry since 1919 until World War II. *See id.* at 37; BROOKS, *supra* note 131, at 16-21, 88-89. Still, company unionism is credited with giving union leaders "a basic training course in the skills of running an organization" and a "consciousness of [the] industry", "recogniz[ing] the economics and technology of the industry as the major element in their dealing with management." BARBASH, *supra* note 130, at 51.

[134] *Id.* at 30-39; BROOKS, *supra* note 131, at 60, 67-74.

The national War Labor Board itself was key in moving labor disputes and wage negotiations away from regional boards towards a national commission with jurisdiction to deal with labor issues on an industry-wide basis.[135] The Board adopted a national approach through a centralized board (as opposed to prior regional labor board systems established earlier in the war) to set competitive wage standards because it was difficult to establish those standards by looking at local labor markets alone—AT&T and its subsidiaries had monopolies in their operating areas with no competition, so government regulators could not set benchmarks for wage rates against comparable jobs in the respective local areas.[136] The national board was thus uniquely effective in stabilizing industry-wide wages and labor peace as well as aligning intra-Bell wage differentials, making possible a national policy within the telephone industry through its tripartite structure incorporating both management and labor representation.[137] Thus, it took government recognition of the NFTW, equalizing the playing field between labor and management through a tripartite board, aggressive intervention in AT&T's wage policies, and application of social scientific expertise to align wage schedules at the national scale to solidify workers' countervailing power industry-wide against AT&T's monopoly.

At the end of the war and the expiration of the War Labor Board's mandate—as well as the no-strike pledge that it imposed—labor militancy among telecommunication workers exploded with over four million workers striking in early 1946 to lift industry-wide wages.[138] The NFTW won its first set of general wage increases through direct collective bargaining with AT&T and its subsidiaries in 1946 and was able to establish second-round wage increases in 1947 along with a ten-item agenda for national bargaining.[139] But without the tripartite War Labor Board in place, AT&T refused to formally accept pattern bargaining industry-wide, insisting that its associated companies were independent entities that made their own decisions—it successfully broke the workers' national effort through reaching settlements with union affiliates through its individual operating companies.[140]

AT&T's ability to break the strike as a single, powerful, unified corporation dividing and conquering the loose association of over fifty affiliated and autonomous federation members strengthened the drive to formally establish a single national union, the Communications Workers of America (CWA), whose jurisdiction extended to all telecommunications workers in 1947. The CWA affiliated with the Congress of Industrial Organizations (CIO) in 1949.[141] But AT&T's monopoly position and "divide

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[135] BARBASH, *supra* note 130, at 35.

[136] *See* PEARCE DAVIS & HENRY MEYER, LABOR DISPUTE SETTLEMENTS IN THE TELEPHONE INDUSTRY (1946).

[137] *Id.* at 36; BROOKS, *supra* note 131, at 82-84.

[138] BARBASH, *supra* note 130, at 54-71.

[139] *Id.* at 62-64; BROOKS, *supra* note 131, at 106-09 (discussing the Beirne-Craig Memo that established a pattern for wage bargaining for the entire Bell System for the first time).

[140] *Id.* at 67-75.

[141] *Id.* at 84-111.

and conquer" strategy limited the union's ability to play off any competitive threats to AT&T to the union's advantage—much as, for example, the United Auto Workers were able to do in the auto industry—thus limiting the union's leverage in the late 1940s.[142] AT&T insisted that all bargaining matters be handled at the local level by each operating company and its local union based on local wage conditions within the community.[143] And after the CWA affiliated with the CIO, all Bell companies instituted a "wave of recognition withdrawals", claiming that the CIO affiliation required decertification of existing unions and new union certifications by local rank-and-file members.[144]

But the union was significantly strengthened through internal reorganization—creating a two-level structure allowing the national union to more directly set local union priorities—as well as worker militancy and innovation using "hit-and-run" strikes coordinated across the country through a centralized CWA.[145] Direct government intervention also played a critical role in strengthening the union. Congressional investigations and a 1951 Senate Labor and Public Welfare Committee Report on the Bell System's labor relations revealed that workers had lost ground on wages since 1939 and that the Bell System functioned as "a closely integrated corporate system, completely and directly controlled by the AT&T management", which had "a direct effect upon the course of labor relations in the system."[146] The Bell System also had uniform wage policies and rules for determining wages based on job content and fluid job structures that cross-trained workers in composite skills so they could be moved more easily from one job to another, in part driven by the variation in need for telephone service daily, seasonally, cyclically, and in emergencies.[147] And AT&T management established uniform financial and operating policies that centralized bargaining demands and strategies between management and workers throughout the Bell System, requiring central approval before management of its local affiliates could

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142 *Id.* at 114-131.

143 BROOKS, *supra* note 131, at 115, 125.

144 *Id.* at 150.

145 *Id.* at 164-65.

146 U.S. Senate Comm. on Labor & Public Welfare, *Labor-Management Relations in the Bell Telephone System Report pursuant to S. Res. 140*, 81st Cong., 1st sess. 3, 25 n.49 (1951) (hereinafter, *Senate Bell System Report*) [digital text at Hathi Trust]. The Report grounded its finding of AT&T's centralized control in "its stock ownership of most of the associated companies, from license contracts which it has with all the operating associated companies in the system, and from the long, continued control which AT&T executives have exercised through the years over promotions and salary increases of administrative officers in the associated companies". The Federal Communications Commission (FCC), which conducted its own investigation into AT&T's unlawful monopoly, came to the same conclusion about its unified structure and control of its operating companies in an earlier 900-page Report. *See* Federal Comm. Comm'n, *Investigation of the Telephone Industry in the United States*, House Doc. No. 340, 76th Cong., 1st sess. (1939).

147 BARBASH, *supra* note 130, at 164-65. Wage variation did exist between men and women, between white and non-white workers, and between localities based on a town classification system. *Id.* at 164; VENUS GREEN, RACE ON THE LINE: GENDER, LABOR, AND TECHNOLOGY IN THE BELL SYSTEM 58-112, 176-77, 254-55 (2001).

commit to binding agreements with workers.[148] The Congressional Report thus recommended national bargaining between the union and AT&T on national issues.[149] The start of the Korean War became an impetus to more directly regulate the telecommunications industry's prices and wages through the Wage Stabilization Board, significantly strengthening the union's involvement in setting the terms of the wage bargain in the context of a relative scarcity of manpower.[150]

Between 1950 and 1955, the CWA was able to win significant wage increases for its workers, negotiating over 80 collective bargaining agreements and winning contractual rights for both telephone and non-telephone workers to respect legitimate CWA picket lines.[151] By 1958, the CWA had formally established a Collective Bargaining Policy Committee (CBPC) to coordinate national bargaining strategies, successfully winning wage increases, improvements in vacations and pensions, and pattern settlements in company paid-for medical insurance and life insurance by 1960.[152] In the 1960s, the CWA successfully established a pattern out of its "cluster bargaining" by setting up a system of three separate contracts: (1) establishing union recognition, payroll deductions, and grievance procedures; (2) dealing with items identical through the Bell System, like pension plans, vacations, progression schedules, and so on; and (3) local contracts dealing with local problems, synced with termination dates of the national contracts.[153] The early pattern bargaining system enabled the union to adapt to automation[154] in the telecommunications industry as well as complicated questions of wage differentials across job titles geographically, instituting a system of wage-bargaining that could apply industry-wide. Specifically, the union used its resources to commission a 500-page economists' study and report on "Geographical Wage Standards" recommending that AT&T's community wage theory be replaced in favor of "a more equitable and rational pay system based on costs of living", allocating labor market areas and wage tables based on rates of pay for key jobs in each of the main departments of an operating company in each work location, applying a cost-of-living formula, and establishing that AT&T's over 100 wage zones

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[148] BARBASH, *supra* note 130, at 184.

[149] Senate Bell System Report, *supra* note 146, at 32-33 ("The subcommittee believes very definitely that AT&T cannot expect to contain collective bargaining within small segments throughout the system while it makes system-wide decisions for piecemeal application to those segments. . . . [I]n view of the closely integrated nature of the system itself and the controlling influence of AT&T, the subcommittee believes that it is utterly unrealistic to expect the parent AT&T to relax the control which it has by the economic fact of stock ownership and by the political fact of the election of company boards of directors and the selection of company officers. The subcommittee strongly believes that AT&T should do the bargaining with the unions on national issues such as wages and pensions which extend beyond any departmental or associated company bargaining unit.").

[150] *Id.* at 142-52.

[151] *Id.* at 166-88.

[152] *Id.* at 205-8.

[153] *Id.* at 211-13.

[154] The CWA commissioned an expert report, the Diebold Report, to study the effects of automation on industry employment and used the Report in its bargaining strategies. *Id.* at 218.

under its community wage theory could be reduced to six wage bands with no more than a $4 wage differential between each band.[155] The CBPC adopted the recommendations of the study to anchor its pattern bargaining going forward.[156] While AT&T did not formally agree to pattern bargaining through the 1960s, the union's strength enabled successful wins reflecting wage increases, reductions in wage inequities, and improvements in benefits.[157]

The union's strength only grew in the 1970s prior to the Bell breakup—it aggressively increased its total members to become the fourteenth largest union in the country, established stronger local organizing structures for community and political advocacy, integrated local unions more seamlessly into the national union, and finally secured AT&T's agreement to national pattern bargaining in 1974 over basic wages, pensions, health insurance, and length of contracts.[158] National bargaining had been the product of three decades of union struggle, but its achievements were evident at the termination of the first contract cycle following the first national agreement: following a strike vote but before the strike's commencement, the union was able to secure wage and benefit improvements amounting to a nearly 36 percent increase, with the total value of the collective bargaining gains estimated at more than $3.119 billion, "by far the largest labor settlement since the lifting of federal wage-price controls."[159]

Thus, while the union faced significant headwinds in establishing pattern bargaining for industry-wide wages, benefits, and working conditions due to AT&T's monopoly power in telephone services and equipment markets, it was able to succeed through a combination of direct government intervention in support of worker bargaining, internal reorganizations adaptive to product and service market conditions, industry expertise, aggressive organizing, and innovative use of strikes. In one stroke, however, the breakup of AT&T reversed many of these hard-fought gains across the entire Bell System, ultimately harming rather than benefiting workers.

2. The Breakup of the Bell System: Agency and Court Indifference to Labor Market Effects

In 1974, the DOJ filed an antitrust action under Section 2 of the Sherman Act against AT&T, Western Electric, and Bell Labs, alleging that defendants had unlawfully monopolized the markets for local exchange services, long-distance services, and telephonic equipment under a "triple-bottleneck" theory: by illegally refusing to provide competitors with local interconnection services, furnishing rivals with inferior maintenance services, and imposing requirements that thwarted the reach

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155 *Id.* at 215.
156 *Id.*
157 *Id.* at 218-29.
158 *Id.* at 226-34.
159 *Id.* at 234-42.

of competing local networks.[160] The Government requested divestiture of the Bell Operating Companies (BOCs) from AT&T as well as, at various times, AT&T's divestiture of Western Electric and Bell Labs.[161] The trial began January 5, 1981.

Before the Government presented its rebuttal case, the parties filed a proposed consent decree that allowed AT&T to retain ownership and control of its core business in the long-distance carrier services and equipment markets but required AT&T to divest ownership and control of the BOCs, creating seven independent regional "Baby Bells". The consent decree also imposed line-of-business restrictions and "equal access" obligations on the independent BOCs requiring that they provide unaffiliated long-distance carriers access to all local-exchange carriers (LECs) that was "equal in type, quality, and price" to that given to AT&T.[162]

The proposed divestiture was informed by an economic view described first by William Baxter, then-Assistant Attorney General of the Antitrust Division, called "Baxter's Law," or, later, the "Bell Doctrine."[163] The Bell Doctrine posited that, in regulated industries, regulators would not be able to stop an integrated monopoly from engaging in predatory anticompetitive conduct in adjacent markets absent a structural remedy.[164] The Reagan Administration viewed aggressive government regulation of AT&T as *itself* feeding AT&T's monopolistic conduct and thus required an equally aggressive break-up remedy to restore free market conditions.[165]

The consent decree was subject to the district court's Tunney Act review, and the court received so many comments—from over 600 "interested persons"—that it established a separate docket for its public interest proceedings.[166] Following a two-day hearing, the court approved the consent decree's divestiture and conduct

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[160] *United States v. AT&T Co.*, 524 F. Supp. 1336, 1354-57 (D.D.C. 1981). Specifically, the complaint alleged that "AT&T used its control over its local monopoly to preclude competition in the intercity market"; (2) prohibited customers' attachment of competitors' equipment to the network except through discriminatory use of protective connecting arrangements; (3) used its control over local operating companies to force them to buy products from Western Electric (even though other manufacturers produced better products or products of identical quality at lower prices); and (4) substantially dominated the telecom industry. *United States v. AT&T Co.*, 552 F. Supp. 131, 161-63 (D.D.C. 1983).

[161] 552 F. Supp. at 139.

[162] 552 F. Supp. at 140-42.

[163] See William Baxter, *Conditions Creating Antitrust Concern with Vertical Integration by Regulated Industries*, 52 ANTITRUST L.J. 243 (1983).

[164] Baxter's Law posited that rate-regulated monopolists could extract monopoly profits from vertically-integrated markets without running afoul of the "single monopoly profit theorem", or the notion that monopolists could only extract one monopoly profit from tying two products at the point of sale. *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 399-400 (2009); *see also* Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 239 n.49 (2006); Paul Joskow & Roger Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and their Network Industries*, 51 STAN. L. REV. 1249, 1249-50 (1999).

[165] Daniel Crane, *Antitrust's Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 132-33 (2018).

[166] 552 F. Supp. at 135, 147 n.62.

remedies,[167] and interpreted its Tunney Act authority and the statute's public interest factors broadly: "the legislative history indicates that the listing of these factors was not meant to limit the court's inquiry", so the criteria "cannot be regarded as embodying *the* standard against which a proposed decree is to be measured" and "the Court may consider factors *other* than [the consent decree's] effect on competition."[168] Further, the court stated that, while the inquiry "must begin by defining the public interest in accordance with the antitrust laws," it was "clear from the cases that other factors" beyond "the issue of competition and the effects on competition . . . are not irrelevant", and "a court should impose the relief which impinges *least* upon *other public policies*."[169] In approving the structural remedy, the court emphasized that its loosening of AT&T's control over telecommunications would "transcend" benefits "which flow from the narrowest reading of the purpose of the antitrust laws," including the court's understanding that just as "[o]ur political system is designed so that the power of one group may be checked by the power of another," the "antitrust laws require the same approach in the economic sphere," "seek[ing] to diffuse economic power in order to promote the proper functioning of both our economic and political systems."[170]

But the court's analysis and remedial sensitivity to establishing checks on AT&T's economic power was directed only at avoiding harms to AT&T's product market competitors—it willfully ignored the effects of the divestiture in the labor markets in which AT&T operated, even though it acknowledged that the Bell System employed over one million people and was the largest employer in the United States with the exception of the federal government.[171] Specifically, the court focused on how the divestiture would impact AT&T's "ability to disadvantage *competitors* in the interexchange and equipment markets through its control of local Operating Companies" rather than other constituencies, including workers.[172]

The court devoted a section of its Tunney Act opinion to the "interests of AT&T employees," and specifically to the CWA's request, motivated by its interest in preserving "continued national bargaining in telecommunications following the reorganization of AT&T", "that the proposed decree explicitly provide that nothing therein will preclude [national bargaining]."[173] But the court found "no need for such

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[167] 552 F. Supp. at 141-42, 147.

[168] 552 F. Supp. at 149 n.77 (citing S. Rep. No. 93-298 at 6; 120 Cong. Rec. 36344 (1974) (Remarks of Rep. Jordan); 119 Cong. Rec. 24599 (1973) (Remarks of Sen. Tunney)), 150 n.81.

[169] 552 F. Supp. at 149-51 (citing *American Tobacco*, 221 U.S. at 185) (emphasis added).

[170] 552 F. Supp. at 164-65.

[171] 552 F. Supp. at 152 n.85.

[172] 552 F. Supp. at 165. The court also ignored potential adverse effects on *consumers* from the divestiture who could no longer rely on AT&T's long-distance rates cross-subsidizing lower rates for local services. The court admitted that the record evidence was contentious on the divestiture's effects on consumer prices, stating that the "divestiture . . . will not necessarily have an adverse effect upon the cost of local telephone service", but "since the trial was aborted by the settlement, no final decision was reached on the issue." F. Supp. at 169 & n.160.

[173] 552 F. Supp. at 210.

modification", both because it viewed "nothing in the proposed decree or in general principles of law" precluding or interfering with such bargaining, and thus "no reason whatever why, following entry of the decree and the reorganization, such bargaining cannot continue as in the past," but also because it found the CWA's comments and views about the effects of the consent decree irrelevant to the purposes of the divestiture.[174] Specifically, the court cited the Clayton and Norris-LaGuardia Act's statutory labor exemptions from the antitrust laws as supporting the proposition that employees impacted by the divestiture were not properly a subject of consideration in its Tunney Act review: "the settlement of the lawsuits[] do not involve AT&T's labor relations and, more particularly, they have nothing to do with the [CWA] and its relationship with the Bell System."[175] Thus, the court engaged in no analysis of how the divestiture—and its impact on pattern bargaining—might affect labor market competition or workers' ability to assert countervailing power against AT&T and the Baby Bells in its bargaining, despite the union's three decades-long struggle to establish pattern bargaining in the national telecommunications market.

3. The Impact of the Bell Breakup on Workers

AT&T formally divested its local BOCs on January 1, 1984, pursuant to the district court's judgment approving the consent decree.[176] Commentators have debated whether the divestiture benefited consumers, competition in the local- and long-distance exchange markets, and innovation, and have extensively discussed the costs and benefits of the court's oversight of the divestiture and twelve-year administration of the consent decree.[177] Aside from a single study, however, there has been no analysis of the breakup's effects on workers and labor market competition, including in the current breakup debates, except to note its labor cost savings to owners.[178]

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[174] 552 F. Supp. at 209-10.

[175] 552 F. Supp. at 209-10 (citing 15 U.S.C. § 17; 29 U.S.C. § 52); *see also* Hafiz, *Interagency Merger Review*, *supra* note 46, at 49. The court acknowledged that the CWA represented "over 500,000 employees of the Bell System, or 51 percent of all the System's employees, in addition to over 70,000 employees in other telecommunications companies." 552 F. Supp. 209 n.330. Meanwhile, in anticipation of the divestiture into separate BOCs, the FCC had required that AT&T and the CWA enter a Memorandum of Understanding specifying that the Bell System employees "who were transferred to separate AT&T subsidiaries or affiliates would be entitled to certain protections," namely, "the preservation of wages and net credited service . . . for five years after the transfer; no reduction of pension, health, or other benefits as a result of the transfer; payment of reasonable travel and moving expenses . . . ; continued application of the collective bargaining agreement to these employees; preferential rehiring rights; advance notice to the union of any work group transfer; and continued recognition by the subsidiaries or affiliates of the [CWA] as the exclusive bargaining representative of transferred employees." 552 F. Supp. at 210 & nn. 331-32.

[176] *See* Kearney, *supra* note 127, at 1398-99.

[177] *See, generally, supra* note 127 (collecting divestiture commentary).

[178] *See, e.g.*, Krouse et al., *supra* note 127, at 77. Labor cost savings is consistent with worker layoffs and reductions in worker pay resulting from declining union density rates and employer monopsony. The single labor economics study reviewing the effects of the divestiture on the CWA is Harry Katz et al., *The Revitalization of the CWA*, 56 INDUS. & LABOR RELATIONS REV. 573 (2003), discussed herein.

Following the breakup, the regional BOCs took more than half a million Bell System employees with them and were among a handful of the largest employers in each of their seven regions.[179] A single labor economic study reviewed the effects of the breakup on workers two decades after the restructuring based on field research, review of union contracts and archival sources, aggregate data from government sources, and survey evidence, and found that the breakup of the Bell System "undermined the union's power, in terms of both membership levels and bargaining leverage" and increased the "uncertainty facing the union."[180] Evidence from the U.S. Census Bureau documents that, after the Bell breakup, union density among all employees in the telecommunications industry fell from 56 percent in 1983 to 24 percent in 2001.[181] Union rates fell among union-eligible network technicians from 82 percent in 1983 to about 57 percent in 2001, while the drop among customer service and sales workers was from 66 percent to 26 percent.[182] The decline is primarily attributable to the BOCs' downsizing in their traditional core union workforce, establishment of non-union subsidiaries for their "growth businesses" (like wireless, information services, and data communications), and entry of non-union companies following the breakup.[183] The breakup impacted employment and earnings by race and gender in the telecommunications industry—nonblack minority men were the only underrepresented group to experience employment gains as managers and professionals following the breakup.[184]

Significantly, the union's loss of its bargaining leverage that derived from its ability to engage in national pattern bargaining destabilized and made more uncertain union-management relationships.[185] Formal centralized bargaining had established a formal structure that produced system-wide agreements on wages, benefits, and employment security, but it also facilitated *internal* mobility for workers across the

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[179] *See* Richard Vietor, *AT&T and the Public Good: Regulation and Competition in Telecommunications*, *in* FUTURE COMPETITION IN TELECOMMUNICATIONS 82 (Stephen Bradley & Jerry Hausman eds., 1989).
[180] Katz et al., *supra* note 178, at 575-76.
[181] CPS, *supra* note 128.
[182] Katz et al., *supra* note 178, at 576 (citing CPS, *supra* note 128).
[183] Katz et al., *supra* note 178, at 576.
[184] See James Peoples & Rhoda Robinson, *Market Structure and Racial and Gender Discrimination: Evidence from the Telecommunications Industry*, 55 AM. J. ECON. & SOCIOLOGY 309 (1996); *see also* Jeffrey Keefe & Karen Boroff, *Telecommunications Labor Management Relations After Divestiture*, *in* CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 303-72 (Paula Voos, ed. 1994) (discussing how national bargaining pre-divestiture compressed the wage structure and increased relative wages of lower-paid traditionally female jobs). Unions generally help reduce reduce racial disparities in wages and raise women's wages. ECON. POL'Y INST., FACT SHEET: UNIONS HELP REDUCE DISPARITIES AND STRENGTHEN OUR DEMOCRACY (Apr. 23, 2021), https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/.
[185] Katz et al., *supra* note 178, at 576-77 ("a key collective bargaining victory in the post-World War II period was to gain a centralized collective bargaining structure that matched the organizational structure of the national telephone industry. In doing so, the union adapted to changes that had occurred in the product market environment, and this adaptation improved its bargaining leverage.").

AT&T subsidiaries so that workers received the same wage increases whether they worked for AT&T or for a local Bell company anywhere in the country.[186] After the breakup, while the CWA sought to continue centralized bargaining, it had to modify its bargaining structure to fit the new corporate environment and most of the Baby Bells used the breakup to demand a return to bargaining at the local level, creating a fragmented structure that undermined union power, reversing the gains the CWA had previously achieved.[187]

The breakup thus decentralized the CWA's bargaining structure, and with the deregulation of the telecommunications industry, workers were confronted with significant corporate restructuring and downsizing, all while facing "a parade of new managers at the bargaining table and in line positions" that made the bargaining process and implementation of negotiated agreements more complex and uncertain.[188] Further, the union faced increased coordination costs in mobilizing its membership against new management and new wage policies in the context of AT&T and Bell affiliate cost-cutting.[189]

The CWA's bargaining leverage continued to decline in the face of antitrust authorities' failure to assess labor market effects in its evolving merger policy, allowing subsequent increases in employers' market power without evaluating losses in telecommunications workers' bargaining leverage in fragmented, restructured, and increasingly non-union workforces. The original seven regional BOCs merged to become four, increasing their power and resources as global entities, and non-union companies that were small new entrants in the 1980s became global giants, including WorldCom/MCI.[190]

The CWA recovered some ground through collective bargaining, political action, and organizing efforts.[191] It was eventually able to secure two-tiered collective bargaining with all the regional BOCs and negotiate wages and benefits to form a national pattern by the 1990s, but while the union was able to maintain real union wage levels between 1983 and 1998, real *non*-union wage levels plummeted in the highly deregulated telecommunications industry.[192] In response to the breakup's negative

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186 Katz et al., *supra* note 178, at 577.
187 Katz et al., *supra* note 178, at 577-78.
188 Katz et al., *supra* note 178, at 576; Jeffrey Keefe & Rosemary Batt, *Restructuring Telecommunications Services in the United States*, *in* TELECOMMUNICATIONS: RESTRUCTURING OF WORK AND EMPLOYMENT RELATIONS WORLDWIDE 31-88 (Harry Katz, ed. 1997).
189 Katz et al., *supra* note 178, at 576-77.
190 Katz et al., *supra* note 178, at 577; Jeffrey Keefe, *Monopoly.com: Will the WorldCom-MCI Merger Tangle the Internet?* (ECON. POL'Y INST. 1998).
191 Katz et al., *supra* note 178, at 577-79.
192 Katz et al., *supra* note 178, at 578; Rosemary Batt & Strausser, *Labor Market Outcomes of Deregulation in Telecommunications Services*, PROCEEDINGS OF THE 50TH ANNUAL MEETINGS OF THE IRRA 126-34 (1998); *see also, e.g.*, Julie Ortega et al., *No Bargain: Comcast and the Future of Workers' Rights in Telecommunications* ii-iii, 1 (Am. Rights at Work, 2004), https://vdocuments.site/no-bargain-comcast-and-the-future-of-workers-rights-in-telecommunication.html (discussing Comcast's anti-union

impact on union institutional security the CWA had previously established through national bargaining, the union prioritized growth through "wall-to-wall" representation organizing drives in the Bell companies and their non-union subsidiaries, but it took nearly a decade, until well into the 1990s, for it to win the institutional security clauses that it had achieved pre-breakup.[193] The union was best able to increase its union density among new members when they could establish security clauses guaranteeing employer neutrality and card-check agreements.[194] But the companies only agreed to such guarantees in exchange for the unions' support before state and federal legislators and agency officials to further deregulate state-level controls over their operations in growth areas and approve their merger activities.[195]

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The breakup of the Bell System offers a number of lessons about the effects of structural remedies on workers as well as agency and judicial failures that contributed to those effects. First, direct government intervention was necessary at each stage of the union's organizing, first against AT&T as a monopolist, and then again against the regional BOCs as the union leveraged the regulatory and deregulatory winds to their favor before state commissions and the antitrust authorities. That the industry was heavily regulated enabled workers to utilize political maneuvering with industry regulators to their advantage. In unregulated industries post-divestiture, workers lack leverage with any industry-level government institutions, leaving them with only the courts and the antitrust agencies to rely on regarding competition issues, and, separately, the NLRB and Department of Labor to ensure compliance with labor and employment laws, a combination that has proven over the past six decades to thoroughly erode workers' countervailing power against dominant employers and limited, if any, support for industry-wide or multi-employer bargaining.[196]

The key takeaway, however, from the breakup is that structural remedies to antitrust violations can, contrary to basic IO intuitions, harm workers instead of benefiting them by decreasing union density and worker earnings through decentralizing and weakening collective bargaining relationships. Judicial review of negotiated remedies under the Tunney Act's public interest standard ignored labor market effects to the dramatic detriment of workers. But the union's recovery through its use of neutrality and card-check agreements as well as vertical organizing and coalition building provide useful lessons for what government agencies and the courts could secure or enable in future cases.

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campaigns and growth in cable sector at wage rates one-third lower than that of unionized telephone companies).

193 Katz et al., *supra* note 178, at 578.

194 Katz et al., *supra* note 178, at 579-80; Keefe & Boroff, *supra* note 184.

195 Katz et al., *supra* note 178, at 579-80, 585-86. *See, e.g.*, CWA Press Release, *Bell Atlantic-GTE Partnership Will Expand Competition, Access and Service, CWA Tells FCC* (Nov. 23, 1998).

196 *See generally* Hafiz, *Structural Labor Rights*, *supra* note 80.

B. Analyzing Labor Market Effects of Breakups

The Bell System breakup reveals that, contrary to standard microeconomic assumptions about structural remedies, breaking up dominant firms does not necessarily lessen employer monopsony, bargaining leverage, or ability to profitably reduce wages and benefits at workers' expense. Agency and court failures to anticipate labor market effects resulting from proposed and imposed corporate restructuring could have averted those worker harms had they analyzed the potential labor market effects of the breakup and incorporated tailored, labor market-sensitive injunctive relief. This Section draws from current social scientific literature on labor markets and worker bargaining to outline the basic contours of what such labor market effects analysis should consider in remedial design. It introduces the analytical tools to analyze how antitrust remedies can benefit and harm workers and sets out a set of considerations for regulatory assessment of remedial impacts to the "buy-side" of the wage bargain—the structure and characteristics of employers in the relevant labor market—and the "sell-side" of the wage bargain—the structure and characteristics of the labor market and worker power.

1. Social Scientific Metrics for Analyzing Remedial Effects in Labor Markets

Given the pervasive integration of IO economics into antitrust analysis,[197] an obvious first step in analyzing how antitrust remedies may impact labor markets and worker power would be to analyze how industry characteristics within the labor market (labor market concentration levels, barriers to entry, and so on) impact workers' countervailing power against those employers. Traditional IO economics, and its evolution to include analysis of game theory and bargaining leverage models, has developed a range of microeconomic tools and empirical applications to address precisely these questions in identifying the sources of employer monopsony power.[198] For example, remedies that result in higher levels of employer concentration and barriers to entry in the labor market mean greater employer market power in the employment bargain, and where any antitrust remedy creates these conditions in any

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[197] *See, e.g.*, Hafiz, *Economic Analysis*, *supra* note 96, at 1145-48; Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105 (1989).

[198] *See, e.g.*, MANNING, *supra* note 125; Thibaut Lamadon et al., *Imperfect Competition, Compensating Differentials and Rent Sharing in the US Labor Market* (NBER Working Paper No. 25954, 2019); Austan Goolsbee & Chad Syverson, *Monopsony Power in Higher Education* (2019); Card et al., *Firms and Labor Markets Inequality*, 36 J. LAB. ECON. S13, S13-S70 (2018); Douglas Staiger et al., *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LAB. ECON. 211 (2010); Boris Hirsch et al., *Differences in Labor Supply to Monopsonistic Firms and the Gender Pay Gap*, 28 J. LAB. ECON. 291 (2010); Michael Ransom & David Sims, *Estimating the Firm's Labor Supply Curve in a "New Monopsony" Framework: Schoolteachers in Missouri*, 28 J. LAB. ECON. 331 (2010); Venkataraman Bhaskar et al., *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 J. ECON. PERSPECTIVES 155 (2002).

geographically-specific labor market, it can adversely affect worker power relative to employers. Labor market concentration can be evaluated either by using Herfindahl-Hirschman Index (HHI) measures (based on the number of firms and their respective market shares in a relevant labor market),[199] or by estimating employers' post-remedial ability to exert downward wage pressure in the relevant labor market (based on estimating the tendency of workers who quit one merging or divested firm as a result of an incremental decrease in wages to join the other merging or divesting firm as opposed to joining other firms in the labor market or dropping out of the labor market).[200]

Integrating game theory and bargaining leverage analyses into an IO analysis of remedial effects, as the antitrust agencies and courts have done in recent cases, can yield more accurate assessments of post-remedial effects on labor markets.[201] Regulators and experts have used game theory modeling to mathematically investigate the properties and likely equilibria of bargaining solutions pre- and post-merger, and could apply those models to pre- and post-remedial settings.[202] These economic models assume that parties' bargaining outcomes over the division of the surplus, or value, of reaching an agreement are influenced by the relative bargaining power of the parties—which impacts the *portion* of the surplus each party captures from the agreement—as well as the parties' bargaining leverage—which impacts the *magnitude* of the surplus and is sourced in each party's outside options, or "best alternatives to a negotiated agreement" (BATNA).[203] More advanced models approximating actual as opposed to theoretical outcomes of bargaining have sought to incorporate parties' perceptions of "fairness" and non-pecuniary considerations in games involving take-it-or-leave-it offers or multi-step games.[204] Economic analysis of employers' pre- and post-remedial bargaining leverage against workers can be assessed by evaluating whether the value to the employer in walking away from the employment bargain, or

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199 *See, e.g.*, Marinescu & Hovenkamp, *supra* note 95.

200 *See* Naidu et al., *supra* note 95, at 578-83.

201 For recent examples, *see, e.g.*, *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 201-26 (D.D.C. 2018); *FTC v. Qualcomm, Inc.*, No. 17-cv-00220, 2018 WL 5848999, at *1 (N.D. Cal. Nov. 6, 2018); *FTC v. Advocate Health Care*, No. 15-C-11473, 2017 WL 1022015, at *10 (N.D. Ill. Mar. 16, 2017); *Laumann v. Nat'l Hockey League*, 117 F. Supp. 3d 299, 322 (S.D.N.Y. 2015). *See also Commentary on the Horizontal Merger Guidelines*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N 13 (2006), http://www.justice.gov/atr/file/801216/download.

202 For general background on game theory, *see, e.g.*, WILLIAM SPANIEL, GAME THEORY (2011); HANS PETERS, AXIOMATIC BARGAINING GAME THEORY (1992); Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 ECONOMETRICA 97 (1982); Richard Kihlstrom et al., *Risk Aversion and Nash's Solution to the Bargaining Problem*, *in* MATHEMATICAL ECONOMICS AND GAME THEORY (Otto Moeschlin & Rudolf Henn eds., 1981).

203 *See* Hemphill & Rose, *supra* note 95, at 2093-94.

204 *See, e.g.*, DAVID LEVINE & JIE ZHANG, HANDBOOK OF EXPERIMENTAL ECONOMIC METHODOLOGY (2015); Colin Cmaerer & Richard Thaler, *Anomalies: Ultimatums, Dictators, and Manners*, 9 J. ECON. PERSP. 209 (1995); Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORGS. 367 (1982).

its BATNA, increases in the post-remedial environment at the expense of workers.[205] Analysis of bargaining leverage would not be limited to an employers' ability to extract wage concessions but could extend to increased leverage to extract non-wage concessions as well, as the DOJ and FCC have recognized: increased bargaining leverage can be used to disadvantage rival employers in labor markets or extract advantageous non-wage employment contract terms that can limit employment or worker output.[206]

While traditional IO and game theory models have developed crucial tools for evaluating employers' market power and bargaining leverage relative to their workers, broader economic and social scientific analyses of wage determination from labor economics, industrial relations, economic sociology, the sociology of labor, and other social scientific fields dramatically enrich our understanding of how market and institutional forces also impact employers' and workers' relative bargaining power. Rather than assuming that labor markets function as perfectly competitive markets, postwar economists and social scientists made the actual operation of the labor market "the core subject of analysis in labor economics", focusing on institutional case studies and fact-specific analyses of the "mechanics of the market process itself."[207] For example, when seeking to assess industry-wide wages that neoclassical economics predicted would settle into uniform "going rates", they found instead "a range of wage rates that varied in an unsystematic way 50 percent or more around the man," and it was "this discrepancy between theory and fact that, more than anything, shaped the[ir] research agenda" and focused "more weight to the role of imperfections in the labor market such as rigid wages, persistent unemployment, and employer domination of local labor markets".[208] Labor economists also focus on how the regulatory environment and existing law impacts workers' bargaining leverage and wage outcomes.[209] The field of "industrial relations" also takes an expansive approach to analyzing workers' bargaining power, drawing from social psychology, organizational behavior, sociology, behaviorally-oriented theories of human behavior, and the research of Sumner Slichter on how work rules and group relations structure the organization of work and the distribution of rewards in the workplace.[210] Economic sociology and the sociology of work have analyzed how firm decisions about how to

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[205] *See generally* Hemphill & Rose, *supra* note 95, at 2094-2105. For application of this kind of bargaining leverage analysis in the monopsony context, *see, e.g.*, *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

[206] *See, e.g.*, Hemphill & Rose, *supra* note 95, at 2103-04; Complaint at 4, *United States v. Charter Commc'ns, Inc.*, No. 1:16-cv-00759 (D.D.C. Apr. 25, 2016).

[207] Bruce Kaufman, *The Postwar View of Labor Markets and Wage Determination*, *in* HOW LABOR MARKETS WORK 147-48 (Bruce Kaufman ed. 1988).

[208] Kaufman, *Postwar View*, *supra* note 207, at 148.

[209] *See, e.g.*, Lawrence Mishel & Josh Bivens, *Identifying the Policy Levers Generating Wage Suppression and Wage Inequality* (ECON. POL'Y INST. May 13, 2021), https://files.epi.org/uploads/215903.pdf (describing and quantifying the policy mechanisms that suppressed wage growth since the 1970s).

[210] Kaufman, *Postwar View*, *supra* note 207, at 148.

structure economic exchanges impact forms of social organization among workers, facilitating or obstructing their social interactions as well as their wage outcomes.[211]

Thus, a broader social scientific approach would analyze how structural remedies affect employers' and workers' relative bargaining leverage, including how corporate restructuring alters market and institutional forces in the relevant industry, at the firm level, and in impacted labor markets.[212] More specifically, that approach would analyze the flux of supply and demand within the labor market ("external labor markets") as a whole, the existence of labor market institutions like unions and other forms of organized worker power ("labor market institutions"), and internal dynamics and policies within firms that determine the parameters and scope of the terms of the labor bargain, including the more human dimension and conceptions of fairness that impact wage bargaining ("internal labor markets"). While, at the highest level, divestiture converts wage-setting by a single employer to at least wage-setting by two or more employers, non-IO social scientists do not assume that the resulting competition between employers for workers in the labor pool necessarily increases workers' wages. Instead, for example, they would view the structural remedy as converting one firm's internal labor market wages to two or more firm's wage-setting policies, which may involve internal labor market wage-setting *or* external labor market wage-setting depending on whether the new employer hires workers directly or outsources or subcontracts labor, with firm restructuring eliminating protections against market competition that workers may have had in the pre-remedial environment as set by a dominant firm.

Ignoring broader sources of employer monopsony power beyond IO-identified sources dramatically underestimates employer buyer power in labor markets in the remedial context and can lead to high error costs in enforcement.[213] For example, employers can accrue market power that decreases workers' bargaining leverage and countervailing power from natural labor market frictions that IO and game theory ignore, but that make it harder for workers to quit when they are underpaid or work in harmful or low-quality conditions. These labor market frictions include: workers' heterogeneous preferences over *non*-wage job characteristics, job differentiation, mobility costs,[214] search costs, information asymmetries, employer-specific and

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211 *See, e.g.*, Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOCIOLOGY REV. 213 (2018); John Dencker & Chichun Fang, *Rent Seeking and the Transformation of Employment Relationships: The Effects of Corporate Restructuring on Wage Patterns, Determinants, ad Inequality*, 81 AM. SOCIOLOGICAL REV. 467 (2016); Arne Kalleberg et al., *Economic Segmentation, Worker Power, and Income Inequality*, 87 AM. J. SOCIOLOGY 651 (1981); Charles Tolbert et al., *The Structure of Economic Segmentation: A Dual Economy Approach*, 85 AM. J. SOCIOLOGY 1095 (1980).

212 *See, e.g.*, Reder, *supra* note 286, at 249-50.

213 *See* Naidu & Posner, *supra* note 95.

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

divergent wage policies, downward wage rigidity, "job structure,"[215] and legal rules that can rig employers' relative bargaining power within the wage bargain like employment at-will defaults or worker exemptions from work law protections. Further, theoretical bargaining models alone, without fact-specific evidence, can do a poor job of empirically estimating the effects of bargaining, particularly "when equilibria are not robust, the environment is complex, or when circumstances are unfamiliar."[216]

Failing to properly estimate how remedial design can decrease bargaining leverage not only frustrates antitrust policy, which seeks to ensure labor market competition, but frustrates broader labor and macroeconomic policy that seeks to secure equal bargaining power between workers and employers, ensure mass purchasing power, employment and access to economic opportunity, and decrease inequality.[217] Failure to properly ensure labor market competition, unlike failures to ensure product market competition, has multiplier effects throughout the economy, making regulatory accuracy more urgent.[218]

2. Consideration of Buy-Side Labor Market Effects

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

- Measuring employer concentration levels in the relevant labor market pre- and post-remedy, using HHI or downward wage pressure modeling;[219]
- Measuring employers' relative market share in the relevant labor market;
- Measuring the unilateral effects of the remedy, or employers' wage-setting power, directly or indirectly;
- Measuring the coordinated effects of the remedy, or the impact of the remedy on the ability of employers to collude on wages and benefits; and

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[215] "Job structure" is the set of employee-provided skills and functions for which wages must be assigned within a firm as well as their organizational relationship to each other horizontally and vertically. *See*, *e.g.*, E. Robert Livernash, *The Internal Wage Structure*, *in* NEW CONCEPTS IN WAGE DETERMINATION 140-172 (George Tayler & Frank Pierson eds. 1957).

[216] Drew Fudenberg & David Levine, *Whither Game Theory? Towards a Theory of Learning in Games*, 30 J. ECON. PERSP. 151, 153 (2016); Joshua Wright & John Yun, *Use and Abuse of Bargaining Models in Antitrust*, 68 KANSAS L. REV. 1055, 1092-96 (2020).

[217] *See* Hafiz, *Structural Labor Rights*, *supra* note 41, at 664, 690-703; Naidu & Posner, *supra* note 95.

[218] *See, e.g.*, Josh Bivens, *Updated Employment Multipliers for the U.S. Economy* (ECON. POL'Y INST. Jan. 23, 2019), https://files.epi.org/pdf/160282.pdf.

[219] *See supra* nn. 199-200 & accompanying text.

- Barriers to entry in the relevant labor market.[220]

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

While assessing the level of horizontal competition for labor services *between* employers is useful for estimating their wage-setting ability—their ability to profitably reduce employment, suppress wages and benefits, or sustain lower quality workplace environments—employers' market power must also be assessed *vertically* in relation to their employment contracts with workers as labor inputs. To evaluate the vertical effects of remedies, regulators can assess an employer's ability to foreclose other employers or raise their costs in the post-remedial environment by, for example, locking in workers with exclusive or anticompetitive employment contract terms (like non-compete agreements, long-term exclusivity provisions, and so on).[221] Remedies can also enable employers to foreclose labor inputs to competitor employers by increasing their bargaining leverage to negotiate lower wages with workers, and most especially, new hires, independent contractors, or other subcontracted or outsourced workers not already employed by acquiring firm(s).[222] Additional effects of remedies may include evasion of regulation or long-term private contracts or collective bargaining agreements, whether because the divestiture allows employers to shift product to non-union facilities, phase out union contracts, or better facilitates outsourcing or subcontracting.[223] Attention should also be paid to whether the structural remedy allows employers to evade seniority provisions in collective bargaining agreements or salary commitments to more senior workers as well as whether it enables employer avoidance or decreases employer commitments to longer-term benefits, like retirement benefits and vested rights workers may have won in pre-remedial employment bargains.

But traditional assumptions of IO economics operate on the model of competitive labor markets, assuming that, on the buy-side, any firm paying less than a

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[220] These metrics and stages of analysis are adapted from the HORIZONTAL MERGER GUIDELINES, *supra* note 42, at §§ 4-7, 9.

[221] *See, e.g.*, DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, VERTICAL MERGER GUIDELINES § 4 (2020) (hereinafter, VERTICAL MERGER GUIDELINES).

[222] For discussion of input foreclosure in negotiation markets, *see* Steven Salop, *A Suggested Revision of the 2020 Vertical Merger Guidelines*, SSRN (May 2, 2021), at 10.

[223] For discussion of evasion of regulation or long-term private contracts, *see* Salop, *Suggested Revisions*, *supra* note 222, at 13.

"going wage rate" will lose workers to its competitors, and thus all noncompensating wage differentials will be competed away and labor will be employed to its most efficient use. Once a divestiture remedy restores competition, wage rates will go up as employers compete for workers, and labor markets will operate more efficiently. Labor economists have studied and documented the degree to which labor markets deviate from this competitive ideal, showing empirically that "there are substantial difference in labor cost per efficiency unit and even larger differences in job attractiveness . . . . [without] much reason to think that these differences tend to diminish over the long run."[224] Labor markets are rife with frictions, heterogeneous company wage policies, labor market segmentation, as well as human and behavioral factors that impact wage bargains, and perceived fairness in firm profit-sharing arrangements,[225] all of which contribute to "a marked dispersion in wage rates in the labor market"[226] even in unconcentrated labor markets. Thus, to assess the buy-side effects of divestiture, incorporating metrics and analyses from labor economics, industrial relations, and other social scientific methods is critical. For example, where remedies would increase the incidence of labor market failures by increasing search costs, information asymmetries (particularly with regard to wage transparency and benefits), worker mobility costs between employers, or job differentiation, they can reduce labor market competition and employment outcomes for workers. [227]

Broader social scientific approaches would also asses how the internal structure of the firm—how it organizes production and manages inputs and outputs—and dynamics that emerge from that structure impact or constrain employer wage-setting.[228] Firm organization, company and plant size, and internal labor markets that regulate the employment relationship through firm policies, administrative rules and procedures that do not apply to arms-length employment contracting play a critical role in workers' wage-and-benefit outcomes. Firm breakups—whether voluntary or imposed, and whether to create separate horizontal competitors or to vertically disintegrate production lines—break apart internal labor market rules of wage-setting, which, as in the "fissured workplace" of outsourced, subcontracted, franchised, or gig work, can result in workers suffering wage penalties relative to wage rates offered in vertically integrated firms.[229]

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[224] LLOYD REYNOLDS, THE STRUCTURE OF LABOR MARKETS 234 (1951).

[225] Bruce Kaufman, *The Evolution of Thought on the Competitive Nature of Labor Markets*, *in* LABOR ECONOMICS AND INDUSTRIAL RELATIONS 181 (Clark Kerr & Paul Staudohar, eds. 1994)

[226] Kaufman, *Postwar View*, *supra* note 207, at 155.

[227] *See, e.g.*, Naidu & Posner, *supra* note 95, at 20-33.

[228] *See, e.g.*, Ronald Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713 (1992).

[229] *See generally*, *e.g.*, WEIL, *supra* note 4, at 88-91, 122-58; Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in Low-Wage Service Occupations?*, 63 INDUS. & LAB. RELS. REV. 287 (2010); Matthew Dey et al., *What Do We Know About Contracting Out in the United States?*, *in* LABOR IN THE NEW ECONOMY 267 (Katharine Abraham et al. eds., 2010). For monopsony in franchising, *see* MinWoong Ji & David Weil, *Does Ownership Structure Influence Regulatory Behavior?* (Bos. Univ. Sch. of Mgmt. Rsch. Paper Series, No. 2010-21, 2009); Annette Bernhardt et al., *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 66 ILR REV.. 808 (2013).

Breaking apart a firm's pre-remedial internal organization, whether geographically, by production lines, or along lines of previously merged entities, can also either fortify or maintain local employer monopsony and/or result in reduced wages because of the loss of the "large-firm premium," or the positive relationship between wages paid and fringe benefit expenditures and the size of the company or plant.[230] Also, larger firms can use high-profit production areas to cross-subsidize workers' wages in less profitable subsidiaries, facilities, or plants.[231] For example, Amazon leverages its profits from its successful Amazon Web Services (AWS), its cloud computing business, to subsidize its retail business, and, in particular, its logistics and distribution business, which still runs at a loss.[232] Thus, severing Amazon's logistics arm from AWS, as one current House bill has proposed and as regulators may demand as a remedy in current monopolization cases against and investigations into Amazon, may further collapse worker earnings in Amazon warehouses and distribution facilities.[233] As of yet, Congress, state Attorneys General, and federal antitrust

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[230] Explanations for the large-firm wage premium include: selection effects (workers at large vs. small firms differ by skill, education, age, gender, etc.—larger firms hire higher-quality workers); firm characteristics (large vs. small firms differ by industry characteristics, geographical regions of operation, etc.); larger firms earn higher rents they can share with workers; and larger firms have higher monitoring costs so incentivize productivity over shirking through higher wages. *See, e.g.*, CHARLES BROWN ET AL., EMPLOYERS LARGE AND SMALL (1990); Matt Bruenig, *Small Businesses are Overrated*, JACOBINMAG.COM (Jan. 16, 2018), https://jacobinmag.com/2018/01/small-businesses-workers-wages/; John Abowd et al., *High Wage Workers and High Wage Firms*, 67 ECONOMETRICA 251 (1999); Walter Oi & Todd Idson, *Firm Size and Wages*, *in* HANDBOOK OF LABOR ECONOMICS 2165-214 (Orley Ashenfelter & David Card eds. 1999); Alan Krueger & Lawrence Summers, *Efficiency Wages and the Inter-Industry Wage Structure*, 56 ECONOMETRICA 259, 259-293 (1988) (hypothesizing that large firms pay efficiency wages); Richard Lester, *Pay Differentials by Size of Establishment*, 7 INDUS. RELATIONS 57, 57-66 (1967). While recent studies indicate that the large firm premium has declined since the 1980s, the current premium—defined as the gap between the average wage earnings of employees in large (10,000+ employee) versus small (100-employee) firms—is 20 percent. *See* Jae Song et al., *Firming Up Inequality*, 134 Q.J. ECON. 1, 7-8 (2019); Nicholas Bloom et al., *Is the Large Firm Wage Premium Dead or Merely Resting?*, 108 AEA PAPERS & PROCEEDINGS 317, 317-22 (2018); J. Adam Cobb & Ken-Hou Lin, *Growing Apart: The Changing Firm-Size Wage Premium and Its Inequality Consequences*, 28 ORG. SCI. 429 (2017);.

[231] *See, e.g.*, Henrik Dellestrand et al., *Headquarter Resource Allocation Strategies and Subsidiary Competitive or Cooperative Behavior*, 9 J. ORG. DESIGN 1, 5-6, 10-12 (2020); Zhijun Chen & Patrick Rey, *Competitive Cross-Subsidization*, 50 RAND J. ECON. 645 (2019).

[232] *See Cloud Unit Pushes Amazon to Record Profit*, WALL ST. J. (Apr. 28, 2016), https://www.wsj.com/articles/amazon-reports-surge-in-profits-1461874333; Benedict Evans, *Amazon's Profits, AWS, and Advertising* (Sept. 6, 2020), https://www.ben-evans.com/benedictevans/2020/9/6/amazons-profits.

[233] For House Bill, *see* Rebecca Kern & Spencer Soper, *Amazon Could Be Forced to Sell Logistics Business Under Bill*, WASH. POST (June 22, 2021), https://www.washingtonpost.com/business/on-small-business/amazon-could-be-forced-to-sell-logistics-business-under-bill/2021/06/22/1cf917ae-d35e-11eb-b39f-05a2d776b1f4_story.html. For current litigation and investigations into Amazon, *see* Press Release, *AG Racine Files Antitrust Lawsuit Against Amazon to End its Illegal Control of Prices Across Online Retail Market* (May 25, 2021), https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon; Tyler Sonnemaker, *Amazon is Reportedly Facing a New Antitrust Investigation Into Its Online Marketplace*, BUSINESSINSIDER.COM (Aug. 3, 2020), https://www.businessinsider.com/amazon-

regulators have not addressed potential labor market effects of such a divestiture. Finally, structural remedies may more easily allow divesting and acquiring firms to suppress wages or engage in wage discrimination between older and newer, post-remedial hires or contract workers. This is because the broken-up firms are free from pre-remedial internal labor market constraints that limited employer wage-setting because of downward wage rigidity—or, wage "stickiness" that prevents employers from reducing workers' wages despite rises in unemployment—and horizontal and vertical pay equity, or "fairness", norms that operated to equalize and reduce wage differentials between workers in the same jobs as well as the highest and lowest paid workers.[234]

3. Consideration of Sell-Side Labor Market Effects

The impacts of antitrust remedies should also be assessed based on how they will impact workers' countervailing power and bargaining leverage relative to employers in the post-remedial environment.[235] Depending on how labor markets are organized and regulated, antitrust remedies can have dramatically different effects on strengthening or weakening the relative bargaining power of workers. Regulators and courts should evaluate the structure and conditions of labor market institutions (union density, the state of organizing drives, workers' union eligibility under law, and other legal protections that enhance or diminish worker leverage), employment bargaining history within the relevant markets, workers' post-remedial coordination costs, and

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antitrust-probe-ftc-new-york-california-online-marketplace-2020-8; Karen Weise & David McCabe, *Amazon Said to Be Under Scrutiny in 2 States for Abuse of Power*, NYTIMES.COM (June 12, 2020), https://www.nytimes.com/2020/06/12/technology/state-inquiry-antitrust-amazon.html.

[234] *See, e.g.*, TRUMAN BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION (1999); COLIN CAMERER, BEHAVIORAL GAME THEORY (2003); WEIL, *supra* note 4, at 83-87; Ernst Fehr et al., *A Behavioral Account of the Labor Market: The Role of Fairness Concerns*, 1 ANN. REV. ECON. 355 (2009); Armin Falk et al., *Fairness Perceptions and Reservation Wages—The Behavioral Effects of Minimum Wage Laws*, 121 Q.J. ECON. 1347 (2006); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986); Richard Freeman, *Do the Newer Generation of Labor Economists Know More than the Older Generation?*, in HOW LABOR MARKETS WORK 205-32 (Bruce Kaufman ed. 1988); Kaufman, *Postwar View*, *supra* note 207, at 149-62; Alan Krueger & Lawrence Summers, *Reflections on the Inter-Industry Wage Structure*, in UNEMPLOYMENT AND THE STRUCTURE OF LABOR MARKETS 17-47 (Kevin Lang & Jonathan Leonard, eds. 1987).

[235] Evaluating workers' relative bargaining power and leverage against employers is not only consistent with antitrust law's efficiency goals in ensuring labor market competition, but is also consistent with the federal labor policy in the NLRA of ensuring equal bargaining power between workers and employers, reduces labor market frictions, and has broader distributional and macroeconomic effects in alleviating inequality. *See, generally*, HARRY KATZ & THOMAS KOCHAN, AN INTRODUCTION TO COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 87-89 (1999); Anna Stansbury & Lawrence Summers, *The Declining Worker Power Hypothesis* 12, 30 & n.48 (Brookings Papers on Economic Activity, Spring 2020), https://www.brookings.edu/wp-content/uploads/2020/12/StansburySummers-Final-web.pdf; Hafiz, *Structural Labor Rights*, *supra* note 41; Benjamin Bental & Dominique Demougin, *Declining Labor Shares and Bargaining Power: An Institutional Explanation*, 32 J. MACROECON. 443 (2010).

broader labor market conditions, like the size of the labor market, who is able to compete, and how the exchange process is organized.

Structure and Conditions of Labor Market Institutions. Labor market institutions are the set of organizations and legal rules that impact wage and employment determination. They can increase workers' bargaining power relative to employers by protecting sources of worker leverage (strikes and strike threats, for example). But they can also impact workers' mobility costs. When unions, worker organizations, or government interventions facilitate hiring and worker movement between employers, they can expand workers' exit options and reduce mobility costs. But those same institutions can increase mobility costs to the extent they incentivize and limit the portability of employer-specific benefits, seniority-based benefits, and permit certain mobility restrictions like non-compete agreements. Labor market institutions also structure information available to workers to aid in their bargaining leverage: collective bargaining agreements or legal rules can mandate worker access to the firm's financials, broader pay structures and pay transparency within the firm and industry-wide (to the extent pattern or multi-employer bargaining exists), notice of wage differentials in the industry (interpersonal, inter-firm, inter-area, inter-occupational, and inter-industry), and decrease employers' ability to hold up or advantage their position in the wage bargain based on imperfect information.

As the Bell System breakup illustrates, structural remedies in industries with higher rates of unionization can adversely impact union density and disrupt long-standing bargaining relationships between workers and management. The labor law does grant union-eligible workers the right to strike and some flexibility in their choice of lawfully protected concerted activity, but their strike potency depends on a number of factors, including the durability and uniqueness of the struck production (perishable goods or services vs. durable goods), the degree of skill and specialization of union members (supply in the labor market), government intervention or support of workers versus employers, broader union density within the industry, downstream demand for struck production and employer profitability, and downstream support through consumer or buyer boycotts.[236] Where divestiture or structural remedies recalibrate any of these aspects of workers' strike threat, they can decrease workers' bargaining power. Further, to the extent that pattern bargaining is "fissured" by divestitures or other structural remedies, unionized facilities or plants are closed in favor of non-unionized facilities or plants, and unions lack security provisions like neutrality, card-check, or successor agreements with divesting or acquiring firms, their bargaining power is reduced in the post-remedial environment.

Applying structural remedies in non-union labor markets requires a different set of considerations. Where employment bargains are primarily handled through arms-length transactions in a post-remedial environment, workers are particularly

[236] ALBERT REES, THE ECONOMICS OF TRADE UNIONS 29-41 (3d ed. 1989).

vulnerable to employer buyer power: "[L]imitations placed on worker mobility by factors such as fringe benefits, seniority rights, and specific training . . . . give firms some monopsony power over their employees, particularly over those that are 'inframarginal'", so firms have "a certain degree of market power over wage rates in a nonunion labor market, both because of the willingness of unemployed workers to accept less than the competitive rate and because of the relative immobility of the employed work force."[237] Under non-union conditions, wage structures among firms in a local labor market are primarily shaped by demand-side factors, and the "supply situation is such that each firm, instead of being faced with a market wage rate, is faced with a considerable range of possible wage levels."[238] In non-union labor markets, the exchange of labor for compensation thus does not function like a bourse with buyers and sellers trading a homogenous good with transparent bids and offers, but is instead a market where a limited number of buyers offer fixed prices to much larger numbers of sellers as "take-it-or-leave-it" offers. Labor markets are segmented with wage-setting being driven by whether they are set as internal or external labor market rates—without unions operating to set broader industry standards and lift wage premiums industry-wide, corporate personnel policies and contracting practices can more easily create winners and losers through wage discrimination and employers' unilateral discretion to contract for labor within or outside the firm.

Employment Bargaining History and Workers' Post-Remedial Coordination Costs. The Bell System breakup also reveals the significance of assessing bargaining history in designing remedies to ensure against employer monopsony in the post-remedial environment. The CWA's long-fought achievement of pattern bargaining was derailed in favor of single-enterprise bargaining, dramatically limiting the union's bargaining leverage, which, in turn, eroded the union's negotiating position when it came to industry expansion into new sectors and outsourcing.[239] The breakup also fragmented the workforce and disrupted relationships of trust and compromise that had evolved between the union and central management, requiring the union to bear the costs of uncertainty and bridge-building with a newly empowered set of employers while also having to coordinate union bargaining strategy across employers in new and challenging ways with decentralized information and higher information asymmetries.[240] Analyzing whether the pre-remedial environment was dominated by single-stage or repeated games (say, "take-it-or-leave-it" employment offers versus cycles of collective bargaining) with more or less numbers of players (individual workers versus a single union versus multiple unions) at lower and higher levels of cooperation is critical for assessing how structural remedies will impact employment bargaining in the post-remedial environment.

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[237] Kaufman, *Postwar View*, *supra* note 207, at 154.
[238] LLOYD REYNOLDS, THE STRUCTURE OF LABOR MARKETS 35 (1951); Kaufman, *Postwar View*, *supra* note 207, at 156.
[239] *See* Katz et al., *supra* note 178.
[240] *Id.*

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

Labor market conditions can also be impacted by product markets and firm profitability in those markets. Organization theory predicts that organizations like unions will adapt their *internal* organizational structure to fit the external environment, including how firms' production lines and labor markets, respectively, are organized.[241] And organizations like unions are *dependent* on the resources of external organizations for their survival and so develop strategies and structures to *lessen* their dependence and *improve* their power and leverage vis-à-vis those organizations, whether, in the case of unions, firms that employ them or, in the case of firms, worker organizations.[242] Those strategies include political action, growth strategies to expand business volume and market share, diversification strategies, and inter-organizational linkages (like mergers, strategic alliances, closer relations with suppliers or customers, etc.) to reduce resource dependence, enhance bargaining power, and advance organizational goals. Also, more profitable firms tend to pay workers more depending on: (1) product market developments; and/or (2) unionization rates[243], and "product market pressures, not excess supplies of labor as envisioned in the competitive model, . . . are the dominant force in causing wage changes, particularly in a downward direction."[244]

Thus, when imposing remedies to anticompetitive conduct in product markets, regulators and courts must consider the adverse labor market effects of those remedies because they are impacted by post-remedial product market competition. Further, whether the employer competes in local or national product markets matters: where the product market is local (e.g., in building trades or service industries), having strong local unions with more bargaining independence reduces workers' coordination costs, but where industries are in national product markets, having a *national* union set the

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241 *See, e.g.*, PAUL LAWRENCE & JAY LORSCH, ORGANIZATION AND ENVIRONMENT (1969); LEX DONALDSON, THE CONTINGENCY THEORY OF ORGANIZATIONS (2001).

242 *See generally* JEFFREY PFEFFER & GERALD SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE (1978).

243 JOHN DUNLOP, WAGE DETERMINATION UNDER TRADE UNIONS 122-48 (2d ed. 1950).

244 Kaufman, *Postwar View*, *supra* note 207, at 157.

economic terms of bargaining with local unions focusing on work rules and agreement administration can strengthen the union and workers' countervailing power.[245]

Assessments of the effects of structural remedies on labor market competition and on workers can include both static, or short-term, effects, as well as dynamic, or long-term, effects, including the relative costs and benefits of firm restructuring as compared to mandating conduct and any administrative costs in monitoring compliance and market competition effects.[246]

C. When Breakups Can Benefit Workers

Firm dominance and anticompetitive conduct in labor markets allows employers to artificially suppress wages and benefits and/or reduce hiring. Merger activity can also result in employers' increased bargaining power over workers, worker layoffs, and lower wages within the industry.[247] Thus, it stands to reason that effective antitrust remedies creating more competition for workers' services through competing offers for better wages and benefits would either reduce or eliminate these adverse labor market effects on workers, at least in certain circumstances. This subsection analyzes the conditions under which structural remedies may benefit workers as a theoretical and empirical matter.

1. Economic Theory

Economic theory predicts that monopsonistic employers' conduct and mergers adversely impact workers through a number of mechanisms: (1) maintaining or increasing labor market concentration that lowers competition for workers and reduces wages and employment; (2) increasing firms' product market power, incentivizing firms to reduce quantities, which then results in lower demand for workers and falling employment (with underdetermined impacts on wages); and (3) reducing or altering production processes in ways that may increase or decrease worker productivity, which can increase or decrease wages for workers or make some jobs

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[245] *See* REES, *supra* note **Error! Bookmark not defined.**, at 23.

[246] *See, e.g.*, Shelanski & Sidak, *supra* note 78, at 5.

[247] *See, e.g.*, Elena Prager & Matthew Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* (Wash. Ctr. for Equitable Growth Working Paper 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391889; Valérie Moatti et al., *Disentangling the Performance Effects of Efficiency and Bargaining Power in Horizontal Growth Strategies*, 36 STRAT. MGMT. J. 745 (2015); Richard Harris et al., *Assessing the Impact of Management Buyouts on Economic Efficiency*, 87 REV. OF ECON. & STATISTICS 148 (2005); Janet Currie et al., *Cut to the Bone?: Hospital Takeovers and Nurse Employment Contracts*, 58 ILR REV. 471 (2005) (finding evidence of increased monopsony power after hospital mergers). Displaced workers from layoffs suffer long-term earnings losses relative to non-displaced workers. *See, e.g.*, Marta Lachowska et al., *Sources of Displaced Workers' Long-Term Earnings Losses* (NBER Working Paper No. 24217, 2018); Till Von Wachter et al., *Long-Term Earnings Losses Due to Mass Layoffs During the 1982 Recession* (2009); Louis Jacobson et al., *Earnings Losses of Displaced Workers*, AM. ECON. REV. 685 (1993).

redundant.[248] Empirical studies support these predictions, finding that employer monopsony lowers wages and decreases employment.[249] Worker earnings can fall by over 2 percent when mergers increase local labor market concentration, with the largest effects in already concentrated markets.[250] Earnings effects in concentrated markets generate negative spillovers on *other* firms in the same labor market, depressing wages by 4 to 5 percent relative to a fully competitive benchmark.[251] That the effects on earnings are similar in tradable industries—or industries where goods can be sold in other locations beyond the location of production—suggests that they are "not driven by changes in product market power" resulting from mergers and acquisitions.[252] Additionally, during the conglomerate merger movement, commentators recognized that conglomerate mergers "shifted tactical collective bargaining power in favor of management" through a number of mechanisms, including "establishing or extending a decentralized system of local unit bargaining . . . vulnerable to divide-and-conquer strategies"[253] and through management's increased ability to cross-subsidize between industries and plants and "whipsaw different unions at its various facilities—supported by substantially enhanced financial staying power."[254]

Under standard IO economic theoretical models operating on the "competitive model" as the "standard frame of reference" for employer wage-setting,[255] divestiture of dominant or merged firms that produce these adverse labor market effects can increase competition for labor inputs by creating two (or more) firms where there had been only one competing over worker hires and driving up wage rates. Structural remedies can thus be a clean way to disrupt a firm's wage-setting

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[248] *See* David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* 1 (2021), https://darnold199.github.io/jmp.pdf.

[249] *See, e.g.*, *supra* notes **Error! Bookmark not defined.**, 11 & accompanying text; Arnold, *supra* note NOTEREF _Ref78644210 \h 248; Alex He & Daniel le Maire, *Mergers and Managers: Manager-Specific Wage Premiums and Rent Extraction in M&As* (Working Paper 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481262; Prager & Schmitt, *supra* note 247; Benmelech et al., *supra* note 12, at 18; Donald Siegel & Kenneth Simons, *Assessing the Effects of Mergers and Acquisitions on Firm Performance, Plant Productivity, and Workers*, 31 STRATEGIC MGMT. J. 903 (2010); Currie et al., *supra* note 247; James McDonald et al., *Consolidation in US Meatpacking* (2000); Charles Brown & James Medoff, *The Impact of Firm Acquisitions on Labor*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES (1988). There is some empirical evidence that, at least in certain industries like hospital service provision, merger-related reductions in wage growth is attenuated where strong labor unions are present or when mergers occur out-of-market that leave local employer concentration unchanged. *See* Prager & Schmitt, *supra* note 247.

[250] Arnold, *supra* note 248.

[251] *Id.*

[252] *Id.* at 2.

[253] George Hildebrand, *Coordinated Bargaining: An Economist's Point of View*, Proceedings of the 1968 Annual Spring Meeting of the Industrial Relations Research Ass'n 526 (1968).

[254] Kenneth Alexander, *Conglomerate Mergers and Collective Bargaining*, 24 ILR REV. 354, 362 (1971); *see also* Charles Craypo, *Collective Bargaining in the Conglomerate, Multinational Firm*, 29 ILR REV. 3 (1975).

[255] Kaufman, *Postwar View*, *supra* note 207, at 146.

power, or their unilateral ability to pay infracompetitive wages and benefits for labor services.

From the sell-side perspective, workers' bargaining power is, at least theoretically, also impacted by firm structure and the number of firms within the relevant labor market, but workers' leverage against employers turns on the level of union density within their industry but also on the *bases* of their aggregation of collective power. For example, aggregating worker power through worker organizations structured by occupation, craft, or group of related crafts (like, say, telephone operators versus service technicians within the Bell System) can create more leverage against employers in certain industries whereas organizing all wage earners in a given industry or group of related industries *regardless* of occupation or skill (like organizing all telecommunications industry workers) can create more leverage in others.[256] American labor law is organized around an enterprise, or worksite-level, bargaining system—where the default counterparty to labor bargaining is presumed to be a single enterprise, division, facility, or plant[257]—so workers' bargaining leverage will depend on how that enterprise is structured, whether by production line, relative degrees of vertical integration or disintegration, and how thinly or thickly concentrated the product and labor markets are in which it operates. Because structural remedies go to the heart of how enterprises are structured, they directly impact workers' bargaining leverage and may impact workers' countervailing power differently depending on how they have structured their own organizations (whether along craft- or industry-lines), the robustness of local union relationships with national or international unions, and how small or large their bargaining units might be for collective bargaining with the employer. Structural remedies will only benefit workers where they either keep workers' organizational strength and collective bargaining leverage intact or even enhance that leverage by restructuring firms in ways that end up expanding union density or reducing workers' coordination costs in their organizing campaigns. They may also benefit workers when they are members of strong national unions that coordinate major policy, conduct and finance strikes, coordinate collective bargaining and negotiate collective bargaining agreements themselves or exercise veto power over contracts reached by constituent local unions that have overcome coordination costs

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[256] REES, *supra* note **Error! Bookmark not defined.**, at 22; *see also* Kaufman, *Postwar View*, *supra* note NOTEREF _Ref77712161 \h 207, at 159 ("A craft union claims an ownership of jobs over a carefully defined occupational and geographical area. The port of entry into the internal labor market is the union hiring hall. Once admitted, a worker can move from firm to firm in an essentially horizontal direction. Industrial unions, on the other hand, create an internal labor market that is organized in a vertical direction within a single plant or firm. The firm in this case controls admittance to the internal labor market by its choice of whom to hire into entry-level positions at the bottom of the job ladder. Competition for the rest of the jobs that fall under the union's jurisdiction, however, is strictly controlled by detailed seniority provisions that make movement up the job ladder a function of length of service.").

[257] For enterprise bargaining, *see, e.g.*, Hafiz, *Structural Labor Rights*, *supra* note 41, at 656, 677-79, 687-88; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 31-32 (2016); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Relations"*, 1990 WIS. L. REV. 1, 1 (1990); Derek Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1397 (1971).

and can ensure industry-level standards that avoid employers "divide and conquer" strategies.

There are also theoretical reasons to think that divestitures could benefit workers under game theory or bargaining theory models to the extent that diffusing or decentralizing bargaining improves workers' bargaining power and bargaining leverage. Divestitures can increase workers' bargaining power and bargaining leverage where they increase workers' BATNA. Workers' BATNA with regard to employment bargains can improve where they can use outside options—more wage offers from the divesting or divested firm, say—to negotiate better wage offers. Workers' credibility in negotiating better offers will turn on whether they have general or firm-specific skills, whether there are lock-in effects and mobility costs in switching because of seniority, vested rights, non-compete agreements, heterogeneous preferences, or other restraints on their ability to easily change employers for higher pay. Employers may be better able to gauge whether workers' would credibly accept alternative offers based on whether they are operating with more or less perfect information. Workers who engage in single-stage or single-shot negotiations with employers as new hires or as contractors in arms-length transactions may benefit from the post-remedial employers' inability to restrict their movement or accurately assess the credibility of their employment preferences, but if the post-remedial labor market is still concentrated and employers may share or easily gain information about competitors' labor costs, workers will be at a disadvantage. Where structural remedies impact high-skilled labor markets, workers in more scarce supply, and workers with industry- rather than firm-specific knowledge are most likely to be advantaged by structural remedies because they can most credibly change employers based on better offers. Theoretical bargaining models, however, assume that there are no differences in bargaining skill between individuals, so to the extent that assumption does not hold true in a post-remedial environment,[258] theoretical models must be supplemented by broader social scientific and fact-specific analysis.

2. Legal and Social Scientific Analysis

Analyzing the effects of structural remedies based on empirical analyses—broader social scientific studies of how industry and firm structure impact worker power and workers' and unions' own qualitative assessments in legal cases—is critical to fully understanding the circumstances under which such remedies can benefit workers.

Social Scientific Analyses. While there are theoretical reasons to believe that structural remedies could benefit workers, there is very limited, if any, empirical data supporting the theory. Empirical IO economics relies "on large survey data sets and

[258] MARTIN OSBORNE & ARIEL RUBINSTEIN, BARGAINING AND MARKETS 2 (2007).

the statistical tools of econometrics",[259] and while there has been a new wave of those studies used to analyze the prevalence and effects of employer monopsony power, there has been very little work either showing that firm restructuring benefits workers or analyzing the circumstances under which that may be the case.[260] Likewise, social scientists who analyze wage-setting in real working environments have produced very limited studies showing that divestiture benefits workers.[261] But history before the National Labor Relations Act suggests that, in certain industries like mining, transport, shipping, and clothing and textile production, employer decentralization had two "key advantages" to unions: "First, unions could play employers off each other, isolating and punishing anti-union bosses with selective strikes and boycotts. Second, decentralized markets allowed unions to play a *governance* role, positioning themselves as the stabilizing and regulating force in their industries."[262] Those union advantages have not proven robust through the transformation of industry, regulation, and labor law limitations on workers' protected right to engage in strikes and boycotts in decentralized, fissured workplaces, however.[263]

Worker Voices on Structural Remedies. Worker or union support of divestitures are useful in revealing workers' own view of their benefits. This Article is the first to document workers' interventions in legal proceedings regarding remedies, focusing on two contexts of intervention in government antitrust enforcement actions: (1) filings in ongoing enforcement actions, almost exclusively in Section 7 merger cases; and (2) filings as comments or amicus briefs in Tunney Act review of consent decrees reached by the government and defendants in those actions. [264]

Since 1992, unions only intervened to support structural remedies to two merger challenges: the UnitedHealth/Sierra Health Services merger and the Anheuser-Busch/SABMiller merger.[265] In the UnitedHealth merger, the DOJ had approved UnitedHealth's acquisition of Sierra, both insurance providers in Clark County, Nevada, but conditioned its approval on a partial divestiture of United's Medicare Advantage business in the commercial insurance market as well as additional conduct

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[259] Kaufman, *Postwar View*, *supra* note 207, at 146.

[260] Quite the contrary—as the next Subsection discusses, the studies that do exist cut the other way, showing that firm restructuring results in labor reductions and lower wages. *See infra* note 288 & accompanying text.

[261] The author found a single study on the Bell System breakup showing that divestiture benefited minoritized workers by reducing earnings differentials "of black men and nonblack minority women with white men" while increasing the relative employment probabilities of "nonblack minority men [in the telecommunications industry] . . . with white men." *See* Peoples & Richardson, *supra* note 184, at 322.

[262] Brian Callaci, *It's Time for Labor to Embrace Antimonopoly*, THEFORGE.ORG (Apr. 13, 2021), https://forgeorganizing.org/article/its-time-labor-embrace-antimonopoly.

[263] *See, e.g.*, WEIL, *supra* note 4; MARK BARENBERG, WIDENING THE SCOPE OF WORKER ORGANIZING (2015), https://rooseveltinstitute.org/publications/widening-the-scope-of-worker-organizing/.

[264] *See* App. A. The author found no worker or union filings in enforcement actions brought against their employers under Sections 1 or 2 of the Sherman Act.

[265] *See* App. A.

remedies to facilitate the success of the divestiture sale and certain restrictions on intellectual property use of the merged firm.[266] The American Medical Association, a consortium of other medical associations, and the Service Employee International Union (SEIU) local representing registered nurses, health care workers and public employees filed comments in the Tunney Act proceedings reviewing the parties' consent decree, arguing that the partial divestiture was insufficient to prevent the anticompetitive effects of the merger in the commercial insurance and physician and nurse services markets.[267] With respect to the labor market effects, they argued that, "combining two of the three largest buyers of physician services in Clark County" posed "a significant threat of reducing physicians' compensation and leading to an overall decrease of the level of service provided to patients".[268] Noting that the DOJ had required divestiture based on monopsony concerns in approving another health insurance company merger, United/PacifiCare, they recommended, among other things, divestiture "of all of United business" and permanently enjoining United's use "of all products clauses and most favored nations provisions".[269] The comments do not explain exactly how the proposed divestiture would avert the threat to physician and nurse compensation levels, but suggest that, where insurance companies can reduce reimbursement rates to hospitals because of their monopsony power, hospitals "will look to recoup their losses by cutting costs in the most logical place", their labor costs, suggesting that with less monopsony power and more competition among insurers, hospitals reimbursement rates would be higher.[270]

In the Anheuser-Busch/SABMiller merger, the International Brotherhood of Teamsters (Teamsters)—representing around 15,000 union members working in the beer industry—also argued for stronger structural remedies in opposition to the DOJ and defendants' proposed consent decree, but on different grounds.[271] The DOJ had conditioned approval only on behavioral remedies rather than divestitures, and the union argued that behavioral remedies were insufficient given the high concentration levels and high barriers to entry in the beer industry post-merger enabling the merged firm to profitably reduce capacity and engage in tacit collusion and price coordination.[272] The union made no arguments regarding the consent decree's labor market effects but instead advocated for divestiture of a single brewery, the Eden

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[266] Final Judgment, *United States v. UnitedHealth Group, Inc. v. Sierra Health Services, Inc.*, No. 1:08-cv-00322 (D.D.C. filed Sept. 24, 2008), https://www.justice.gov/atr/case-document/final-judgment-186.

[267] *See* American Medical Ass'n et al. Comments, *United States v. UnitedHealth Group, Inc. and Sierra Health Services, Inc.* (D.D.C. filed Sept. 18, 2008) (hereinafter, AMA et al. Comments); SEIU, Local 1107 Comments, *United States v. UnitedHealth Group, Inc. and Sierra Health Services, Inc.* (D.D.C. filed Feb. 25, 2008) (hereinafter, SEIU Comments).

[268] AMA et al. Comments, *supra* note 267, at 5.

[269] AMA et al. Comments, *supra* note 267, at 6, 14.

[270] SEIU Comments, *supra* note 267.

[271] *See* International Brotherhood of Teamsters (IBT) Comment, *United States v. Anheuser-Busch InBev SA/NV and SABMiller plc* (D.D.C. filed Jan. 13, 2017) (hereinafter, IBT Comment), https://www.justice.gov/atr/case/us-v-anheuser-busch-inbev-sanv-and-sabmiller-plc.

[272] IBT Comment, *supra* note 271, at 1-2, 11-13.

Brewery in North Carolina, to "open the beer market to competition" and "allow independent brewers to have significant expansion capability, which would make such brewers more effective competitors."[273] The union's divestiture request had a back story: the Eden Brewery had been a Teamster-unionized production facility employing over 500 workers in a city of around 15,000 residents.[274] The merging firms announced the Eden Brewery's closure days before their merger talks became public, and the union accused SABMiller of using the merger to shutter the facility in favor of shifting production to a non-unionized facility and reduce capacity and output in the beer industry.[275] While the union sought a remedy to the production transfer as discriminatory under labor law, employers are not required to collectively bargain with workers regarding total plant closures or management decisions to relocate production, and the National Labor Relations Board found nothing unlawful in the closure.[276] To the extent the closure violated the antitrust laws, the Board stated that "any [such] alleged impropriety . . . does not translate to finding that the Employer's actions were unlawful under the National Labor Relations Act."[277] So the union turned to the DOJ and the courts to request divestiture and sale to an acquiring party as an antitrust remedy to preserve continued production at the facility, focusing on product market effects in light of limited precedent securing remedial modifications based on alleged anticompetitive labor market effects of Section 7 remedies.[278] Neither the DOJ nor the reviewing court were convinced, however. The DOJ refused to alter its consent decree to seek a structural remedy, and the court, reviewing the materials submitted by the parties and by the union, summarily ruled that the consent decree was "in the public interest."[279]

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

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[273] IBT Comment, *supra* note 271, at 2.

[274] *Seawell v. Miller Brewing Co.*, 576 F. Supp. 424, 425-26 (M.D.N.C. 1983); Alicia Wallace, *Teamsters Picket Molson Coors' Shareholder Meeting in Denver* (May 25, 2016), https://www.denverpost.com/2016/05/25/teamsters-picket-molson-coors-shareholder-meeting-in-denver/.

[275] Wallace, *supra* note 274. The union also pointed to SABMiller's termination of a purportedly profitable production contract with Pabst Blue Ribbon at the Eden Brewery as evidence of their intent to reduce capacity and labor costs through transferring production to a non-unionized facility.

[276] *See* General Counsel Denial Letter, Case 10-CA-167896 (N.L.R.B. filed May 13, 2016) (hereinafter, Denial Letter), https://www.nlrb.gov/case/10-CA-167896; *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Dubuque Packing*, 303 NLRB 386 (1991).

[277] Denial Letter, *supra* note 276.

[278] For lack of precedent and judicial confusion regarding cognizable labor market effects challenges in the Section 7 context, *see, e.g.*, Posner & Marinescu, *supra* note 65, at 1373-74.

[279] Order, *United States v. Anheuser-Busch InBev SA/NV, et al.*, No. 1:16-cv-01483 (D.D.C. filed Oct. 22, 2018).

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

- Decrease labor market concentration in the relevant geographic markets at issue;
- Decrease the defendants' ability to unilaterally reduce hiring, wages, benefits, or the quality of working conditions *and/or* ability to coordinate or collude with other employers in a relevant labor market regarding labor costs;
- Impact only workers with general, industry-specific skills (rather than workers with firm-specific skills that make them less competitive to employers industry-wide);
- Maintain or improve workers' post-remedial bargaining leverage, or BATNA, in negotiating employment bargains with acquiring firm(s) relative to the pre-remedial environment with the divesting firm (e.g., for example, by increasing the number of employers competing over wage offers);
- Maintain or improve workers' level of organization relative to employer(s)' firm structure, ensuring that workers' countervailing power or union density matches the employer(s)' level of organization (for example, maintaining a single, enterprise-wide bargaining unit to collectively bargain with a single enterprise rather than, say, creating two enterprises with one unionized and one non-unionized workforce or fragmenting bargaining units between two employers);
- Apply to product markets that are local versus national in a manner that decreases workers' coordination costs;
- Apply to product markets that are national versus local where workers are represented by a strong national union that can easily coordinate major policy across firms and relevant locals or bargaining units through pattern bargaining;
- Ensure no or low lock-in effects or mobility costs in workers switching firms in the post-remedial environment;
- Ensure no or low information asymmetries between employers and workers regarding wages and employment conditions in the post-remedial environment; and
- Preserves continued employment in the divesting or acquiring firms or otherwise enables hiring at the same wage-and-benefit scale and entitlements as workers enjoyed in the pre-remedial environment.

D. When Breakups Can Harm Workers

As the Bell System breakup illustrates, structural remedies can harm workers by decreasing union density and workers' wages and benefits. In fact, since the 1980s, breaking up companies was associated with reducing worker power both in the popular imagination and in the economic scholarship because they were viewed as driven by firm efforts to bust unions, reduce labor costs, and minimize "redundancies" through layoffs in the name of creating shareholder value.[280] This Subsection seeks to integrate those and more recent social scientific analyses into current breakup debates to better understand when structural remedies can harm workers.

1. Economic Theory

As a theoretical matter, even under traditional IO economics, structural remedies alone may not significantly increase labor market competition or lift wages. First, the structural remedy may increase competition in a relevant product market by selling off a production line or division to a competitor, but may not impact labor markets or may even leave them more highly concentrated, either as defined based on job classifications, geographic location, or both. For example, imagine Firm A and Firm B operate in a national market and seek to merge, and the DOJ proposes, and a court approves, divestiture of a particular division of Firm A to Firm C as a condition for approving the merger. If that division only employs highly-skilled tech workers in California and Firm C is the only other employer of such highly-skilled tech workers in California, the labor market for those skilled workers would become more highly concentrated as a result of the divestiture even if the product market with respect to outputs may become more competitive nationally. Additionally, divestitures can result in less cross-subsidization between more and less profitable divisions of a single firm that had once elevated workers' wages; where the broken-up firms operate in less profitable industries or markets, that would lower workers' wages relative to the pre-remedial outcome. The break-up of firms may also lower the effects of the "large-firm premium" so that workers end up receiving lower wages following a divestiture if the post-remedial firms earn lower revenues to share with workers.[281]

Additionally, divestitures can result in layoffs to reduce production costs in product markets or avoid redundancies in the acquiring firm. And they can also be used to offload or shift production from unionized to non-unionized facilities or

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[280] *See, e.g.*, WALL STREET (Twentieth Century Fox 1987); Van Loo, *supra* note 81, at 1982-83, 1989; Donald Bergh, *Restructuring and Divestitures*, *in* OXFORD RESEARCH ENCYCLOPEDIA, BUSINESS AND MANAGEMENT 1-29 (2017); Caterina Moschieri & Johanna Mair, *Research on Corporate Divestitures*, 14 J. MGMT. & ORG. 399 (2008).

[281] *See supra* note 230; Wilmers, *supra* note 211, at 215; David Card et al., *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LABOR ECON. S13 (2018); Patrick Kline et al., *Who Profits from Patents? Rent-Sharing at Innovative Firms* (Inst. Research on Labor and Empl. Working Paper 107-17 (2017)); Dencker & Fang, *supra* note 211; Kalleberg et al., *supra* note 211; Tolbert et al., *supra* note 211.

divisions, gain concessions with unions under threat of layoffs, or disrupt existing long-term or collective bargaining agreements that had previously limited employers' discretion regarding wage reductions. Certain workers may be particularly disadvantaged from divestitures like older workers that would need to overcome high transaction costs and have little leverage in negotiating seniority-based pay and benefits packages or retirement packages—they would not likely benefit from more competition in the post-remedial environment.

Further, where structural remedies occur in highly concentrated industries and the remedy merely creates a duopoly from a monopoly in a relevant labor market, or where firms have oligopsony power in a relevant labor market post-remedy and can easily engage in tacit collusion on wages and benefits, a divestiture may not significantly impact labor market competition.[282] This is especially true in labor markets because they are highly localized—workers face mobility and switching costs between employers often operating in distinct geographic markets—and workers' labor services are highly differentiated and often involve firm-specific skills.[283]

From the perspective of bargaining theory, divestiture decentralizes bargaining relative to the pre-remedial environment where NLRA-protected workers can, theoretically at least, negotiate with a single employer as a unified workforce. The vertical disintegration of firms and workplace fissuring beginning in the late 1970s and 1980s is at least a historical example of how corporate restructuring disrupted pattern bargaining across industries and weakened workers' bargaining leverage, resulting in wage and benefit losses.[284] Structural remedies may increase transaction costs between the parties (which can reduce the size of the pie), create more vetoes and potential delay in the employment bargaining relationship, increase coordination costs between workers, and divide union resources.[285] Where divestiture enables firms to engage in "single-shot" wage offers with workers, or make "take-it-or-leave-it" offers outside of repeated games or long-term contracting (for example, because they can rely on arms-length contracting with independent contractors, temporary workers, or subcontracted workers with short-term employment contracts), workers after the divestiture may be

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[282] *See, e.g.*, HORIZONTAL MERGER GUIDELINES, *supra* note 42, at § 7 (discussing coordinated effects); [more IO literature on monopoly vs. duopoly]; Yongmin Chen & Michael Riordan, *Price-Increasing Competition*, 39 RAND J. ECON. 1042 (2008). For the anticompetitive effects of tacit collusion, *see, e.g.*, Edward Green et al., *Tacit Collusion in Oligopoly*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger Blair & Daniel Sokol, eds. 2014).

[283] *See, e.g.*, Naidu & Posner, *supra* note 95.

[284] *See* Callaci, *supra* note 262; Brandon Magner, *Labor Law and Corporate Concentration*, Labor Law Lite (Nov. 22, 2020), https://brandonmagner.substack.com/p/labor-law-and-corporate-concentration; Wilmers, *supra* note 211; Brian Callaci, The Historical and Legal Creation of a Fissured Workplace: The Case of Franchising (Oct. 30, 2019) (unpublished Ph.D. dissertation, Univ. of Massachusetts, Amherst), https://scholarworks.umass.edu/dissertations_2/1696/.

[285] *See, e.g.*, Kenneth Dau-Schmidt, *Bargaining Analysis of American Labor Law*, 91 MICH. L. REV. 419, 469 & nn. 5-6 (1992) (noting relative ease of union organizing against a single dominant employer and collecting historical examples of unions preferring to organize one employer at a time).

disadvantaged or suffer wage penalties relative to their pre-remedial ILM wage. Non-unionized low-wage or low-skill workers may also be at a bargaining disadvantage following a divestiture because employment contracts are incomplete contracts operating against an at-will default: if they find themselves in a more competitive labor market with persisting excess in the labor supply or unemployment and have some level of risk aversion to job loss, adverse employment action or face discrimination or retaliation for higher wage demands or organizing.[286] Employer "take-it-or-leave-it" offers are common with larger firms or firms that post wages or rigid list prices because they lower the employer's transaction costs resulting from separate negotiations with the same worker over time or with alternate employees; "take-it-or-leave-it" offers enable employers' future flexibility, secrecy, and wage discrimination or exceptions in individual employment contracts.[287]

2. Legal and Social Scientific Analysis

In addition to theoretical reasons to be concerned about the adverse effects of divestiture on workers, social scientific analyses and union filings in antitrust cases reveal how structural remedies can do so in practice.

Social Scientific Analyses. There is significant evidence that divestitures result in labor reductions and reduced labor costs when firms voluntarily divest for business reasons absent any antitrust enforcement, whether in regulated and unregulated industries.[288] Cost savings are generated through "layoffs, early retirements, hiring

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[286] Melvin Reder, *On Labor's Bargaining Disadvantage*, *in* LABOR ECONOMICS AND INDUSTRIAL RELATIONS 244-46 (Clark Kerr & Paul Staudohar, eds. 1994); *see also* Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777-95 (1972) (theorizing employment contract as involving incompletely-specified employee effort and potential shirking and related employer counterefforts).

[287] Reder, *supra* note 286, at 247.

[288] *See, e.g.*, RESIZING THE ORGANIZATION: MANAGING LAYOFFS, DIVESTITURES, AND CLOSINGS (Kenneth DeMeuse & Mitchell Lee Marks, eds. 2003); DAVID RAVENSCRAFT & F. M. SCHERER, MERGERS, SELLOFFS AND ECONOMIC EFFICIENCY (1987); U.S. SECRETARY OF LABOR'S TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION, ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY (Dec. 1986), https://eric.ed.gov/?id=ED279871; Andrew Gunnoe, *The Financialization of the US Forest Products Industry: Socio-Economic Relations, Shareholder Value, and the Restructuring of an Industry*, 94 SOC. FORCES 1075, 1075-1101 (2016) (describing transformation of US forest products industry since the 1980s resulting from "a large-scale merger movement, and a series of restructuring programs that included the divestiture of millions of acres of timberland and the loss of employment for hundreds of thousands of workers"; "In the paper products sector, the number of employees was cut nearly in half over the course of a decade, while in the more labor-intensive wood products sector employment decreased by over a third from its peak in 1999. In both sectors, the layoffs rose dramatically in the years following 1999, corresponding to the merger wave and restructuring that took place in the late 1990s and early 2000s."); Lucas Davis & Catherine Wolfram, *Deregulation, Consolidation, and Efficiency: Evidence from US Nuclear Power*, 4 AM. ECON. J.: APPLIED ECON. 194, 220-21 (2012) (finding labor reductions post-divestiture in nuclear power-fired plants); Jennifer Shanefelter, *Restructuring, Ownership, and Efficiency: The Case of Labor in Electricity Generation*, EAG Discussion Papers 200812 (Department of Justice, Antitrust Div. 2008),

freezes, wage reductions, reductions in future pension benefits, and other cuts in compensation," including reversions of excess pension assets and wage reductions of union employees through scrapping prior collective bargaining agreements.[289] As the Bell System breakup illustrates, divestiture can slow wage growth, make wage negotiation outcomes increasingly responsive to regional rather than national conditions, and increase wage differentials between unionized and non-unionized workers.[290]

Worker Voices on Structural Remedies. Since at least 1970, unions have opposed the imposition of divestiture remedies in Section 7 cases, primarily because the divestiture involved sale of divisions or facilities that would either impact union members' job security or result in layoffs. For example, in *United States v. Simmonds Precision Products*, a local machinists' union opposed a firm's acquisition of their employer's manufacturing plant in Long Island City (LIC) that produced fuel gauging systems for aircrafts.[291] The union expressed its interest in intervening in the case as protecting worker job security and preserving their employer's "position as an independent competitor in the manufacture and sale of fuel gauging systems" by seeking to "prevent either a piecemeal sale or removal of the work done" at their local manufacturing plant to the acquirer's other plant out-of-state.[292] The court denied the union's motion to intervene and, citing the higher labor costs at the LIC facility, approved the parties' proposed consent decree requiring divestiture by immediate sale of the plant as an entity or piecemeal within a four-year period.[293]

Similarly, in *United States v. Stroh Brewery Co.*, the Teamsters and two local affiliates sought to intervene in the merger of Stroh Brewery and Joseph Schlitz Brewing, which the DOJ had approved on condition that Stroh sell one of Schlitz's two breweries once the companies merged.[294] The union intervened "to protect their members' collective bargaining rights and job security", arguing that the proposed consent decree made "no provision for the protection of employment and collective bargaining rights of the employees" at either of the plants, but the court denied the unions' motion to intervene, finding that, even though the sale was a condition of the

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https://www.justice.gov/atr/public/eag/240245.pdf (finding labor reductions after divestiture at fossil fuel-fired plants); Sanjai Bhagat et al., *Hostile Takeovers in the 1980s*, BROOKINGS PAPERS: MICROECON. 1, 6-10 (1990) (collecting sources); Frank Lichtenberg & Donald Siegel, *The Effect of Ownership Changes on the Employment and Wages of Central Office and Other Personnel*, 33 J. LAW & ECON. 383 (1990); Brown & Medoff, *supra* note 249; Gordon Alexander et al., *Investigating the Valuation Effects of Announcements of Voluntary Corporate Selloffs*, 39 J. FIN. 503 (1984) Katherine Schipper & Abbie Smith, *Effects of Recontracting on Shareholder Wealth: The Case of Voluntary Spinoffs* (Working Paper: Graduate School of Industrial Administration, Carnegie-Mellon University, 1983).

289 Bhagat et al., *supra* note 288, at 6-10 (collecting studies).

290 *See* James People, *Wage Outcomes Following the Divestiture of AT&T*, 4 INFO. ECON. & POL'Y 105 (1989).

291 319 F. Supp. 620 (S.D.N.Y. 1970).

292 *Id.* at 621.

293 *Id.* at 621-23.

294 1982 U.S. Dist. LEXIS 13033 (D.D.C. June 8, 1982).

merger, the unions' "speculated injury to employment arises not directly from the merger" nor "directly from the prospective entry of the proposed final judgment itself."[295] A local machinists' union challenged the Verso/NewPage merger on similar grounds, arguing that the merger resulted in capacity reductions in one paper mill that cost the union 58 jobs, in part because the consent decree permitted the merger without conditioning approval on the sale of the mill, allowing the merged firm to shut it down and sell it for scrap.[296] The court refused to order the divestiture at the request of the union, noting that the closed mill had been operating at a loss and was "simply one of many closures in a declining industry."[297]

A slightly different example of worker intervention in merger proceedings is unions' intervention to approve a merger without any imposed structural remedies, as in the intervention of the pilots, flight attendants, and transport workers' unions in the US Airways/American Airlines merger.[298] The union had access to American Airlines' financial data as creditors in their Chapter 11 bankruptcy proceedings and were thus able to access and provide a fulsome analysis of the labor market effects of the merger, which they presented to the court.[299] The union sought to intervene in favor of the court's "expeditious resolution" of the merger approval process and to explain to the court the costs and impact "on employees of delaying . . . or disallowing the merger."[300] These included less certain job outlooks for their members, more furloughs, and because of the potential bankruptcy of American, losses to pilots and flight attendants who had benefited from "industry-wide seniority rules" because they "tend to stay with one carrier for their entire careers" spanning 18 to 20 years, and could suffer significant losses if the "long-term survival and competitiveness of American" were threatened by the merger's disapproval.[301] The unions also pointed to American's loss of market share as a result of the Delta/United merger, which it measured "in a loss of American employee jobs in the tens of thousands," estimating that the workforce was 36 percent smaller than it was prior to the Delta/United merger.[302]

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[295] *Id.* at 2. *See also Imetal v. Paper, Allied-Industrial, Chemical and Energy Workers Int'l Union* (D.C. Cir. 2000); *Bailey v. Iowa Beef Processors, Inc.*, 213 N.W.2d 642 (Iowa 1973), cert. denied, 95 S. Ct. 52 (1974).

[296] IAMAW, Locaal 1821 Comments, *United States v. Verso Paper Corp. and NewPage Holdings Inc.* (D.D.C. filed May 18, 2015), https://www.justice.gov/atr/case-document/response-plaintiff-united-states-public-comments-proposed-final-judgment-exhibit-1.

[297] *United States v. NewPage Holdings, Inc.*, 2015 WL 9982691 (D.D.C. Dec. 11, 2015).

[298] Allied Pilots Ass'n, Ass'n of Prof. Flight Attendants, Ass'n of Flight Attendants-CWA & Transport Workers Union of America Amicus Brief in Support Defendant's Motion to Set Trail Date, *United States et al. v. US Airways and AMR Corp.* (D.D.C. Case No. 1:13-cv-01236-CKK (filed Aug. 23, 2013) (hereinafter, Pilots' Amicus).

[299] *See id.* at 3-10.

[300] *Id.* at 6.

[301] *Id.*

[302] *Id.* at 7.

To conclude, in assessing whether structural remedies may harm workers, agencies and courts may draw from the existing social scientific literature to consider a number of factors, including whether the remedy would:

- Increases labor market concentration in labor markets, especially in local labor markets, under an HHI or downward wage pressure analysis, or otherwise increases employers' wage-setting power;
- Increases employers' market share in a relevant labor market;
- Has coordinated effects in any relevant labor market enabling employer collusion;
- Increases barriers to entry in any relevant labor market;
- Enables employer foreclosure of other employers or raises employers' costs;
- Subjects workers to layoffs or redundancies with limited or no outside options;
- Increases the incidence of labor market failures by increasing search costs, information asymmetries (particularly with regard to wage transparency and benefits), worker mobility costs between employers (particularly workers with firm-specific versus industry-specific or general skills), or job differentiation;
- Increases employers' BATNA in the employment bargain relative to the pre-remedial environment;
- Displaces unions with an established history of bargaining with a single employer, are expert representatives of worker interests with employers and government actors, or that have honed their internal structures to set top-down national policy with agility to local unions, especially when that bargaining history has resulted in industry-wide or pattern bargaining, and post-divestiture results in decentralized, fragmented structures that undermine union power;
- Increases regulation over employers that favor consumer over worker welfare effects;
- Increases firms' ability to wage discriminate between workers performing the same functions, including by disrupting ILM wages in favor of external labor market wage-setting and increasing racial or gender wage disparities;
- Disrupts national bargaining in industries with national product markets or otherwise disrupts workers' strike threats because of restructured product lines;
- Enables employers to avoid regulation or long-term private contracts, collective bargaining agreements, or seniority provisions and longer-term benefits commitments;
- Reduces any "large-firm premium" or cross-subsidization of wages between profitable subsidiaries, divisions, facilities or plants;
- Increases worker coordination costs between firms and across the industry, particularly in evolving industries that have a number of growth areas in new, non-unionized sectors of the economy; and

- Decentralizes bargaining to increase workers' transaction costs in bargaining, delays bargaining, and/or divides union resources.

III. BEYOND BREAKUPS: TOWARDS ANTITRUST REMEDIES THAT BENEFIT WORKERS

To ensure that our antitrust laws work to not only encourage competition and innovation, but also strong labor markets and high-wage growth, it is critical that our tools for remedying abuses of dominance and anticompetitive conduct incorporate analysis of labor market effects and further federal labor policy. Just as "the architects of Roosevelt's Second New Deal . . . saw antitrust enforcement and collective bargaining as complementary policies,"[303] so should government enforcement and regulation of competition policy work in tandem with strengthening worker power. As Part II illustrates, active government intervention and support of workers facing dominant employers is critical for countering employer monopsony power.[304]

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

A. Breakups "Plus": Considering Labor Market Effects

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

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[303] Callaci, *Time for Labor*, *supra* note 262.

[304] *See, e.g.*, Callaci, *Time for Labor*, *supra* note 262 ("Unions were thus eventually able to unionize monopolists, but only with aa level of wartime-dependent state support not seen before or since. When new mega-corporations like Walmart, FedEx, and Intel arose in the second half of the 20th century, unions were unable to rely on state support, and failed to organize or establish pattern bargaining relationships with the new corporate giants.").

incorporate, and consider workers' interests in their "public interest" assessments of consent decrees and remedies for antitrust violations under their existing authority.

1. Merger Reviews and Designing Consent Decrees

While scholars have put forward a number of proposals for reviewing mergers for their anticompetitive labor market effects, no scholarship has yet focused on how to integrate labor market effects analysis in agencies' remedial design when negotiating and proposing consent decrees for judicial approval.[305] But agencies could deploy similar metrics and methods of analysis to their assessments of their proposed divestitures and other remedies as they would when evaluating the anticompetitive effects of the merger itself.

Just as with the substantive merger reviews, the antitrust agencies could conduct simulations to evaluate whether a proposed divestiture may result in highly or moderately concentrated labor markets in any relevant, geographically-designated labor market affected by the remedy.[306] Alternatively, the agencies could measure remedial effects of a divestiture through a "downward wage pressure" approach, calculating the tendency of workers who quit the merging firm as a result of an incremental decrease in wages to join the acquiring firm (as opposed to joining other firms in the labor market or dropping out of the labor market), or by calculating the amount by which workers' wages are below their marginal revenue product before the divestiture.[307] Agencies should also assess local monopsony power resulting from the divestiture based on market share within commuting distance of the divesting or acquiring firm for workers within the same six-digit Standard Occupational Classification (SOC) as the affected workers.[308] In assessing labor market power from market share, the agencies should apply lower market share thresholds than they would apply in product markets because "buyer power can and does arise at lower levels of market concentration and can involve larger numbers of competitors than would raise concerns on the selling side of the market."[309]

As discussed in Part II, IO-based economic analysis is underinclusive in predicting the effects of a divestiture on worker power. Analysis from labor economists within the Economic Analysis Group of the Antitrust Division at DOJ and Bureau of Economics at the FTC should also assess how any structural remedies

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[305] For scholarly proposals regarding merger reviews in labor markets, *see, e.g.*, Hafiz, *Interagency Merger Review*, *supra* note 46; Marinescu & Hovenkamp, *supra* note 95; Naidu et al., *supra* note 95, at 574-95.

[306] *See, e.g.*, Marinescu & Hovenkamp, *supra* note 95, at 1039-51. The agencies could impose the same thresholds for HHI effects for remedies as they do for screening the mergers themselves.

[307] Naidu et al., *supra* note 95, at 548-49.

[308] *See, e.g.*, *Reed v. Advocate Health Care*, 268 F.R.D. 573, 590 (N.D. Ill. 2009); Marinescu & Hovenkamp, *supra* note 95, at 1048; Naidu et al., *supra* note 95, at 563.

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

may have adverse labor market effects due to existing labor market institutions, lack of union density, the parties' history of labor and employment law compliance, the history and structure of bargaining over employment terms and wage offers within the industry, and labor market segmentation and reliance on arms-length contracting in the industry. Economists should also assess whether, but for the remedy imposed, labor markets would be more competitive, what workers' outside options or alternatives may be for employment in the relevant geographic market, and sources of workers' countervailing power or holdout ability (for example, job protections under existing collective bargaining agreements, union resources and strike funds, existing state or local "just cause" requirements for termination absent high union density, and other sources). The agencies may and have hired economic experts as testifying experts and to assess possible remedies.[310] But they can also solicit expert analyses from external industrial relations experts and union economists to perform fact-specific assessments of a structural remedy's likely effects on labor markets and to advise on any additional conduct remedies needed. [311]

Where the agencies find that structural remedies would increase employer buyer power in a relevant labor market or decrease workers' bargaining leverage, that remedy should either be abandoned or additional structural or behavioral remedies should be imposed to prevent any anticompetitive labor market effects unless the union or unions representing the affected workers approve the consent decree's terms.[312] Absent union approval, the agencies could incorporate any or all of a range of structural or behavioral remedies. First, and least controversially, the agencies could standardize the relatively rare use of employee-specific conduct requirements imposed in consent decrees that include structural remedies.[313] These include reducing the divesting firm employees' mobility costs and the mobility restrictions between employers by requiring that the divesting firm waive non-compete and non-disclosure agreements, and mandating that the acquiring firm: pay employees' their current and accrued compensation and benefits, including their most recent bonuses paid, aggregate annual compensation, and current target or guaranteed bonus; fulfill any

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310 *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL III-15 (5th ed.), https://www.justice.gov/atr/file/761166/download; 15 U.S.C. § 42 (authorizing FTC hiring of "special experts"); 88 Stat. 2138, § 202(h)(1) (authorizing FTC to hire expert witnesses in trade regulation rulemaking proceedings).

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

312 As discussed *supra*, where the agencies find that a merger may substantially lessen competition or tend to create a monopoly in a labor market, they should move to block the merger. 15 U.S.C. § 18; *supra* note 42 & accompanying text. Similarly, where any negotiated remedies could not but do the same, agencies should move to block the merger.

313 The DOJ has utilized these remedies only three times since 2017. *See supra* note 117, App. A.

retention agreement or incentives, and any other payments due, compensation or benefit accrued, or promised made to personnel; vest all unvested pension and other equity rights; provide any pay pro-rata as well as all other compensation and benefits they have fully or partially accrued; and provide all other benefits that those employees otherwise would have been provided had they continued employment with divesting defendant.[314] Additionally, the DOJ has mandated that divesting firms require or facilitate acquiring firm hiring of divesting firm employees by requiring the divesting firm to provide the acquiring firm with personnel information (names, job titles, reporting relationships, past experience, responsibilities, training and educational histories, and relevant certifications and contact information), "promptly make" personnel available for private interviews, and prohibiting divesting firm interference in hiring negotiations with the acquiring firm.[315] The agencies could go further and ban the employers' use of non-competes in their employment contracts.[316]

But the antitrust agencies could go considerably beyond these behavioral remedies to ensure against adverse labor market effects, drawing from the tools of federal labor policy and empirical analyses of on-the-ground conditions required for successfully building worker power. First, the agencies could require as a condition of merger approval that defendants sign card-check neutrality agreements with an existing union or a union seeking to represent the impacted workers which promise employer neutrality in the union's organizing drive and automatic recognition of the union if a certain number of signed union authorization cards are collected. Alternatively, the neutrality agreement could be coupled with a rapid election following divestiture using confidential phone or internet voting or continuous early voting. The neutrality agreement could also require union access to the employer's premises, access to the names and contact information of impacted workers, and a prohibition of any mandatory employer "captive audience" meetings. The use of neutrality and card-check agreements in organizing campaigns substantially increases union recognition rates and reduces management use of unlawful tactics.[317] The agencies could further require extension or rapid resolution of successor agreements between the acquiring firm and any unions representing transferred personnel from the divesting firm.[318]

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[314] *See, e.g.*, Asset Preservation and Hold Separate Stipulation and Order, *United States v. Stone Canyon Industries Holding et al.*, Docket No. 1:21-cv-01067 (D.D.C. Apr. 19, 2021), ECF No. 4.

[315] *United States et al. v. Deutsche Telekom AG et al.*, No. 1:19-cv-02232 (D.D.C. Jul. 29, 2019) (Dish).

[316] *See* EO 14,036, *supra* note 6, § 5(g); *see* Eric Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165 (2020).

[317] *See, e.g.*, Benjamin Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 701-27 (2009); Adrienne Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns*, 62 ILR REV. 157 (2009); Adrienne Eaton & Jill Kriesky, *Union Organizing under Neutrality and Card Check Agreements*, 55 ILR REV. 42 (2001).

[318] For overview of current successorship doctrine, *see e.g.*, Kenneth Jenero, *The NLRB's Successorship Doctrine, Perfectly Clear Successors, Executive Order 13495, and Worker Retention Laws*, 32 ABA J. LAB. & EMP. L. 353 (2017). A successor employer must lawfully bargain with the union over unilateral layoffs, *Tramont Mfg., LLC*, 369 NLRB No. 136 (July 27, 2020), so a successor agreement is essential to secure continuity

The agencies could also require that employers provide them notice of any plant or facility closing or layoffs of employees if they make up at least 33% of the employer's active workforce, notice that firms with over 100 employees are already required to provide under Worker Adjustment and Retraining Notification (WARN) Act to affected workers, their representatives, State U.S. Department of Labor dislocated worker units and the appropriate unit of local government.[319]

In highly or moderately concentrated industries or labor markets, to remedy anticipated labor market harms tied to the harm caused by the merger, or where the employers have a demonstrated history of labor and employment law obligations, agencies may consider more aggressive voluntary measures, like requiring the defendants and acquiring party to engage in pattern bargaining as a condition for merger approval. The federal government under various administrations has established precedents in conditioning federal contracts on contractors' commitment to entering a collective bargaining agreement with at least one union in order to solidify employment terms for the length of a federal contract, and federal law does not preempt them.[320] And the National Labor Relations Board may impose bargaining orders requiring an employer and a union to collectively bargain if an employer engages in a "campaign" of unfair labor practices that causes a union election loss or makes "the holding of a fair election unlikely",[321] so such a requirement in a consent decree would be consistent with federal labor policy.[322]

Finally, to ensure adequate representation of stakeholders with regard to the adequacy of remedies, the agencies could expand their use of "monitoring trustees"[323] that supervise compliance with consent decrees to include workers' representatives in

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of collective bargaining terms between the divesting and acquiring firms and to ensure against the unilateral exercise of the acquiring firm's buyer power through employment reductions.

319 *See* WARN Act, 29 U.S.C. §§ 2101 *et seq.* Merging parties that meet the "minimum size of transaction" or "size-of-person" thresholds triggering reporting requirements to the antitrust agencies for their merger review under the Hart-Scott-Rodino Act are already likely subject to WARN Act obligations, so this recommendation only requires additional notice of closures or layoffs to the antitrust agencies as well. *See* Federal Trade Comm'n, *HSR Threshold Adjustments and Reportability for 2021* (Feb. 17, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/02/hsr-threshold-adjustments-reportability-2021.

320 *See Building & Constr. Trades Council of the Metro. Dist. v. Ass'd Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231 (1993); Ben Penn & Ian Kullgren, *Punching In: White House Mulling Order on Contract Labor Pacts*, BLOOMBERGLAW.COM (June 28, 2021), https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/BNA%200000017a3e43d95ea77abf4f67820001?bna_news_filter=daily-labor-report.

321 *See NLRB v. Gissel Packing*, 395 U.S. 575, 610-16 (1969); *but see, e.g.*, Michael Oswalt, *Liminal Labor Law*, 110 CAL. L. REV. ___, at 23 (forthcoming 2022).

322 For the importance of countervailing power in federal labor policy, *see* Kate Andrias & Benjamin Sachs, *Constructing Countervailing Power*, 130 YALE L.J. 546, 576-77 (2021); Hafiz, *Structural Labor Rights*, *supra* note 41.

323 *See, e.g.*, DEP'T OF JUSTICE, 2020 MERGER REMEDIES MANUAL 30 (2020) (hereinafter, MERGER REMEDIES MANUAL), https://www.justice.gov/atr/page/file/1312416/download.

order to ensure that any firm restructuring or reorganization protects workers' interests.[324] Currently, the DOJ requires monitoring trustees "when technical expertise unavailable within the Division is critical to an effective divestiture" or "when there is an unusually high burden associated with monitoring compliance with a decree . . . and that burden is more appropriately borne by the parties than the taxpayers."[325] But in the context of the DOJ's monitoring of consent decrees reached in civil rights enforcement actions against police departments, the agency has required civilian oversight through Civil Review Board Task Forces and established independent monitors, chosen jointly by the parties, "highly qualified in policing, civil rights, monitoring, and related areas, to assess and report whether" the implementation of the consent decree "is resulting in constitutional and otherwise lawful policing and administration of justice, and increased community trust between the public", the police department, and the court.[326] Where the agencies anticipate that the imposition of structural remedies would adversely impact labor markets or worker power, establishing a "Divestiture Review Task Force" with worker representation could offer workers the opportunity to formally object in writing to the consent decree in advance of Tunney Act proceedings, developing a record for the Tunney Act court's public interest review, and could also function to ensure, following entry of judgment, adequate monitoring and compliance with any structural and behavioral requirements imposed by the decree pertaining to worker protections and labor market competition.

2. Tunney Act Proceedings and Judicial Remedies

Additionally, while courts have significant discretion in conducting their public interest review of consent decrees reached in antitrust enforcement actions, they have yet to use their full authority to analyze the labor effects of any structural and/or behavioral remedies incorporated into those decrees. While courts have been judicious in their allowance and review of worker or union comments under their Section 16(e) authority, since 1992, courts have never required defendants or the government to present evidence of labor market effects of their proposed consent decrees, even in cases where unions file comments, amicus briefs, or seek to intervene because of their concerns regarding labor market effects.[327] Nor have courts ever used their authority under Section 16(f) of the Tunney Act to "take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or

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[324] While other scholars have advocated for more "collaborative governance" in designing divestiture remedies "co-administered with the private sector . . . to leverage business sector expertise to compensation for administrative agency sophistication shortfalls and information asymmetries," including "involving independent third-party M&A consultants," those proposals have not contemplated a role for stakeholders affected by the firm reorganization, including, most importantly, the firm's employees and unions. *See* Van Loo, *supra* note 81, at 1960-61, 1990-95.

[325] MERGER REMEDIES MANUAL*, supra* note 323, at 30.

[326] *See, e.g.*, Consent Decree, *United States v. City of Ferguson*, No. 4:16-cv-000180 99-116 (E.D. Mo. Filed Mar. 17, 2016), https://www.justice.gov/opa/file/833431/download.

[327] 15 U.S.C. § 16(e); *see* App. A.

upon its own motion, as the court may deem appropriate," or to even "appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate."[328] Thus, courts could seek the advice and analysis of IO economists, labor economists, industrial relations experts, union or industry experts in labor relations, worker representatives or individual workers, as well as the guidance of Department of Labor and National Labor Relations Board officials, with regard to the adequacy of the remedies and any potential modifications to the consent decree that would ensure against adverse labor market effects or reduced worker bargaining leverage.

Soliciting advice and doing fulsome review of labor market effects in the context of effectuating competition policy, while rare in the Article III courts, is not at all rare in the agency and commission context. Other federal agencies tasked with reviewing industry-specific mergers under a range of shared authorities with the DOJ and FTC—the FCC's "double veto" over mergers in the telecommunications industry under a public interest standard, the Surface Transportation Board's exclusive jurisdiction to review railroad mergers, also under a public interest standard, and other agencies in advisory roles with the DOJ and FTC regarding the merger's compliance with broader federal policy—do rigorous reviews of labor market effects as part of their review and analysis of a merger's effects.[329]

State commissions and other regulators also subject regulated and merging parties to extensive justifications for their mergers and other conduct, explicitly inquiring into and reviewing the effects of their mergers and rate-setting on employment and wages. For example, when the California Public Utilities Commission reviewed Sprint/T-Mobile's joint application for approval of transfer of control and merger under Section 854(a) of California's Public Utilities Code, it utilized its staff to conduct a thorough analysis of the economists' estimates of labor market effects and applied a public interest standard in its very searching review—much more searching than the federal district court—into how the merger would affect the quantity of labor inputs, the labor economists' modeling of labor market effects, quantitative assessments of the defendants' promised "transaction-specific 'job-years' in the 5 years post-transaction", and evidence of job gains generated from network-related commitments by the merged firm.[330] While the Commission ultimately approved the

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[328] 15 U.S.C. § 16(f)(1)-(2).

[329] *See, generally*, Hafiz, *Interagency Merger Review*, *supra* note 46, at 51-60.

[330] *See In the Matter of the Joint Application of Sprint Communications Company and T-Mobile USA, Inc., For Approval of Transfer of Control of Sprint Communications Co. Pursuant to California Public Utilities Code Section 854(a) and Related Matter*, 2020 Cal. PUC LEXIS 408-09 (Apr. 16, 2020) (hereinafter CPUC Order). The federal district court conducted no real analysis of labor market effects of the Sprint/T-Mobile merger. *See United States et al. v. Deutsche Telekom AG et al.*, Docket No. 1:19-cv-02232 (D.D.C. Nov. 8, 2019), ECF No. 44-2.

merger and denied the union's request to prohibit employee firings, require T-Mobile to commit to return overseas customer call center jobs to the U.S., and commit to complete neutrality in allowing their employees to form a union free of interference, it did so only after analysis of the explanatory variables in the union economists' models and its finding that the economists' labor market definition was too narrow and failed to include broader sources of employment in retail outside of wireless electronics sales.[331] After doing a deep dive into the economists' modeling and resulting analysis, the Commission ultimately found that, while "some job losses are possible, . . . the potential resulting efficiencies and overall consumer welfare benefits would be likely to outweigh harm to specific employees from the elimination of some jobs," and there was insufficient evidence "that ties the loss of jobs to a potential output reduction—to intervene in the market by stipulating the number of jobs that New T-Mobile must retain," so it was "not in the public interest to impose job-related conditions in the current instance."[332] The Commission's analysis is not unique—countless energy rate regulators, telecommunications commissions, and other specialized agencies do rigorous analyses of labor market effects when reviewing proposed rates and approving mergers and acquisitions, setting a standard for Article III courts on how to conduct their Tunney Act "public interest" reviews.[333]

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

B. Improving Remedial Design Through Government Administration

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[331] CPUC Order, *supra* note 330, at 409.

[332] *Id.* at 410. The Commission focused only on IO economists' analysis in the case, however. Had the Commission sought or reviewed broader evidence of the merged firm's monopsony power from a labor economist's perspective—assessing workers' search and mobility costs, potential loss of compensation from firm-specific skills post-merger, etc.—it may have reached a different conclusion.

[333] *See, e.g.*, William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. REG. 721 (2018).

Antitrust remedial enforcement could also benefit from broader government expertise in labor market regulation and more coherent alignment with enforcement and administration of federal labor policy. President Biden's Executive Order on "Promoting Competition in the American Economy" was an explicit recognition that a "Whole-of-Government Policy" was needed to counter "[c]onsolidation [that] has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better working conditions."[334] The Order also formed the White House Competition Council to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy",[335] and placed significant responsibility with the Office of Information and Regulatory Affairs (OIRA) to oversee this "whole-of-government policy" and "incorporate into its recommendations for modernizing and improving regulatory review . . . the [Order's] policies . . . . , including consideration of whether the effects on competition and the potential for creation of barriers to entry should be included in regulatory impact analyses."[336] The antitrust and labor agencies should draw on these mechanisms for coordination and review to ensure that any structural remedies are informed by analysis of their labor market effects.

While the labor agencies have developed a robust network of interagency collaboration through memoranda of understanding (MOUs), joint policy-making, enforcement and investigation, information-sharing, and even interagency compliance reviews and personnel training programs, no such networks have been developed between the labor and antitrust agencies.[337] The antitrust agencies—the DOJ and FTC—have also developed networks of coordination between each other and other competition enforcement agencies like the FCC.[338] Thus, at the very least, the labor and antitrust agencies could extend best practices of interagency coordination that they have developed with other agencies to each other, establishing through MOUs interagency institutions and procedures to jointly develop and implement policy, enforcement, investigations, information-sharing, and referrals regarding regulation of employers with monopsony power in order to ensure labor market competition, higher employment, and higher worker earning potential.

For example, the antitrust agencies, NLRB, and DOL could coordinate on merger review enforcement, evaluating the potential labor market effects of proposed consent decrees, and administering compliance with any structural or behavioral

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[334] EO 14,036, *supra* note 6, at §§ 1, 2.
[335] *Id.* at § 4(f).
[336] *Id.* at § 5(u).
[337] *See* Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 ADMIN. L. REV. ACCORD __ (forthcoming 2021).
[338] *See* Hafiz, *Interagency Coordination*, *supra* note 337, at App. A (listing interagency agreements between the DOJ and FTC); Hafiz, *Interagency Merger Review*, *supra* note 46, at 51-60 (describing antitrust agency coordination with other federal agencies in merger reviews).

requirements of consent decrees that impact labor market competition and worker power.[339] This collaboration could occur through an interagency office that would perform a full, independent analysis of labor market effects and solicit feedback from both labor economists and other experts within the antitrust and labor agencies as well as solicit feedback from external industrial relations experts, relevant unions and workers' advocates, and any other interested parties. The office could also be involved in the administration of consent decrees as a member of the Divestiture Review Task Force established as a condition for approving the settlement of an antitrust enforcement action, ideally regional, state, or local NLRB and DOL officials, that could monitor compliance with any behavioral requirements pertaining to defendants' conduct in labor markets, including compliance with neutrality agreements, card-check provisions, administering expedited elections, ensuring against commission of unfair labor practices in negotiating collective bargaining agreements or successor agreements, and gathering evidence and testimony for potential Board review of bargaining unit determinations in contracts with new employers that ensure workers' countervailing power.[340] An interagency office between the labor and antitrust agencies could also coordinate annual reviews and retrospectives of the labor market effects—including on wages, job cuts, and the local economy—of imposed structural and behavioral remedies and monitor WARN Act filings to both ensure compliance and gather data on best practices for future remedial design and enforcement.[341]

CONCLUSION

How we remedy corporate concentration and dominance—and the tools we bring to bear—can make the difference between who wins and who loses in our broader economic policy. As the role of antitrust regulation grows to take on the challenges of economic inequality and ensure robust economic self-determination against powerful corporate employers, government agencies and the courts must also expand their expertise and analyses about the impacts of their antitrust enforcement on labor markets and on workers.

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[339] For NLRB and DOL involvement in antitrust agencies' merger reviews, *see* Hafiz, *Interagency Merger Review*, *supra* note 46, at 60-65.

[340] *See* Hafiz, *Structural Labor Rights*, *supra* note 41, at 677-79; Alexander, *supra* note **Error! Bookmark not defined.**, at 368-70 (proposing allowing bargaining unit definition be a mandatory subject of bargaining warranted "to allow the adaptability of the institution of collective bargaining to contribute to the viability of the institution under conditions of rapid change, especially the conglomerate merger movement").

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

Appendix A: Tunney Act Docket Search Results (1992 – Present)

1	*United States of America v. Zen-Noh Grain Corp. et al*, Docket No. 1:21-cv-01482 (D.D.C. June 1, 2021)
2	*United States of America v. Stone Canyon Industries Holdings et al*, Docket No. 1:21-cv-01067 (D.D.C. Apr. 19, 2021)
3	*United States of America et al v. Republic Services, Inc. et al*, Docket No. 1:21-cv-00883 (D.D.C. Mar. 31, 2021)
4	*United States of America v. Intuit Inc. et al*, Docket No. 1:20-cv-03441 (D.D.C. Nov. 25, 2020)
5	*United States of America v. National Association of Realtors*, Docket No. 1:20-cv-03356 (D.D.C. Nov. 19, 2020)
6	*United States of America v. Liberty Latin America Ltd. et al*, Docket No. 1:20-cv-03064 (D.D.C. Oct. 23, 2020)
7	*United States of America et al v. Waste Management Inc. et al*, Docket No. 1:20-cv-03063 (D.D.C. Oct. 23, 2020)
8	*United States of America v. Odyssey Investment Partners Fund et al*, Docket No. 1:20-cv-01416 (D.D.C. May 28, 2020)
9	*United States of America v. United Technologies Corporation et al*, Docket No. 1:20-cv-00824 (D.D.C. Mar. 26, 2020)
10	*United States of America v. Olympus Growth Fund VI, L.P. et al*, Docket No. 1:20-cv-00464 (D.D.C. Feb. 19, 2020)
11	*United States of America v. ZF Friedrichshafen A.G. et al*, Docket No. 1:20-cv-00182 (D.D.C. Jan. 23, 2020)
12	*United States of America v. Nat'l Ass'n for College Admission Counseling*, Docket No. 1:19-cv-03706 (D.D.C. Dec. 12, 2019)
13	*United States of America v. Symrise AG et al*, Docket No. 1:19-cv-03263 (D.D.C. Oct. 30, 2019)
14	*United States of America et al v. Nexstar Media Group, Inc. et al,* Docket No. 1:19-cv-02295 (D.D.C. Jul. 31, 2019)
15	*United States of America et al v. Deutsche Telekom AG et al,* Docket No. 1:19-cv-02232 (D.D.C. Jul. 26, 2019)
16	*United States of America v. Harris Corporation et al*, Docket No. 1:19-cv-01809 (D.D.C. June 20, 2019)
17	*United States of America v. Canon Inc. et al*, Docket No. 1:19-cv-01680 (D.D.C. June 10, 2019)
18	*United States of America v. Amcor Ltd. et al*, Docket No. 1:19-cv-01592 (D.D.C. May 30, 2019)
19	*United States of America v. Thales S.A. et al*, Docket No. 1:19-cv-00569 (D.D.C. Feb. 28, 2019)
20	*United States of America v. Learfield Communications, LLC et al,* Docket No. 1:19-cv-00389 (D.D.C. Feb. 14, 2019)
21	*United States of America v. Gray Television, Inc. et al*, Docket No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018)
22	*United States of America v. Sinclair Broadcast Group, Inc. et al*, Docket No. 1:18-cv-02609 (D.D.C. Nov. 13, 2018)
23	*United States of America et al v. CVS Health Corporation et al*, Docket No. 1:18-cv-02340 (D.D.C. Oct. 10, 2018)
24	*United States of America v. United Technologies Corporation et al*, Docket No. 1:18-cv-02279 (D.D.C. Oct. 1, 2018)
25	*United States of America v. CRH PLC et al,* Docket No. 1:18-cv-01473 (D.D.C. June 22, 2018)
26	*United States of America v. Bayer AG et al*, Docket No. 1:18-cv-01241 (D.D.C. May 29, 2018)
27	*United States of America et al v. Martin Marietta Materials et al*, Docket No. 1:18-cv-00973 (D.D.C. Apr. 25, 2018)
28	*United States of America v. Knorr-Bremse AG et al*, Docket No. 1:18-cv-00747 (D.D.C. Apr. 03, 2018)
29	*United States of America et al v. Vulcan Materials Company et al*, Docket No. 1:17-cv-02761 (D.D.C. Dec. 22, 2017)
30	*United States of America v. Transdigm Group Incorporated*, Docket No. 1:17-cv-02735 (D.D.C. Dec. 21, 2017)
31	*United States of America v. Entercom Communications Corp. et al*, Docket No. 1:17-cv-02268 (D.D.C. Nov. 1, 2017)
32	*United States of America v. Centurylink, Inc. et al,* Docket No. 1:17-cv-02028 (D.D.C. Oct. 2, 2017)
33	*United States of America v. Showa Denko K.K. et al*, Docket No. 1:17-cv-01992 (D.D.C. Sep. 27, 2017)
34	*United States of America et al v. Dow Chemical Company et al*, Docket No. 1:17-cv-01176 (D.D.C. June 15, 2017)
35	*United States of America v. General Electric Company et al*, Docket No. 1:17-cv-01146 (D.D.C. June 12, 2017)
36	*United States of America v. Danone S.A. et al*, Docket No. 1:17-cv-00592 (D.D.C. Apr. 3, 2017)
37	*United States of America v. Smiths Group PLC et al*, Docket No. 1:17-cv-00580 (D.D.C. Mar. 30, 2017)
38	*United States of America v. Clear Channel Outdoor Holdings et al*, Docket No. 1:16-cv-02497 (D.D.C. Dec. 22, 2016)
39	*United States of America v. AMC Entnm't Holdings, Inc. et al*, Docket No. 1:16-cv-02475 (D.D.C. Dec. 20, 2016)
40	*United States of America v. Alaska Air Group, Inc. et al*, Docket No. 1:16-cv-02377 (D.D.C. Dec. 6, 2016)
41	*United States of America v. Westinghouse Air Brake Tech. et al*, Docket No. 1:16-cv-02147 (D.D.C. Oct. 26, 2016)
42	*United States of America v. Nexstar Broadcasting Group, Inc. et al*, Docket No. 1:16-cv-01772 (D.D.C. Sep. 2, 2016)
43	*United States of America v. Anheuser-Busch InBev SA/NV et al*, Docket No. 1:16-cv-01483 (D.D.C. Jul. 20, 2016)
44	*United States of America v. GTCR Fund XIA AIV LP et al*, Docket No. 1:16-cv-01091 (D.D.C. June 10, 2016)
45	*United States of America v. Charter Communications, Inc. et al*, Docket No. 1:16-cv-00759 (D.D.C. Apr. 25, 2016)
46	*United States of America v. Iron Mountain Inc. et al*, Docket No. 1:16-cv-00595 (D.D.C. Mar. 31, 2016)
47	*United States of America v. BBA Aviation PLC et al*, Docket No. 1:16-cv-00174 (D.D.C. Feb. 3, 2016)

48	*United States of America v. Gray Television, Inc. et al*, Docket No. 1:15-cv-02232 (D.D.C. Dec. 22, 2015)
49	*United States of America et al v. AMC Entnm't Holdings et al*, Docket No. 1:15-cv-02181 (D.D.C. Dec. 15, 2015)
50	*United States of America et al v. Springleaf Holdings, Inc. et al*, Docket No. 1:15-cv-01992 (D.D.C. Nov. 13, 2015)
51	*United States of America v. Cox Enterprises, Inc. et al*, Docket No. 1:15-cv-01583 (D.D.C. Sep. 29, 2015)
52	*United States of America v. General Electric Company et al*, Docket No. 1:15-cv-01460 (D.D.C. Sep. 8, 2015)
53	*United States of America v. Third Point Offshore Fund, Ltd. et al*, Docket No. 1:15-cv-01366 (D.D.C. Aug. 24, 2015)
54	*United States of America v. Entercom Communications Corp. et al*, Docket No. 1:15-cv-01119 (D.D.C. Jul. 14, 2015)
55	*United States of America v. Waste Management, Inc. et al*, Docket No. 1:15-cv-00366 (D.D.C. Mar. 13, 2015)
56	*United States of America v. Verso Paper Corp. et al*, Docket No. 1:14-cv-02216 (D.D.C. Dec. 31, 2014)
57	*United States of America v. Continental AG et al*, Docket No. 1:14-cv-02087 (D.D.C. Dec. 11, 2014)
58	*United States of America v. Nexstar Broadcasting Group et al*, Docket No. 1:14-cv-02007 (D.D.C. Nov. 26, 2014)
59	*United States of America v. Media General Inc. et al*, Docket No. 1:14-cv-01823 (D.D.C. Oct 30, 2014)
60	*United States of America et al v. Tyson Foods, Inc.*, Docket No. 1:14-cv-01474 (D.D.C. Aug 27, 2014)
61	*United States of America v. LM U.S. Corp. Acquisition Inc. et al*, Docket No. 1:14-cv-01291 (D.D.C. Jul 30, 2014)
62	*United States of America et al v. Sinclair Broadcast Group, Inc. et al*, Docket No. 1:14-cv-01186 (D.D.C. Jul. 15, 2014)
63	*United States of America et al v. Martin Marietta Materials et al*, Docket No. 1:14-cv-01079 (D.D.C. June 26, 2014)
64	*United States of America v. Conagra Foods, Inc. et al*, Docket No. 1:14-cv-00823 (D.D.C. May 20, 2014)
65	*United States of America v. Heraeus Electro-Nite Co., LLC*, Docket No. 1:14-cv-00005 (D.D.C. Jan. 2, 2014)
66	*United States of America v. Gannett Co., Inc. et al,* Docket No. 1:13-cv-01984 (D.D.C. Dec. 16, 2013)
67	*United States of America et al v. US Airways Group Inc. et al*, Docket No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013)
68	*United States of America et al v. Cinemark Holdings, Inc. et al*, Docket No. 1:13-cv-00727 (D.D.C. May 20, 2013)
69	*United States of America v. Ecolab Inc et al*, Docket No. 1:13-cv-00444 (D.D.C. Apr. 8, 2013)
70	*United States of America v. Anheuser-Busch InBev SA/NV et al*, Docket No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013)
71	*United States of America v. Star Atlantic Waste Holdings, et al*, Docket No. 1:12-cv-01847 (D.D.C. Nov. 15, 2012)
72	*United States of America v. Standard Parking Corporation et al*, Docket No. 1:12-cv-01598 (D.D.C. Sep. 26, 2012)
73	*United States of America et al v. Verizon Comm'ns, Inc. et al*, Docket No. 1:12-cv-01354 (D.D.C. Aug. 16, 2012)
74	*United States of America v. United Technologies Corporation et al*, Docket No. 1:12-cv-01230 (D.D.C. Jul. 26, 2012)
75	*United States of America v. Humana, Inc. et al,* Docket No. 1:12-cv-00464 (D.D.C. Mar. 27, 2012)
76	*United States of America v. International Paper Company et al*, Docket No. 1:12-cv-00227 (D.D.C. Feb. 10, 2012)
77	*United States of America v. Deutsche Borse AG et al*, Docket No. 1:11-cv-02280 (D.D.C. Dec. 22, 2011)
78	*United States of America v. Exelon Corporation et al*, Docket No. 1:11-cv-02276 (D.D.C. Dec. 21, 2011)
79	*United States of America v. Grupo Bimbo, S.A.B. de C.V. et al*, Docket No. 1:11-cv-01857 (D.D.C. Oct. 21, 2011)
80	*United States of America v. General Electric Company et al*, Docket No. 1:11-cv-01549 (D.D.C. Aug. 29, 2011)
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