Free the Market: How We Can Save Capitalism from the Capitalists

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The free market works because no one person or company is making the decisions. In a competitive market, businesspeople make the wrong decisions all the time, just as central planners do. But the consequences of those decisions don't infect the market as a whole. Businesses that guess wrong lose money or go out of business. But as long as there is a competitor out there who guesses right, the market provides people what they want.

But it turns out that the very last thing capitalists want is a free market. Capitalism may thrive under conditions of robust market competition, but most capitalists don't. They would much rather operate in an environment free from government restraint but also free from the discipline of a truly competitive market.

Unfortunately, we have obliged them. At every turn, we have allowed the dominant forces in a market to erect barriers to protect themselves from being dislodged and to maximize their own profits at the expense of everyone around them. The result has been that while we have a capitalist economy, we no longer have a free market. Nearly every market sector is less competitive today than it was fifty years ago. We have centralized control over important sectors of the economy in a handful of companies. And we have given them the tools to use that control to prevent new competition, to make it hard for consumers to take advantage of what competition there is, to drive down wages, and to extract as much short-term profit as possible rather than invest in long-term productivity. Late-stage capitalism isn't the free market run amok. It is the capture of markets by actors who have a vested interest in making sure there is no free market. And the consequences have been dire, not only for consumers, but for inequality and political stability in the U.S. and throughout the world.

The good news is that we have the tools to reverse that process and to free the market—and many of them are legal tools. These are big problems; much bigger than the law. But many of these problems are traceable to our failure over the past forty years to enforce legal rules that regulate

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markets. Enforcing the antitrust laws we already have will make a good start at undoing this harm. There are also a number of other laws we can pass that can help free the market, restricting mergers, opening markets, protecting consumers from corporate efforts to block consumer access to information, and ensuring a free market for employees. And one agency—the Federal Trade Commission—has both the authority and the motivation to open markets to competition. In this paper, I discuss the ways in which capitalists have prevented market competition and how we can reverse those changes.

TABLE OF CONTENTS

INTRODUCTION

The twentieth century saw the triumph of capitalism. By the end of the 1990s, the verdict of history seemed clear: the free market worked.[1] Competition brought new innovations, lower prices, freedom, and a shared prosperity in which a rising tide lifted all boats.[2] Countries that embraced capitalism prospered, while those that chose communism or authoritarian control over the private sphere languished. With the fall of the Soviet Union, Francis Fukuyama could declare "the end of history."[3] We'd figured out how to make the world better—not perfect, surely, but better. The course of history was one in which the lives of people were destined to improve over time.

A quarter century later, political and economic freedom is in retreat around the world. Country after country has turned away from the promise of a global free market and towards authoritarian nationalism.[4] Countries like the United States that seem to have most clearly embraced capitalism are in decline, their influence in the world waning.[5] The engine of progress seems to have stalled; economists puzzle over a long-term decline in productivity[6] while markups—the amount that price exceeds cost—are growing.[7] The United States spends almost twice as much money on healthcare as any other country in the world—and gets less for it, with health outcomes below those of any other country in the developed world and even some in the developing world.[8] Wealth inequality has

1. *See* Guy de Jonquières, *The World Turned Upside Down: The Decline of the Rules-Based International System and the Rise of Authoritarian Nationalism*, 54 INT'L POL. 552, 553 (2017) (discussing how the spread of free market democracies across the globe contributed to increases in economic prosperity).

2. *See id.* ("Hundreds of millions of people have been lifted out of poverty[] . . . []while once impoverished or backward economies, such as China, Japan, South Korea, Singapore and Taiwan, have industrialised and risen up the development ladder. Meanwhile, many countries have been transformed from dictatorships into democracies, albeit often imperfect ones.").

3. *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (arguing society has reached the "end of history," after the Cold War and Soviet Union dissolved).

4. *See* Michael A. Peters, *The End of Neoliberal Globalisation and the Rise of Authoritarian Populism*, 50 EDUC. PHIL. & THEORY 323, 324 (2018).

5. *See* de Jonquières, *supra* note 1, at 553–54 (discussing reasons why the influence of the United States as a world leader has decreased in recent years); ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD, at xiv–xvi (2020).

6. *See* JAMES BESSEN, THE NEW GOLIATHS: HOW CORPORATIONS USE SOFTWARE TO DOMINATE INDUSTRIES, KILL INNOVATION, AND UNDERMINE REGULATION 87 (2022); ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH 16 (2016) (showing the drop in productivity growth); Fiona Scott Morton, Kartikeya Kandula & Karissa Kang, *Do We Need a New Sherman Act?*, 2022 COLUM. BUS. L. REV. 42, 42 (2022) ("Since 1980, evidence has accumulated that the United States economy is becoming less dynamic and less competitive.").

7. Robert E. Hall, *New Evidence on the Markup of Prices Over Marginal Costs and the Role of Mega-Firms in the U.S. Economy* 14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24574, 2018), https://www.nber.org/system/files/working_papers/w24574/w24574.pdf.

8. *See* Munira Z. Gunja, Evan D. Gumas & Reginald D. Willams II, *U.S. Healthcare from a Global Perspective, 2022: Accelerating Spending, Worsening Outcomes*, THE COMMONWEALTH FUND (Jan. 31, 2023), https://www.commonwealthfund.org/publications/issue-briefs/2023/jan/us-health-care-global-perspective-2022.

surged in the United States in the last forty years.[9] And while it used to be said that a rising tide lifts all boats, people (except those at the very top) are no better off than they were forty years ago.[10] People today speak not of globalism and the end of history—the triumph of capitalism over everything—but of "late-stage capitalism."[11] The (usually unspoken) assumption is that capitalism is dying and that the future belongs to an unspecified something else.

What happened? In this Article, I argue that capitalism didn't fail us; capitalists did. I continue to believe that a robust free market, appropriately regulated, is the best economic system ever devised for increasing wealth and human happiness. But it's not a perfect system. Far from it. The market needs to be tempered with regulation aimed at its imperfections. Still, like democracy,

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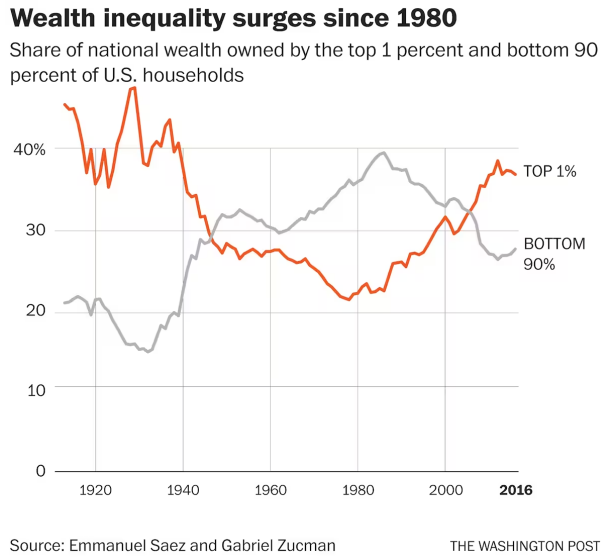
9. Chad Stone, Danilo Trisi, Arloc Sherman & Jennifer Beltrán, *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 13, 2020), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality.

10. *Id.*; Christopher Ingraham, *For the First Time, Workers Are Paying a Higher Tax Rate Than Investors and Owners*, WASH. POST (Oct. 16, 2019, 6:00 AM EDT), https://www.washingtonpost.com/business/2019/10/16/us-now-taxes-wages-higher-rate-than-capital-fueling-income-inequality-study-finds.



The same is true of income inequality, though the numbers are not quite as stark. The top 1% of earners grew from 10% of all income in the United States to 19% from 1980-2020; the number is only 13% in the U.K. and 10% in France. Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441, 501 (2023).

11. Annie Lowrey, *Why the Phrase 'Late Capitalism' Is Suddenly Everywhere: An Investigation into a Term That Seems to Perfectly Capture the Indignities and Absurdities of the Modern Economy*, ATLANTIC (May 1, 2017), https://www.theatlantic.com/business/archive/2017/05/late-capitalism/524943.

the market is the worst form of economic distribution . . . except for everything else.[12]

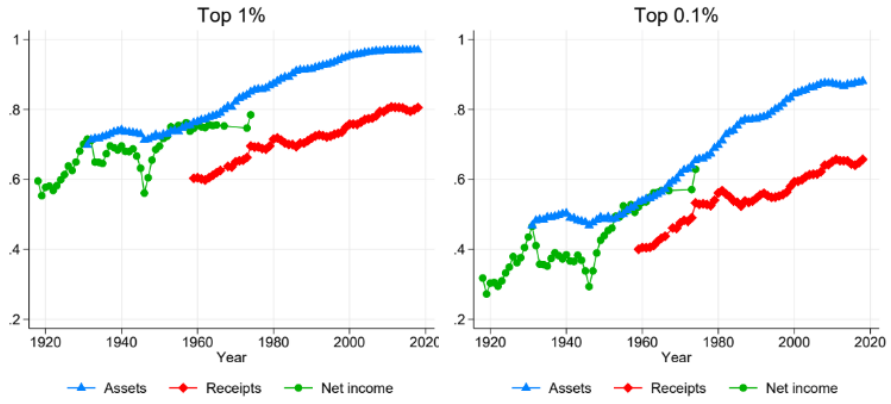
But it turns out that the very last thing capitalists want is a free market. *Capitalism* may thrive under conditions of robust market competition, but most *capitalists* don't. Capitalists would much rather operate in an environment free from both government restraint and the discipline of a truly competitive market.

Unfortunately, we have obliged them. At every turn, we have allowed the dominant forces in the market to erect barriers to protect themselves from being dislodged and to maximize their own profits at the expense of everyone around them—not just competitors, but suppliers, workers, and consumers.[13] The result has been that, while we have a capitalist economy, we no longer have a free market. Nearly every market sector is less competitive today than it was fifty years ago.[14] We have centralized control over important sectors of the economy in a mere handful of companies.[15] And we have given them the tools to use that control to prevent new competition, to make it hard for consumers to take advantage of what competition there is, to drive down wages, and to extract as much short-term profit as possible rather than invest in long-term productivity.[16] And indeed, they have done so, raising markups and profitability at the expense of consumers and workers.[17] Late-stage capitalism isn't the free market run

12. *The Worst Form of Government*, INT'L CHURCHILL SOC'Y (Feb. 25, 2016), https://winstonchurchill.org/resources/quotes/the-worst-form-of-government ("[D]emocracy is the worst form of Government except for all those other forms that have been tried from time to time . . . ." (quoting Winston Churchill)).

13. *See infra* Parts.II–III; YANIS VAROUFAKIS, TECHNOFEUDALISM: WHAT KILLED CAPITALISM 106–11 (Bodley Head 2024).

14. Yueran Ma, *New Data Shows the Rise of Corporate Concentration in the US in the Past 100 Years*, PROMARKET (Apr. 21, 2022), https://www.promarket.org/2022/04/21/new-data-shows-the-rise-of-corporate-concentration-in-the-us-in-the-past-100-years.



15. *See id.*

16. *See infra* Parts.II–III.

17. *See* Jan de Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 562 (2020) (finding a rise in aggregate firm markups (the extent to which price exceeds cost) from 21% in 1980 to 61% forty years later).

amok. Instead, it is the capture of markets by actors who have a vested interest in making sure there *is no* free market. The consequences have been dire, not only for consumers but for inequality and political stability in the United States and throughout the world.

The good news is that we have the tools—many of them legal—to reverse that process and to free the market. These are big problems, not just legal ones. But many of these problems are traceable to our failure over the past forty years to enforce laws that regulate markets. Enforcing existing laws and passing new laws that help free the market is an important first step in undoing this harm. Importantly, one agency—the Federal Trade Commission (FTC)—has both the authority and the motivation to open markets to competition. And it is increasingly using it, though it remains to be seen whether the Trump Administration will reverse its progress.[18] In the Parts that follow, I discuss the ways in which capitalists have prevented market competition and how we can reverse those changes.

I. BLOCKING COMPETITION

The reason capitalism works better than government control of markets isn't that individual businesspeople are better planners than government officials. There is no reason to think that's true.[19] No one has a monopoly on knowledge of the future. Any individual company owner may be stupid, short-sighted, lazy, or all three, just as government central planners might. And some famous billionaires have recently driven home the point that you can be rich, successful, and still be a petulant man-child who runs his company into the ground.[20] But even if business leaders are smart and industrious, they might simply guess wrongly about what consumers will want next year or what new technologies will arise to reshape the market, just as central planners might.

Rather, the free market works because no one person or company makes all the decisions.[21] In a competitive market, businesspeople often make wrong decisions, just as central planners do, but the consequences of those decisions don't affect the market as a whole. Businesses that guess incorrectly lose money

18. *See infra* notes 211–258 and accompanying text.

19. *See* Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 149 (2004) ("Individual companies are neither omniscient, pure-hearted, nor necessarily rational. Indeed, at best, they are out to line their pockets with as much money as they can find. No less a capitalist than Adam Smith warned us not to expect individual private companies to behave in the public interest.") [hereinafter Lemley, *Justifications*]; Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 274–77 (2010).

20. *See* Oliver Darcy, *Elon Musk Has Officially Killed Twitter. The Zombie Platform Lives on as X, a Disfigured Shell of Its Former Self*, CNN (July 25, 2023, 3:03 AM EDT), https://www.cnn.com/2023/07/24/media/twitter-x-reliable-sources/index.html.

21. *See* Lemley, *Justifications*, *supra* note 19 ("The reason we can generally rely on private ordering to produce desirable outcomes is . . . because individual companies are constrained by the discipline of a competitive market. If they are irrational, or poorly informed, or too greedy, other companies will outperform them and take their place.").

or go out of business, but the market still provides what people want as long as at least one competitor guesses correctly.[22] But that is only possible if there are multiple competitors making independent decisions.

It is easy to lose sight of that fact. Some extol private enterprise as a virtue in itself, assuming that decisions made by businesses are trustworthy simply because they are made by businesses. But it is not that capitalists are any better than regulators at seeing the future; capitalism works because the ones who get it wrong fail and are replaced by the ones who get it right.

That system only works if we have robust market competition. A company that doesn't face competition may make the wrong decision without facing market discipline. If consumers have no choice, they are stuck trusting the decisions of a single planner, just as they would be in a planned economy. In fact, those consumers are likely to be even worse off than those living under planned economies. Government central planners might at least try to operate with the public interest in mind. Businesspeople unconstrained by competition feel no such compunction to make decisions in the public interest. To the contrary, they are repeatedly told that "greed is good"[23] and that their job is to maximize their short-term profits.[24] These days, businesspeople aren't even likely to act in their own companies' long-term best interests.[25] They will do whatever makes them the most money today. The only way capitalism works is if competitors can drive capitalists out when their greed leads them to make decisions that help themselves but hurt everyone else.

Unfortunately, the last forty years have seen the elimination of competition in wide swaths of the economy. The average number of competing businesses has dropped in almost all major industries, leaving consumers with fewer choices than they had in previous years for almost all goods and services.[26]

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22. *See id.*

23. 20th Century Home Ent, *35 Years Ago, Gordon Gekko Delivered His Notorious "Greed Is Good" Speech in "Wall Street"*., YOUTUBE (Dec. 11, 2022), https://www.youtube.com/watch?v=kzKE-ErSBN0.

24. *See* Jena McGregor, *Group of Top CEOs Says Maximizing Shareholder Profits No Longer Can Be the Primary Goal of Corporations*, WASH. POST (Aug. 19, 2019, 6:18 PM EDT), https://www.washingtonpost.com/business/2019/08/19/lobbying-group-powerful-ceos-is-rethinking-how-it-defines-corporations-purpose/ (noting one pushback against the overwhelming consensus).

25. *See id.* (discussing how the Business Roundtable, which represents the chief executives of 192 large companies, has warned that the short-term decisions made by many CEOs do not benefit the "long-term health" of their businesses).

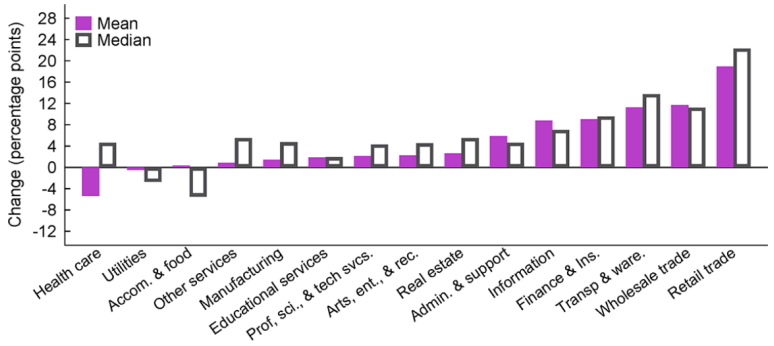
26. *See, e.g.*, James Bessen, *Industry Concentration and Information Technology*, 63 J.L. & ECON. 531, 531–33 (2020) (collecting sources reporting on industry concentration levels); Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 697–700 (2019) (discussing increased concentration in large majority of U.S. industries over the last two decades); Ryan Decker & Jacob Williams, *A Note on Industry Concentration Measurement*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 3, 2023), https://www.federalreserve.gov/econres/notes/feds-notes/a-note-on-industry-concentration-measurement-20230203.html (fig. 1, showing the increase in the share held by the top four firms in various industries).

Moreover, industry after industry now exhibits market concentration levels that would have been unthinkable in previous generations.[27] The result is higher prices for goods across a wide range of industries.[28] Below, I examine several trends that have contributed to this increased market concentration.

A. MERGERS

The United States government largely stopped enforcing the antitrust laws after 1980, driven by the Chicago School theory that antitrust enforcement did more harm than good.[29] The result was a wave of merger activity that had not been seen in more than a century, since before the enactment of antitrust laws.[30] In case after case, the government did not challenge mergers that significantly concentrated markets.[31] In fact, during the 1990s and 2000s, the government

Figure 1. Change in average top-4 firm share by sector, 1997-2017



For further examples of increasing concentration, see Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, WHITE HOUSE: BLOG (July 9, 2021), https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy.

27. *See, e.g.*, Nick Merrill & Tejas N. Narechania, *Inside the Internet*, 73 DUKE L.J. ONLINE 35, 59 (2023) (giving the example of internet backbone transmission, sometimes described as competitive but with a Herschman-Herfindahl index over 6000).

28. *See* Grullon et al., *supra* note 26, at 712 ("[L]ack of competition may allow remaining industry incumbents to gain wider profit margins by setting higher prices relative to production costs.").

29. *See* Lancieri et al., *supra* note 10, at 442 (explaining how the continued influence of the Chicago School's approach to antitrust contributed to "the demise of antitrust enforcement in the United States").

30. *See M&A Statistics*, INST. FOR MERGERS, ACQUISITIONS & ALLS., https://imaa-institute.org/mergers-and-acquisitions-statistics/#:~:text=Number%20%26%20Value%20of%20M%26A%20Worldwide,4%25%20to%203.8%20trillion%20USD (last visited Nov. 22, 2024) (showing a dramatic increase in the number of mergers each year since the 1980s); *Number of Merger and Acquisition (M&A) Transactions Worldwide from 1985 to April 2023*, STATISTA (June 3, 2024), https://www.statista.com/statistics/267368/number-of-mergers-and-acquisitions-worldwide-since-2005.

31. *See* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 245 (Robert Pitofsky ed., 2008) (discussing the lack of antitrust enforcement during the Reagan administration).

didn't challenge mergers in most cases unless the merger would reduce the market to two, or at most three, competitors.[32]

Even when the government did challenge mergers, forty years of indoctrination from the Chicago School meant that courts often rejected those challenges.[33] The Chicago School's theory posited that mergers could bring efficiency benefits.[34] And occasionally, that is true.[35] But economic evidence suggests that the claimed efficiencies of mergers almost never materialize.[36] The real "benefit" of a merger between competitors accrues to the merging parties, who raise their profits by eliminating a source of competition that would otherwise constrain them.[37] But that boost in profits comes at the expense of

32. *See* John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 867 tbl.5 (2017); Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 64 (2021); D. Daniel Sokol & Sean Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 FLA. L. REV. 265, 271–72 (2024).

33. *See* Baker & Shapiro, *supra* note 31, at 240.

34. *See* Lancieri et al., *supra* note 10, at 442–43 ("[Chicago School] scholars argued that antitrust should be based on economic principles of price theory and industrial organization, with emphasis on maximizing efficiency or consumer welfare. Drawing on those principles, they argued that antitrust law and enforcement should be narrowed.").

35. Mark Glick, Gabriel A. Lozada & Darren Bush, *Why Economists Should Support Populist Antitrust Goals*, 2023 UTAH L. REV. 769, 770–73 (2023).

36. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 12–13 (2014); Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S67–68 (2014); Lancieri et al., *supra* note 10, at 501–02 ("Merger studies uniformly find that consummated mergers have resulted in higher prices and/or that they failed to generate the assumed efficiencies."); Bruce A. Blonigen & Justin R. Pierce, *Mergers May Be Profitable, but Are They Good for the Economy?*, HARV. BUS. REV. (Nov. 15, 2016), https://hbr.org/2016/11/mergers-may-be-profitable-but-are-they-good-for-the-economy; Sangjun Cho & Chune Young Chung, *Review of the Literature on Merger Waves*, 15 J. RISK FIN. MGMT. 432, 436 (2022), available at https://www.mdpi.com/1911-8074/15/10/432 ("[M]any studies support the view that takeovers generally do not create significant value for merged firms' shareholders in the long run."); Chris Sagers, *Why Do Corporations Merge and Why Should Law Care?*, 56 U. MICH. J.L. REFORM 291, 291 (2023) ("Generations of researchers have failed to find evidence that merger and acquisition activity generates any lasting benefits for the combining firms' owners or anyone else."). For a detailed discussion of efficiencies in mergers, see generally, Louis Kaplow, *Efficiencies in Merger Analysis*, 83 ANTITRUST L.J. 557 (2021). *But see generally* Carl Shapiro & Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32762, 2024) (arguing that the merger evidence doesn't actually reflect increasing concentration).

37. *See* Grullon et al., *supra* note 26, at 712 (finding that mergers increase profit margins but do not increase efficiency).

higher prices for consumers[38]—and, as we will see, lower wages for employees.[39] As market concentration increases, so do prices.[40]

Moreover, it's not just incumbents buying erstwhile competitors. Private equity firms have increasingly invested not in helping existing companies grow and prosper, but in "rolling up" hundreds of independent small businesses into a single giant via a series of relatively small-scale mergers.[41] We have seen this practice across various sectors encompassing everything from independent medical offices to third-party Amazon sellers.[42]

Mergers between competitors don't just raise prices. They also eliminate the market discipline capitalism is supposed to provide. When a less-efficient dominant firm buys an upstart competitor, consumers don't just lose the benefits of price competition. They also lose the potential that the upstart could displace the incumbent by developing new technologies and become the new dominant player—a concept economists call Schumpeterian competition.[43] The incumbent, aware it can stave off threats by acquiring any company whose new technologies pose a risk, has little incentive to innovate itself.[44] Indeed, the reason internet companies have not faced Schumpeterian competition in the last two decades is simple: they bought up any competitors who might have displaced them.[45] Sometimes, these companies co-opt their former competitors, as Facebook did with Instagram, but often they acquire challengers only to shut

38. *See* Lancieri et al., *supra* note 10, at 502 ("[A]fter an acquisition, markups increased between 15% and 50% in acquired plants relative to non-acquired plants."). Lancieri, Posner & Zingales point to multiple studies of the anticompetitive effects of mergers in particular industries. *See id.* at 502–03; *see also* Sarah Schutz, Mergers, Prices, and Innovation: Lessons From the Pharmaceutical Industry 3 (Nov. 8, 2023) (unpublished manuscript) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4631188) (finding that after mergers, pharmaceutical firms raise drug prices by 19%; they also increase R&D spending, but that increase does not result in additional new drugs making it through the FDA approval process); Keith Brand, Chris Garmon, & Ted Rosenbaum, *In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009 to 2016*, 66 J. L. & Econ. 639, 639 (2023) (showing that hospital mergers raised prices 5% on average).

39. *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 19 (Supp. 2018); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 244 (2017).

40. *See, e.g.*, Justin Stofferahn, *You're Probably Getting Screwed by Your Grocery Bill*, SUBSTACK (Aug. 9, 2024), https://screwed.substack.com/p/youre-probably-getting-screwed-by-6ed (showing the correlation between grocery concentration and prices).

41. *See, e.g.*, Denise Hearn, Krista Brown, Taylor Sekhon & Erik Peinert, *The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions* 7 (Am. Econ. Liberties Project, Working Paper Series on Corporate Power No. 10, 2022), https://www.economicliberties.us/our-work/the-roll-up-economy.

42. *Id.*; Erin C. Fuze Brown & Mark A. Hall, *Private Equity and the Corporatization of Health* Care, 76 STAN. L. REV. 527, 527 (2024).

43. Christopher Ziemnowicz, *Joseph A. Schumpeter and Innovation*, *in* ENCYCLOPEDIA OF CREATIVITY, INVENTION, INNOVATION, AND ENTREPRENEURSHIP 1171, 1172 (Elias G. Carayannis ed., 2013).

44. *Arrow Replacement Effect*, JEFF FOSSETT (June 5, 2020), https://jeffreyfossett.com/2020/06/05/arrow-replacement.html.

45. *See* Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 14 (2021) (explaining that many technology startups are acquired by incumbents).

them down.[46] And it's not just internet companies; buying competing brands only to shut them down happens in industries from software[47] to hiking boots[48] to beer.[49] Even if an incumbent doesn't buy the company outright, the possibility that the incumbent will pay top dollar for a startup can encourage the startup (and its funders, who may want an exit strategy) not to challenge the incumbent too aggressively. Along with acquisitions, this is one way incumbents co-opt disruption.[50]

In short, companies know the risk that others can displace them in a competitive market, so they aim to eliminate that risk by buying out their competition. And for the last forty years, we have let them, because we have been guided by an outdated view of what neoliberal economics tells us about social welfare.[51]

That has left us with a world in which companies don't see antitrust enforcement as a serious obstacle to mergers. The situation is so bad that when the PGA Tour, the only game in town for professional golf, faced a single upstart challenger that filed antitrust litigation accusing the PGA Tour of monopoly power, the two settled the lawsuit by merging![52]

B. INTEROPERABILITY

Some products need to work with other products. Software programs must run on specific hardware; video games must work with a particular platform; toasters and hairdryers must be charged using a standard voltage with a compatible plug. We need interface standards to allow products to work together. Sometimes these standards are simple, as with the three-prong electrical outlets common in the United States;[53] sometimes, they are more complex.

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46. *See* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649, 651 (2021) ("We show that this disincentive to innovate can be so strong that an incumbent firm may acquire an innovative start-up simply to shut down the start-up's projects and thereby stem the 'gale of creative destruction' of new inventions.").

47. *See Worst Tech Mergers and Acquisitions: Oracle and Sun, and the Sad Tale of Palm*, ZDNET (Feb. 11, 2016, 10:28 AM PT), https://www.zdnet.com/article/worst-tech-mergers-and-acquisitions-oracle-and-sun-and-the-sad-tale-of-palm.

48. *See* Anders Nielsen, *What Happened to Ahnu Hiking Boots?*, WATERSNAKE (Sept. 10, 2022), https://www.watersnake.net/what-happened-to-ahnu-hiking-boots.htm.

49. *See* Dave Infante, *Sapporo USA Will Shut Down Anchor Brewing Co.*, VINEPAIR (July 20, 2023), https://vinepair.com/booze-news/anchor-brewing-company-sale.

50. *See* Lemley & McCreary, *supra* note 45, at 9–10; Mark A. Lemley & Matthew Wansley, *Coopting Disruption*, 105 B.U. L. REV. (forthcoming Jan. 2025).

51. See Glick et al., *supra* note 35, at 770–73.

52. Kevin Draper, *The Alliance of LIV Golf and the PGA Tour: Here's What to Know*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/06/07/sports/golf/pga-liv-golf-merger.html.

53. *Power Plug & Outlet Types A & B*, WORLD STANDARDS (Aug. 26, 2024), https://www.worldstandards.eu/electricity/plugs-and-sockets/ab.

These interfaces provide potential chokepoints for competition because the optimal number of such standard interfaces is often one.[54] For example, we don't want different phone systems that can't communicate with each other. A company that controls a standard has the power to decide what downstream products will work with that standard and, therefore, has the power to control the downstream market. However, there can still be competition for products built to work with the standard product. The key to whether competition can exist is whether the interfaces are open or closed—whether anyone can make products that use the interface or whether doing so requires permission.

In previous generations of technology, open standards have generally outperformed closed standards because open standards allowed the benefit of competition within the standard. For example, the VHS video cassette recorder prevailed over the competing Betamax (arguably a superior technology) because the VHS interface standard was open, allowing anyone to produce a VHS-compatible device.[55] As a result, VHS-compatible devices were cheaper, and companies competed to improve their quality.[56] This increased consumer adoption of VHS-compatible devices led to a greater number of movies being released for VHS than for Betamax.[57]

The same was true for personal computers. Even though Apple made a better computer in the 1980s, the open nature of the IBM PC architecture meant that many companies competed to make better and cheaper computers based on IBM's original product.[58] That, in turn, meant that more companies wrote software for those computers.[59] Apple maintained a closed system and lost its lead in personal computers, becoming a niche player by the 1990s; it regained stature in the market only after technological changes meant that virtually any software could run on any type of computer, essentially making most aspects of the system open.[60] Ironically, Apple's closed approach survived only because of interoperability.

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54. *See* CORY DOCTOROW & REBECCA GIBLIN, CHOKEPOINT CAPITALISM 4–5 (2022) ("Just a handful of firms—and sometimes only one—now control everything from the arts . . . to finance . . . to agribusiness . . . and everything in between . . . .").

55. *See The Difference Between VHS and Betamax Tapes and How VHS Became the Household Tape*, CAPTURE (Apr. 26, 2023), https://www.capture.com/blogs/video/vhs-vs-betamax#:~:text=The%20VHS%20vs.,VHS%20as%20the%20clear%20victor ("While Sony retained control of their Betamax format, JVC shared the VHS format, which made it more available and affordable. This was one of the deciding factors in the format war that left VHS as the clear victor.").

56. *Id.* ("When JVC decided to allow other manufacturers in the late 1970s, they drastically brought down the price of VHS tapes and equipment. By 1984, there were over 70 VCR manufacturers . . . .").

57. *Id.* ("It didn't take long for motion picture companies to begin producing movies in VHS format and completely abandon Betamax simply because VHS was more available and widely used.").

58. *See* Michael J. Miller, *Why the IBM PC Had an Open Architecture*, PCMAG (Aug. 12, 2021), https://www.pcmag.com/news/why-the-ibm-pc-had-an-open-architecture.

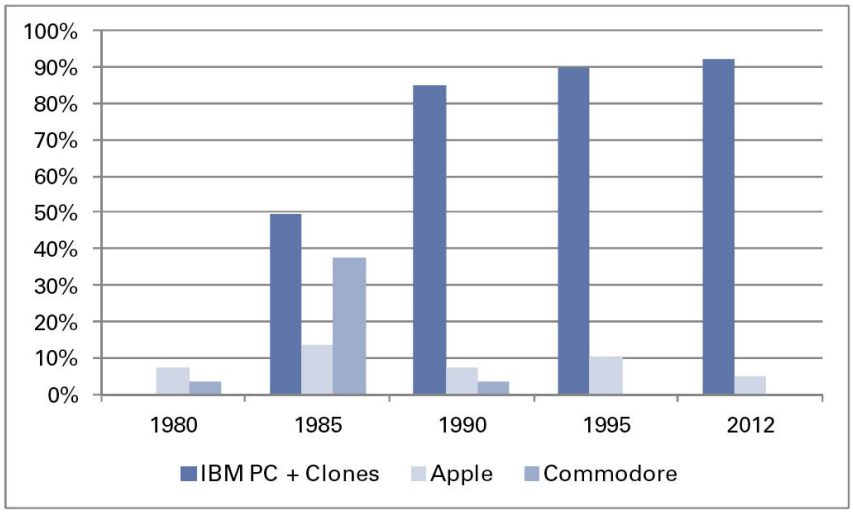
59. *See id.*

60. Jay Yarow, *How Apple Really Lost Its Lead in the '80s*, BUS. INSIDER (Dec. 9, 2012, 5:26 AM PST), https://www.businessinsider.com/how-apple-really-lost-its-lead-in-the-80s-2012-12 (ex. 71).

Another example is the telephone network, which was a closed system during the decades when AT&T held a government-granted monopoly; from 1914 until 1984, no one could connect devices or services to the telephone network without AT&T's approval.[61] The opening of that network after the breakup of AT&T in 1984 led to a dramatic explosion in innovation, from hardware to software to cellular telephones.[62]

The most significant example of the success of interoperability is the internet. The open nature of the internet protocol means that it has no "gatekeeper." Anyone can upload anything to the internet as long as they use the proper protocol.[63] This "end-to-end" architecture was responsible for the greatest outpouring of innovation in modern history, precisely because no single company held the power to decide what was permitted on the internet.[64] That

Exhibit 71: PC Market Share by shipments
While Apple and Commodore were able to gain early prominence in the personal computer market, the IBM PC + Clones, running Microsoft's operating system, were able to eventually overtake them as AAPL and CBM suffered from limited software development.



Source: Jeremy Reimer, Total Share: 30 years of personal computer market share figures; Goldman Sachs Research estimates.

61. JERRY KANG & ALAN BUTLER, COMMUNICATIONS LAW AND POLICY 291–96 (5th ed. 2016) (reviewing history of AT&T from inception to breakup).

62. *See* Martin Watzinger & Monika Schnitzer, *The Breakup of the Bell System and Its Impact on US Innovation* 2–3 (CEPR Press, Discussion Paper No. 17635, 2022), https://www.monika-schnitzer.com/uploads/4/9/4/1/49415675/watzinger_schnitzer_breakup_of_bell.pdf.

63. Spandan Pokhrel, *Does the Internet Have a Gatekeeper?*, THE KATHMANDU POST (Apr. 8, 2023, 7:32 AM), https://kathmandupost.com/science-technology/2023/04/08/does-the-internet-have-a-gatekeeper (explaining that the internet is a decentralized network managed by several international nonprofit organization).

64. *See generally* J.H. Saltzer, D.P. Reed & D.D. Clark, *End-to-End Arguments in System Design*, *in* 2ND INTERNATIONAL CONFERENCE ON DISTRIBUTED SYSTEMS, PARIS, FRANCE (1981), *reprinted in* 2 ACM TRANSACTIONS ON COMPUT. SYS. 277 (1984) (presenting the "end-to-end argument" design principle that "helps

architecture was enshrined in the principle of net neutrality, which meant that internet access providers did not charge based on who was sending or receiving data or on the content of that data.[65]

Unfortunately, interoperability and open interfaces are a vanishing breed in late-stage capitalism because, as it turns out, there is significant money in owning the chokepoints. Companies like Facebook that started out with open application programming interfaces (APIs) decided to close their APIs when their standards became dominant so that they could capture the value of that dominance.[66]

Shutting down interoperability is particularly profitable when a company is vertically integrated. Incumbent companies will often buy companies that depend on the incumbent's platform, giving the incumbent an incentive to prefer the acquired company over others and to keep people from using multiple competing sites.[67] For example, Apple owns the iPhone platform and also runs its own music business. It has an interest in making it easier for people to use its music app rather than competing ones. Antitrust law under the influence of the Chicago School has proven even more lenient to these vertical mergers than to horizontal ones, allowing these acquisitions to become widespread.[68]

Some companies also reduce interoperability by deliberately making it difficult to build interconnection devices. When IBM dominated the mainframe computer industry, it notoriously changed its plug interfaces to make it harder for third parties to connect their peripherals.[69] More recently, the U.S. Department of Justice and the European Union have accused Apple of changing its phone interfaces to disadvantage companies that make phone attachments.[70]

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guide placement of functions among the modules of a distributed computer system"); Lawrence Lessig & Mark A. Lemley, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001) (discussing the principles that drove the internet's "end-to-end" design and the threat that cable company mergers would pose to it given cable companies' unrestricted ability to impose conditions on their customers).

65. *See, e.g.*, *A History of Net Neutrality in the United States*, MOZILLA, https://foundation.mozilla.org/en/campaigns/net-neutrality-timeline (last visited Nov. 22, 2024); Timothy B. Lee, *Network Neutrality, Explained*, VOX (May 21, 2015, 2:07 PM PDT), https://www.vox.com/2015/2/26/18073512/network-neutrality. For a general overview of the development of networking standards, see BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION (2012).

66. *See FTC Sues Facebook for Illegal Monopolization*, FTC (Dec. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

67. *See* Susan Athey & Fiona Scott Morton, *Platform Annexation*, 84 ANTITRUST L.J. 677, 678–79 (2022).

68. *See* Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1964–65 (2018) (discussing how the influence of Chicago School economic theories has led to limited antitrust enforcement against vertical mergers).

69. *See In re* IBM Peripheral EDP Devices, 481 F. Supp. 965, 973 (N.D. Cal. 1979) ("Telex and Marshall were but two of the companies which were successful in displacing IBM peripheral equipment by offering it at prices well below those IBM was charging. IBM responded . . . [with] new CPUs . . . that were incompatible with the PCMs' existing peripherals."), *aff'd on other grounds*, 698 F.2d 1377, 1382 (9th Cir. 1983).

70. *See* Complaint at 3–4, United States v. Apple Inc., No. 2:24-cv-04055 (D.N.J. Mar. 21, 2024); *see generally* Jon Porter & James Vincent, *USB-C Will be Mandatory for Phones Sold in the EU 'by Autumn 2024*,*'* THE VERGE (June 7, 2022, 7:25 AM ET), https://www.theverge.com/2022/6/7/23156361/european-union-usb-

Other companies, like Qualcomm, use intellectual property (IP) rights to assert control over fundamental standards like cellular networks.[71] Internet platform companies selectively give access to formerly open platforms, using their control over access to their data and networks to stifle competition.[72] They even open APIs selectively only to companies who promise not to compete with them.[73] The internet itself is in danger of being replaced by proprietary "walled gardens," as people increasingly access the internet not through open standards over computers but through hand-held devices that limit access to apps sold and approved by the companies that sell the platforms.[74]

As a result of this trend, companies that rule chokepoints now control important markets that used to be open to all. Those companies can and do demand significant tolls to use the standard; Apple and Google take 30 percent of the revenue of apps they allow into their systems.[75] They also determine what kinds of competition are permissible. Even when this type of 'mother may I' system is employed for good ends like computer security or protecting privacy,[76] it stifles innovation by putting one gatekeeper in charge of deciding what innovation is permissible.

Control over chokepoints also gives incumbents power to prevent upstarts from deploying technologies that might threaten the incumbent's dominance. When coupled with vertical integration, this control leads to self-preferencing. That's why Spotify and Netflix faced difficulties obtaining approval for their apps on Apple's App Store; Apple didn't want to allow competition with its own

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c-wired-charging-iphone-lightning-ewaste (discussing the European Union's new legislation forcing Apple to change its charging accessories to USB-C).

71. The Ninth Circuit unfortunately blessed this anticompetitive practice in *FTC v. Qualcomm Corp.*, 935 F.3d 752 (9th Cir. 2019).

72. *See* Lemley & Wansley, *supra* note 50; Daniel Francis, *Monopolizing by Conditioning*, 124 COLUM. L. REV. 1917, 1992 (2024) (identifying and condemning the practice of preferential access by monopolists designed to disadvantage competitors).

73. *See, e.g.*, Crowder v. LinkedIn Corp., No. 22-CV-00237, 2024 WL 1221956, at *5 (N.D. Cal. Mar. 21, 2024) (denying motion to dismiss antitrust claim against LinkedIn for conditioning APIs on a promise not to compete).

74. *See, e.g.*, Epic Games v. Apple Inc., 67 F.4th 946, 967–68 (9th Cir. 2023) (discussing Apple's "walled garden" ecosystem for iOS); *see also* Simon Rockman, *The Walled Garden Has Happened*, ZDNET (Dec. 6, 2011, 4:33 AM PT), https://www.zdnet.com/article/the-walled-garden-has-happened (emphasizing manufacturers have created "walled gardens" in technology now—"[t]he walls have gone up and we are shut in").

75. Austin Carr, *Apple's 30% Fee, an Industry Standard, Is Showing Cracks*, BLOOMBERG (May 3, 2021, 3:45 AM PDT), https://www.bloomberg.com/news/newsletters/2021-05-03/apple-s-30-fee-an-industry-standard-is-showing-cracks#xj4y7vzkg. However, both companies now halve this percentage for apps that make less than $1 million a year. *Id.*

76. On antitrust and privacy protection, see generally Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647 (2021). Rory Van Loo notes that companies often use privacy as a pretext for anticompetitive acts. Rory Van Loo, *Privacy Pretexts*, 108 CORNELL L. REV. 1, 24 (2022); *cf.* Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 303–05 (2021) (noting the tensions between privacy protection and antitrust enforcement).

music and video businesses.[77] And it's why no one can use any web browser other than Safari on the iPhone; even if you think you are using Firefox or Chrome, you are actually using a shell written over the Safari browser, which is far less efficient.[78] And it's why video game console makers are buying game makers and locking in content on their platforms instead of responding to consumer demand for cross-platform play.[79] Companies that find natural market chokepoints do their best not only to hold onto them but to expand that control into adjacent markets.

C. AFTERMARKETS, RESALE, AND THE RIGHT TO REPAIR

A third source of competition that companies would like to eliminate comes from their own products. A monopolist may be the only one who makes a product in a particular industry, but they are not the only one who can sell that product. The monopolist's own customers may resell the products they buy to others. Each resale is a potential lost sale for the monopolist. Worse (for the monopolist), the existence of a resale market threatens a company's control over price. Clever buyers can undo a price discrimination scheme by engaging in "arbitrage"—buying up goods in bulk when they are cheaper and reselling them to consumers the company would like to charge higher prices.[80] Charging above-market prices for new goods may make used goods competitive.[81] And if the product costs enough, consumers can also "compete" by keeping durable goods longer and fixing them when they break.

Companies are doing their best to shut down these forms of "consumer competition." They are targeting resale markets using IP law, arguing (with

77. *See* Ariel Shapiro & Jacob Kastrenakes, *Spotify Pulls Audiobook Purchases from iOS App After Apple Blocks Updates*, THE VERGE (Oct. 27, 2022, 8:41 AM PDT), https://www.theverge.com/2022/10/27/23426631/spotify-apple-pulls-audiobook-purchases-ios-app; Andrew Cunningham, *Report: Apple Blocks Spotify App Update After In-App Subscription Removal*, ARS TECHNICA (June 30, 2016, 3:04 PM), https://arstechnica.com/gadgets/2016/06/spotify-accuses-apple-of-anticompetitive-behavior-after-app-update-is-blocked.

78. Section 2.5.6 of Apple's App Review Guidelines requires "[a]pps that browse the web" to use WebKit, which is the Safari web browser engine. *See App Review Guidelines*, APPLE (Sept. 13, 2024), https://developer.apple.com/app-store/review/guidelines; WEBKIT, https://webkit.org (last visited Nov. 22, 2024).

79. Microsoft locked Zenimax/Bethesda's content into its platform after the companies merged. *See* Brendan Sinclair, *Phil Spencer Stresses Exclusivity in ZeniMax Deal*, GAMESINDUSTRY.BIZ (Mar. 11, 2021), https://www.gamesindustry.biz/phil-spencer-stresses-exclusivity-in-zenimax-deal. It has promised not to do the same with Call of Duty after it acquires Activision; so far, that promise has swayed the courts to allow the merger. *See* FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1090–94, 1101 (N.D. Cal. 2023). That merger is only one example of a consolidation that has made platform companies the dominant force in the video game industry, holding eight of the ten largest game company spots in 2022, up from five in 2012. Joost van Dreunen, *Platform Power, by the Numbers*, SUPERJOOST PLAYLIST (Oct. 6, 2023), https://superjoost.substack.com/p/platform-power-by-the-numbers.

80. Anna-Louise Jackson, *Understanding Arbitrage*, FORBES (July 30, 2024, 7:13 PM), https://www.forbes.com/advisor/investing/what-is-arbitrage.

81. *See* Pasquale Schiraldi, *Second-Hand Markets and Collusion by Manufacturers of Semidurable Goods* 2 (London Sch. of Econ. & Pol. Sci., Rsch. Paper No. EI48, 2009) ("[T]he potential substitutability of different vintages means the availability of used units lowers the monopolist's new unit price.").

limited success thus far) that they should be allowed to block arbitrage and importation[82] and prevent resales on online marketplaces.[83] Companies have had more success using contract law rather than IP law to prevent resales, claiming that they are merely "licensing" software and books for one-time use and prohibiting resale.[84] They have persuaded the courts that the right to resell books doesn't apply at all in digital form.[85] They are "tethering" digital goods to their platforms so that media like books, music, and video games, which have traditionally been bought and owned, must instead dial home to the mothership and can be remotely bricked or deleted (including, ironically, George Orwell's *1984*).[86]

The result is that content is disappearing for the first time in forty years.[87] Companies are turning product features of durable goods, such as cars, into subscription services, as BMW infamously did with subscriptions to its seat heaters.[88] Companies are using glue and non-standard screws to prevent consumers from opening their phone cases.[89] They are imposing technological controls to enforce lockout and tethering schemes, and then turning to a mutant form of copyright law—the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA)[90]—to declare the act of trying to access the content that consumers own to be a crime. And they're not just doing it to computers and phones. Companies have used the DMCA to try to prevent people

82. *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 527–29, 554 (2013); Impression Prods., Inc. v. Lexmark Int'l, Inc., 581 U.S. 360, 377–82 (2017).

83. *See, e.g.*, Tiffany, Inc. v. eBay, Inc., 600 F.3d 93, 101 (2d Cir. 2010); Williams Sonoma, Inc. v. Amazon.com, Inc., No. 18-CV-07548, 2019 WL 7810815, at *2 (N.D. Cal. May 2, 2019); *see also* Daniel R. Cahoy, *Trademark's Grip over Sustainability*, 94 U. COLO. L. REV. 1043,1048–49 (2023) (noting the risks of trademark challenges to the right to repair).

84. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 31–32, 40–41 (1994); Mark A. Lemley, *The Benefit of the Bargain*, 2023 WIS. L. REV. 237, 255 (2023) ("Courts will even enforce contracts that take away the very item the deal was supposed to provide, turning purchases of media and consumer goods into involuntary rentals terminable at will by the company without notice.").

85. *See, e.g.*, Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 655 (2d Cir. 2018).

86. Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 17, 2009), https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html; Mark A. Lemley, *Disappearing Content*, 101 B.U. L. REV. 1255, 1262 (2021) ("But streaming had one important, unforeseen effect—it took control over what content was available out of the hands of consumers. Unlike DVDs or digital downloads, which were (mostly) buy-and-keep arrangements, what you can stream at any given time depends on what is available on streaming platforms.").

87. *See generally* Lemley, *supra* note 86 (discussing the unforeseen effect that streaming would have for content availability to consumers as compared to purchases that were purchased in a physical or digital download format).

88. James Vincent, *BMW Starts Selling Heated Seat Subscriptions for $18 a Month*, THE VERGE (July 12, 2022, 3:45 AM PDT), https://www.theverge.com/2022/7/12/23204950/bmw-subscriptions-microtransactions-heated-seats-feature.

89. *See* Michael A. Carrier, *How the Federal Trade Commission Can Use Section 5 to Strengthen the Right to Repair*, 37 BERKELEY TECH. L.J. 1145, 1165–66 (2022) (discussing how Apple and Microsoft engaged in this practice).

90. 17 U.S.C. § 1201.

from fixing their tractors,[91] buying replacement clickers for garage door openers,[92] refilling printer toner cartridges,[93] operating MRI machines,[94] and even fixing McDonald's ice cream machines.[95] Companies are also cracking down on the ability to repair our own devices or have them repaired by third parties.[96] They increasingly make it hard to open or fix devices, installing digital locks to defeat repair efforts, and then using the DMCA to make it illegal to break those locks.[97] Companies void the warranty if consumers try to repair their devices or have them repaired by third parties—and then use the very fact that they refuse to honor the warranty as an argument that consumers can't resell a good once it has been fixed because the absence of a warranty will confuse the buyer.[98] Companies are even "bricking" products—designing them to shut down if third parties try to repair them. And they don't just brick consumer products: a train manufacturer designed its trains to shut down if third parties tried to repair or modify them.[99]

Even when companies haven't been able to stop repairs altogether, they have done their best to drive third-party repair shops out of business. They have asserted pretextual patent claims over spare parts,[100] conspired to deprive car repair shops of parts, and used design patent law to stop part manufacture.[101] They have asserted bogus claims of trade secrecy to prevent repair shops from

91. *See* Michael A. Carrier, *The Right to Repair, Competition, and Intellectual Property*, 15 LANDSLIDE, Dec. 2022–Jan. 2023, at 14, 15. A district court recently held that John Deere's efforts to block users and third parties from repairing their tractors could violate the antitrust laws. *In re* Deere & Co. Repair Serv. Antitrust Litig., 703 F. Supp. 3d 862, 913 (N.D. Ill. 2023).

92. Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1182 (Fed. Cir. 2004).

93. Hewlett-Packard Co. v. Repeat-o-Type Stencil Mfg. Corp., 123 F.3d 1445, 1449 (Fed. Cir. 1997); Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 528–29 (6th Cir. 2004).

94. *See* Philips Med. Sys. Nederland B.V. v. TEC Holdings, Inc., No. 3:20-cv-21, 2023 WL 2064201, at *2 (W.D.N.C. Feb. 16, 2023) (noting the anticompetitive effects of the DMCA being used in this way but finding the court had not power to prevent it).

95. Kyle Wiens, *POV: Congress Is Preventing Us from Fixing McDonald's Ice Cream Machines*, FAST CO. (July 14, 2023), https://www.fastcompany.com/90923565/congress-mcdonalds-ice-cream-machines.

96. *See* AARON PERZANOWSKI, THE RIGHT TO REPAIR: RECLAIMING THE THINGS WE OWN 177–90 (2022). For an overview of the right to repair, see generally Shubha Ghosh, *The Continuing Right to Repair*, 37 BERKELEY TECH. L.J. 1097 (2022).

97. *See* Madison Bower, *Keeping the DMCA Away from Functional Use*, 35 BERKELEY TECH. L.J. 1067, 1067 (2020) ("[T]he anticircumvention provisions [of the DMCA] have allowed makers of functional products, like calculators, appliances, and cars, to sue consumers who repair or modify those products.").

98. *See* Otter Prods., LLC v. Triplenet Pricing Inc., 572 F. Supp. 3d 1066, 1072–73 (D. Colo. 2021).

99. Ashley Belanger, *Trains Were Designed to Break Down After Third-Party Repairs, Hackers Find*, ARS TECHNICA (Dec. 13, 2023, 2:14 PM), https://arstechnica.com/tech-policy/2023/12/manufacturer-deliberately-bricked-trains-repaired-by-competitors-hackers-find.

100. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1200 (9th Cir. 1997).

101. *See, e.g.*, LKQ Corp. v. Gen. Motors Global Tech. Operations LLC, 102 F.4th 1280, 1287–90 (Fed. Cir. 2024) (en banc). Full disclosure: I represented LKQ in this case.

accessing the data needed for repair and have even used copyright law to prevent computer repair shops from turning the computers on in order to fix them.[102]

We have grown used to the idea that we can resell used cars as long as we tell the buyer what condition they're in and can fix our dishwasher when it breaks, but companies are trying hard to make sure that resale competition doesn't spread to other devices like phones. If they succeed, have no doubt that they will be coming for the used car market too.

D. REGULATORY CAPTURE

The most straightforward way to prevent competition is to outlaw it. A variety of regulations restrict or affirmatively prohibit competition in a series of important markets.[103] Some were passed because we believed competition wouldn't work in the industry, and a promise to prevent competition was part of the bargain for price regulation.[104] We abandoned those entry restrictions in a host of markets from the 1970s to the 1990s, and in virtually every case—ground transportation, air travel, telephony, electric power—it turned out that both competition and innovation were possible in markets we once thought were not amenable to competition.[105] The Biden Administration has taken further steps to try to eliminate regulatory rules that prevent entry.[106]

But while regulations that insulated companies from competition were a bad idea, simply deregulating them is not enough. We still need to ensure that the deregulated monopolists face real competition. While current markets have more competitors than they did under entry regulation, many of them remain quite concentrated and not fully competitive.

And other restrictions on market entry persist. About 30 percent of all occupations require licensing to enter, raising prices in those industries and costing consumers hundreds of billions of dollars.[107] Some of these restrictions make sense for health and safety reasons. We don't want unlicensed doctors and

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102. *See* MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 519 (9th Cir. 1993) (affirming an injunction preventing Peak Computing from repairing MAI computers on grounds that "the loading of software into the RAM creates a copy under the Copyright Act"). Congress passed a law in 1998 that overruled this decision, but only in a very limited context. 17 U.S.C. § 117(d).

103. *See generally* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON, & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY (2022) (discussing traditionally regulated industries).

104. *Id.*

105. *See* Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 78–82 (2020).

106. *FACT SHEET: White House Competition Council Announces New Actions to Lower Costs and Marks Second Anniversary of President Biden's Executive Order on Competition*, THE WHITE HOUSE (July 19, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/19/fact-sheet-white-house-competition-council-announces-new-actions-to-lower-costs-and-marks-second-anniversary-of-president-bidens-executive-order-on-competition/?utm_source=link.

107. *See* Morris M. Kleiner & Evgeny Vorotnikov, *Analyzing Occupational Licensing Among the States*, 52 J. REGUL. ECON. 132, 136 (2017) (documenting the share of occupations that require licensing); MORRIS M. KLEINER & EVGENY S. VOROTNIKOV, INSTITUTE FOR JUSTICE, AT WHAT CO$T?: STATE AND NATIONAL ESTIMATES OF THE ECONOMIC COSTS OF OCCUPATIONAL LICENSING 5 (2018) (documenting over $200 billion in costs from licensing).

airline pilots, for instance. But many others, such as entry regulations for barbers, seem unnecessary, or are tied to anticompetitive restrictions that are clearly the product of lobbying, such as exclusive territories for car dealers.[108]

Even when barriers to entry were adopted for valid reasons, history shows that the industry beneficiaries can and will game the regulatory system to protect themselves from competition. For instance, there is good reason to regulate entry into the pharmaceutical industry and to reward innovation with a temporary monopoly in the form of patent protection.[109] However, the pharmaceutical industry has become adept at gaming the patent system and the FDA regulatory environment to extend its control and prevent competition long after patents and regulatory exclusivity should have expired.[110] Pharmaceutical companies regularly employ a variety of practices to leverage regulatory rules to prevent competition the law is supposed to allow. Many of these practices have been going on for decades, such as paying potential competitors to stay out of the market,[111] using regulatory loopholes to "product hop" by making minor tweaks to products to avoid generic competition,[112] filing false petitions to delay generic approval,[113] and even listing things like software on the FDA registry limited to drug patents.[114] The result is that a patent system designed to carefully calibrate incentives for innovation and a regulatory system designed to ensure drug safety have been hijacked to generate hundreds of billions of dollars in costs every year at the expense of consumers.[115]

Companies in other regulated industries, like the electric power industry, are also adept at capturing regulators and using regulation to prevent innovation

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108. *See* Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 230 n.101 (2019).

109. *See* Roberto Mazzoleni & Richard R. Nelson, *The Benefits and Costs of Strong Patent Protection: A Contribution to the Current Debate*, 27 RSCH. POL'Y 273, 275 (1998) (highlighting studies concluding that the pharmaceutical industry is one of the few sectors in which patents are consistently effective and necessary to recoup firms' financial investments).

110. On the problems of evergreening of pharmaceutical patents, abuse of the regulatory exclusivity, and collusive settlements that pay competitors to stay out of the market, see generally 1 HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER R. LESLIE & MICHAEL A. CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTRITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW, ch. 15–16 (3d ed. 2011) [hereinafter IP AND ANTITRUST].

111. *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 140–41 (2013).

112. *See, e.g.*, New York v. Actavis PLC, 787 F.3d 638, 642–43 (2d Cir. 2015); Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 687–89 (2009).

113. *See, e.g.*, IP AND ANTITRUST, *supra* note 110, § 15.03[A][1].

114. *See, e.g.*, Jazz Pharms., Inc. v. Avadel CNS Pharms., LLC, 60 F.4th 1373, 1376–78 (Fed. Cir. 2023).

115. The U.S. spent $574 billion on medicines in 2022. *See* Matej Mikulic, *Total Nominal Spending on Medicines in the U.S. from 2002 to 2022*, STATISTA (Sept. 15, 2023), https://www.statista.com/statistics/238689/us-total-expenditure-on-medicine. That is more than twice per capita what other developed countries spend, suggesting a social cost of roughly $330 billion per year. That cost difference is attributable to patent and regulatory abuse, combined with the fact that private rather than government actors negotiate drug prices in the U.S. I discuss the price negotiation issues *infra* notes 159–163.

that threatens their monopolies.[116] This doesn't negate the need for behavioral regulation, but it does raise the specter of "regulatory capture"—of agencies that gradually come to serve the interests of the capitalists they are supposed to be holding in check.

It is important to distinguish between regulations that prevent competition and regulations that govern behavior in the marketplace for reasons related to health, safety, or environmental effects. Regulation that interferes with competition is almost always a bad idea, and companies often have an incentive to encourage those restrictions. But avoiding entry regulation doesn't mean we should avoid legitimate behavioral regulations. Indeed, as we will see, we may need more regulation of behavior even as we get rid of rules that protect incumbents from competition.

Whether through buying up the competition, locking up the supply of complementary goods, preventing used goods from competing with new ones, or persuading the government to make competition illegal, incumbents have grown adept at ensuring that the "free market" does not include effective competition.

II. GUMMING UP THE WORKS

Even where incumbent companies can't eliminate competition entirely, they are working hard to make competition less robust by making it more difficult for customers to find what they are looking for and to switch between suppliers.[117] Competition depends not only on having competitors to choose from but also on a reasonably efficient system for consumers to find those competitors, compare prices and product quality, and actually switch suppliers.[118]

The internet promises, in theory, to make competition truly efficient, providing one-stop shopping where consumers can easily find alternatives, compare their prices, read reviews, and make purchases. But companies are targeting every aspect of that system, trying to throw sand in the gears to make it harder for consumers to realize they have a choice and to exercise that choice. In the process, companies have corrupted the internet, turning it from a

116. *See* Lemley & McKenna, *supra* note 105, at 78 ("Incumbents often use regulation to insulate themselves from competition. A long literature discusses the history of incumbents warping regulations originally intended to check their power into tools for protecting themselves against disruptive entry."). In California, the electric utilities persuaded the Public Utilities Commission to radically increase the price and reduce the benefits of installing solar power because its success was a threat to their business model. *See* Deven R. Desai & Mark A. Lemley, *Editorial: Scarcity, Regulation, and the Abundance Society*, 7 FRONTIERS RSCH. METRICS & ANALYTICS, Jan. 25, 2023, at 1, 2 (discussing this history).

117. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 214 (1986).

118. *See* Steven Salop & Joseph Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493, 493 (1977) ("The central implication of costly information-gathering is that the equilibrium will not occur at the perfectly competitive price. . . . Consumers would be unwilling to gather the extra information needed to switch stores or brands.").

mechanism for a truly efficient market to a tool that prevents consumer choice. Here's how.

A. THE "ENSHITTIFICATION" OF THE INTERNET

If you want to consider switching from one company to another, the first thing you need to know is what your alternatives are. The internet of the 1990s made enormous strides in helping users find what they wanted. Amazon gave you "the everything store,"[119] offering the products you wanted for sale. Yelp! and other review sites allowed you to evaluate those products. Facebook, Netflix, Spotify, and TikTok all made their mark by figuring out what you wanted to see and hear and showing it to you. Google made it possible to see what was out there with a single click. Its search engine was so good that in the 2000s, it featured an "I'm feeling lucky" button that would take you directly to the first search result.[120] More often than not, it was the thing you were looking for.

Google doesn't promote its "I'm feeling lucky" button anymore, and no wonder. Every one of the companies just mentioned rose to dominance because it was better than everyone else at figuring out what consumers wanted and showing it to them more quickly than their competitors. But once those competitors disappeared, by competition or by merger, what Cory Doctorow calls "the enshittification of the internet" set in.[121] The very companies that made their mark by giving consumers what they wanted to see now have a captive audience. And it turned out that others would pay good money to show you what *they* wanted you to see instead. Sometimes those were ads, which increased in frequency and became harder and harder to distinguish from organic search results. Other times, they were pay-for-placement deals, allowing producers to pay a fee to jump the queue and show you their product first instead of the one best suited to you. And sometimes they were self-dealing, with companies showing you their own affiliate products before more attractive alternatives from third parties.

The combined result is that internet search is worse today at each dominant firm than it was a decade ago. Google's first search page is filled with self-preferencing and third-party deals, especially for any search term that might be

119. *See generally* BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON (1st ed. 2013) (discussing the story behind creating Amazon).

120. Lee McMahon, *The Life and Demise (?) of Google's "I'm Feeling Lucky" Button*, STANDING CLOUD (Oct. 26, 2022), https://standingcloud.com/im-feeling-lucky-google ("[I]f you use the same keyword phrase in Google and click the 'I'm Feeling Lucky' Button instead, the search engine skips the search results and directly takes you to the top-ranking page for that search term or phrase.").

121. Cory Doctorow, *The 'Enshittification' of TikTok*, WIRED (Jan. 23, 2023, 12:44 PM), https://www.wired.com/story/tiktok-platforms-cory-doctorow.

construed as a customer looking to buy something.[122] You may have to scroll down pages to find organic search results. You can no longer rely on Amazon's product list to give you the closest match to what you're looking for; instead, Amazon prioritizes the products that give them the biggest cut,[123] and it has allegedly used its power as a market intermediary to prevent third party sellers from discounting their goods elsewhere.[124] Spotify and Pandora engage in "pay to playlist," promoting songs and podcasts for which it has deals, and even offering artists promotions if they accept lower royalties.[125] Facebook and TikTok have polluted their feed with content they want to push rather than content you want to see.[126] What should have been—and once was—a potent tool for consumer choice has instead become a pay-to-play tool for consumer manipulation.

B. CONCEALING PRICES AND FEES

Once you find the products you might want, you next need to know what they cost. Numerous state laws require gas stations and grocery stores to post their prices prominently.[127] The goal is to avoid deception and bait-and-switch tactics. But, in most cases, you have to go into the store to know what things will

122. Danny Sullivan, *Are Google's Results Getting Too Ad-Heavy & Self-Promotional?*, SEARCH ENGINE LAND (July 9, 2013, 1:50 PM), https://searchengineland.com/google-results-too-ad-heavy-166226. Search has other problems, including the growth of "affiliate marketing" and low-quality AI-generated content increasingly populating search results. *See* Janek Bevendorff, Matti Wiegmann, Martin Potthast & Benno Stein, *Is Google Getting Worse? A Longitudinal Investigation of SEO Spam in Search Engines*, *in* ADVANCES IN INFO RETRIEVAL: 46TH EUR. CONF. ON INFO RETRIEVAL, ECIR 2024, GLASGOW, UK, MAR. 24–28, 2024, PROCEEDINGS, PART III 56 (Nazli Goharian, Nicola Tonellotto, Yulan He, Aldo Lipani, Graham McDonald, Craig Macdonald & Idh Ounis eds., 2024).

123. Aditya Karla & Steve Stecklow, *Amazon Copied Products and Rigged Search Results to Promote Its Own Brands, Documents Show*, REUTERS (Oct. 13, 2021, 11:00 AM GMT), https://www.reuters.com/investigates/special-report/amazon-india-rigging; Rory Van Loo & Nikita Aggarwal, *Amazon's Pricing Paradox*, 37 HARV. J.L. & TECH. 1, 5 (2023) (showing that Amazon charges higher prices than people anticipate, in part by manipulating search results to hide lower-priced products).

124. *See* FTC v. Amazon.com, Inc., No. 2:23-cv-01495-JHC, 2024 WL 4448815, at *1–2 (W.D. Wash. Sept. 30, 2024) (denying Amazon's motion to dismiss antitrust complaint against "Project Nessie," Amazon's effort to prevent third-party sellers from discounting elsewhere).

125. Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26356 (May 2, 2016) ("Pandora has now tested and proven its ability to modify its playlist-selecting algorithms to rely more or less heavily on the music of particular record companies so that it can steer its listeners toward or away from the music from any one record company."); Christopher Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. IRVINE L. REV. 805, 831 (2022) ("Spotify has recently announced 'Discovery Mode,' an alternative promotional opportunity that won't require any upfront costs, but which will only be available in exchange for an artist or label agreeing to accept a lower-than-market royalty payment."); Xiyin Tang, *Intellectual Property Law as Labor Policy*, 99 NYU L. Rev. (forthcoming 2024) (draft at 50) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761809) (discussing Pandora's skewing of algorithms to play more songs from record companies that charge it a lower rate).

126. Doctorow, *supra* note 121.

127. For a collection, see *U.S. Retail Pricing Laws and Regulations by State*, NIST (Feb. 28, 2024), https://www.nist.gov/pml/owm/us-retail-pricing-laws-and-regulations-state.

cost.[128] And in some important areas of the economy, like health care, you *can't find out* what your care will cost![129]

Here too, the internet promised to be a powerful consumer tool for comparison-shopping because you no longer had to drive around looking for deals at different stores. And for a while it was. But not anymore. While you can still find prices on sites like Amazon and Google Shopping—and that is a real benefit—those prices are increasingly not standard prices offered to everyone. Instead, they are algorithmically generated prices that differ depending on a host of factors, including your purchase history, the time of day, the browser you use, where you live, or what you looked at on Facebook recently.[130] So while the internet has provided price transparency in one sense, it has also increased opacity and made reliable comparison-shopping harder.

Further, even sites that offer you price comparisons often do so only within their domain. Amazon will show you prices for the products it carries, but it won't show you products it doesn't carry or even tell you they exist.[131] Buy.com will do the same. Moreover, all the shopping sites use contract law, IP law, and even the Computer Fraud and Abuse Act (CFAA), a criminal law designed to prevent computer hacking, to prevent independent third parties from scraping their sites and giving a true price comparison.[132]

Companies also bury fees—what Cory Doctorow calls "drip pricing."[133] Baggage and seat fees on airlines are a notorious example, but restaurants, rental cars, and any number of other companies conceal the total price a customer will

128. Requirements that gas stations post their prices prominently are an exception. *See generally* DIV. OF MEASUREMENT STANDARDS, CAL. DEP'T OF FOOD AND AGRIC., PETROLEUM PRODUCTS PROGRAM: INFORMATION GUIDE, https://www.cdfa.ca.gov/dms/programs/petroleum/petInfoGuideBusiness.pdf (discussing the regulation of advertising and labeling of products for petroleum products).

129. *See generally* Gregory Day, *Anticompetitive Healthcare*, 101 WASH. U. L. REV. 1539 (2024) (documenting this phenomenon and arguing that it is anticompetitive).

130. *See* Le Chen, Alan Mislove & Christo Wilson, *An Empirical Analysis of Algorithmic Pricing on Amazon Marketplace*, WWW '16: PROC. 25TH INT'L CONF. ON WORLD WIDE WEB 1339, 1339 (2016), https://mislove.org/publications/Amazon-WWW.pdf. Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't*, PROPUBLICA (Sept. 20, 2016, 8:00 AM EDT), https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt; Van Loo & Aggarwal, *supra* note 123, at 16; *see also* Christopher R. Leslie, *Predatory Pricing Algorithms*, 98 N.Y.U. L. REV. 49 (2023) (demonstrating how this creates antitrust problems).

131. *See* Multi Time Machine, Inc. v. Amazon.com, Inc., 804 F.3d 930, 935–36 (9th Cir. 2015). Full disclosure: I represented Amazon in this lawsuit.

132. *See, e.g.*, Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1067 (9th Cir. 2016); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 472–74 (2006) (giving examples of cases in which scraping was prohibited). Indeed, Facebook proudly advertises its efforts to stop scraping. *See* Jessica Romero, *Leading the Fight Against Scraping-for-Hire*, META (Jan. 12, 2023), https://about.fb.com/news/2023/01/leading-the-fight-against-scraping-for-hire. Fortunately, it has recently been unsuccessful in suing search firms for scraping. Meta Platforms, Inc. v. Bright Data Ltd., No. 23-cv-00077, 2024 WL 251406, at *22 (N.D. Cal. Jan. 23, 2024).

133. Cory Doctorow, *Amazon Is a Ripoff*, PLURALISTIC (Nov. 6, 2023), https://pluralistic.net/2023/11/06/attention-rents. And not drip in the current, good sense, either.

pay by including hidden fees.[134] Doing so prevents robust price competition. That's its point. As Cory Doctorow puts it, this is "an iron law of cons: any time someone adds complexity to a proposition bet, the complexity exists *solely* to make it hard for you to figure out if you're getting a good deal."[135]

C. CO-OPTING REVIEW SITES

Once you know what products are available and what they cost, the next thing you want to know is whether they are any good. Here too, the internet of the 2000s offered the promise of real market efficiency, with sites like Yelp! and Trip Advisor crowd-sourcing reviews to give people a composite picture of what others thought of the product. Unfortunately, the enshittification of the internet has struck review sites too. Yelp! makes money by partnering with some of the very sites it reviews, and it has a strong incentive to bias the reviews in favor of its partners.[136] TripAdvisor has deleted reviews that contained detailed allegations of sexual assaults by hotel employees at hotels with which TripAdvisor had business deals.[137] Intermediaries can selectively delete bad reviews for favored companies. Yelp! and other review sites have considerable discretion over which reviews to highlight, giving all those sites substantial power to boost the companies with whom they have business partnerships.[138] And they do. Other "independent" reviewers like Underwriters' Laboratories are funded by the companies they review, and some are paid hundreds of thousands of dollars by companies for the right to use their reviews in advertising.[139] Many seemingly independent review sites, including Rotten Tomatoes, Metacritic, TripAdvisor, and Goodreads, are, in fact, owned by the very companies they purport to evaluate neutrally.[140]

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134. *The Hidden Cost of Junk Fees*, CFPB: BLOG (Feb. 2, 2022), https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees; Elaine Glusac, *The Latest on Resort Fees and Transparency*, N.Y. TIMES, Oct. 21, 2023, at B3.

135. Doctorow, *supra* note 133.

136. Many business owners claim that Yelp! hides negative reviews for its advertising partners and promotes negative reviews for businesses which refuse to pay for partnership; Yelp! has denied these allegations. *See Yelp: What Business Owners Should Know About It*, SCHEDULING INST.: BLOG (Nov. 14, 2019), https://schedulinginstitute.com/blog/yelp-what-business-owners-should-know. Yelp has also been accused of removing or hiding positive reviews unless a site does business with it. *See* Levitt v. Yelp! Inc., 765 F.3d 1123, 1127–33 (9th Cir. 2014).

137. Raquel Rutledge & Andrew Mollica, *TripAdvisor Removed Warnings About Rapes and Injuries at Mexico Resorts, Tourists Say*, MILWAUKEE J. SENTINEL (Dec. 29, 2017, 1:18 PM CT), https://www.jsonline.com/story/news/investigations/2017/11/01/tripadvisor-removed-warnings-rapes-and-injuries-mexico-resorts-tourists-say/817172001.

138. The extent to which Yelp! does this is a matter of dispute, but the FTC has received thousands of complaints over the practice. *See* Daren Fonda, *Yelp Gets Bad Reviews over Its Business Practices*, KIPLINGER (June 3, 2016), https://www.kiplinger.com/article/spending/t062-c000-s002-yelp-gets-bad-reviews-over-its-business-practices.html.

139. Matthew Dolan, *Auto Awards Clouded by Fees*, WALL ST. J. (May 10, 2010, 12:01 AM ET), https://www.wsj.com/articles/SB10001424052748703404004575198322978785374. For a detailed discussion, see generally Jim Gibson, Reputation Reconsidered (Jan. 26, 2024) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4708040).

140. Gibson, *supra* note 139, at 60.

Review sites operated directly by the companies whose products are reviewed have an even more obvious conflict of interest. For example, Amazon's detailed review system, typically highly regarded, sometimes ignores its own ratings in order to promote its own lower-ranked products over the ones its algorithm recommends.[141] Google likewise ignores its own Page Rank algorithm to engage in self-preferencing—promoting its own verticals like shopping and restaurant reviews over objectively better search results from competitors.[142]

As if all of that wasn't bad enough, you can hire companies to suppress bad reviews for you. Companies like reputation.com specialize in getting information you do not like (true or false) taken off the internet. Other sites engage in "review gating," submitting false reports about bad reviews for their clients.[143] Still others submit fake reviews as a business model.[144] And increasingly fake reviews are being generated automatically by AI.[145] The result is that a system with the potential to inform consumers and facilitate informed decisions has been co-opted to promote the businesses who pay to play the game (or who own the board).

D. DARK PATTERNS AND AUTO-RENEWS

A third way companies raise barriers to competition is by making it easy to accidentally enter into a deal and making it very hard to get out of it. Many of these shady business tactics have been around for decades and take familiar forms: recurring charges that come with the promise that you will pay no money now and can cancel anytime. They rely on the expectation that people won't cancel, and if they try to, these practices make canceling difficult. Indeed, there are well-established patterns designed to make it hard to cancel ongoing subscriptions.[146] Companies let you sign up with a click but make you call to

141. Daniel Konstantinovic, *Amazon Prioritizes Search Results for Its Own Products Above Competitors, per The Markup Report*, EMARKETER (Oct. 18, 2021), https://www.emarketer.com/content/amazon-prioritizes-search-results-its-own-products-above-competitors-per-markup-report; Gibson, *supra* note 139, at 57; Van Loo & Aggarwal, *supra* note 123, at 16; Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1290 (2020).

142. *General Court Confirms Self-preferencing Abuse of Google Shopping*, SIMMONS & SIMMONS (Nov. 23, 2021), https://www.simmons-simmons.com/en/publications/ckwc99r3u1gs00b738mzxax1e/general-court-confirms-self-preferencing-abuse-of-google-shopping.

143. *See* Yelp, Inc. v. ReviewVio, Inc., No. 3:23-cv-06508, 2024 WL 2883668, at *1 (N.D. Cal. June 6, 2024); Gina Kim, *Yelp Accuses Reputation Co. of Suppressing Bad Reviews*, LAW360 (Dec. 19, 2023, 9:33 PM EST), https://www.law360.com/articles/1778709/yelp-accuses-reputation-co-of-suppressing-bad-reviews.

144. Stuart A. Thompson, *Mounting a New Effort to Combat Fake Reviews*, N.Y. TIMES, Nov. 14, 2023, at A1.

145. *See* FTC Order Against AI-Enabled Review Platform Sitejabber Will Ensure Consumers Get Truthful and Accurate Reviews, FTC (Nov. 6, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/11/ftc-order-against-ai-enabled-review-platform-sitejabber-will-ensure-consumers-get-truthful-accurate (reporting consent decree against AI site that submitted reviews in the name of people who hadn't yet received the product).

146. Attila Tomaschek, *Canceling Online Subscriptions Is Confusing, Difficult and Absurd . . . by Design*, CNET (May 2, 2022, 12:29 PM PT), https://www.cnet.com/tech/services-and-software/canceling-online-

cancel.[147] When you call, you will likely spend countless minutes on hold, only to be transferred from person to person who tries to persuade you not to cancel.[148] Other companies charge fees to switch away from their services. Cloud storage providers, for instance, charge you to leave—a very real problem given that they have all your data.[149] Even companies that promise refunds often make it very hard to deliver on those promises, as anyone who has had a flight canceled knows. Moreover, if you end up in a dispute over any of these practices, the company will most likely prevent you from bringing suit, forcing you to arbitration instead, to avoid public accountability.[150]

The internet has only made efforts to lock people into interactions and transactions more sophisticated. Companies invest time and effort designing their websites, not to improve the user experience, but to do the opposite.[151] They make it harder to find what you are looking for, encouraging you to click on buttons that appear to lead to content but, in fact, lead to ads[152] and opening windows while deliberately hiding the "close" button.[153] They write false "clickbait" headlines to lure you to their pages so they can increase their impression count.[154] They add "nudges" to push you to click what they want you to click when you have a choice, requiring more clicks to protect your data than

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subscriptions-confusing-difficult-absurd-by-design (discussing how many companies employ similar "dark patterns" to make it difficult for customers to cancel services).

147. *Id.*

148. *Id.*; *see also* David McCabe, *U.S. Files Suit Against Adobe over the Fees for Software*, N.Y. TIMES, June 18, 2024, at B4 (discussing government suit challenging Adobe's efforts to make it hard to cancel its subscription software services).

149. Google commendably ended this practice, but Microsoft and Amazon continue to do it. *See* Dina Bass, *Google Ends Cloud Switching Fees, Pressuring Amazon and Microsoft*, BLOOMBERG (Jan. 11, 2024, 6:45 AM PST), https://www.bloomberg.com/news/articles/2024-01-11/google-googl-ends-switching-fees-for-cloud-data-pressuring-amazon-microsoft.

150. *See, e.g.*, Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 41 (2015).

151. *See, e.g.*, Harry Brignull, *Dark Patterns: Deception vs. Honesty in UI Design*, A LIST APART (Nov. 1, 2011), https://alistapart.com/article/dark-patterns-deception-vs-honesty-in-ui-design.

152. Eric Ravenscraft, *How to Spot—and Avoid—Dark Patterns on the Web*, WIRED (July 29, 2020, 9:00 AM), https://www.wired.com/story/how-to-spot-avoid-dark-patterns. These "dark patterns that manipulate consumer behaviour are now a pervasive feature of digital markets. Woon C. Koh & Yuan Z. Seah, *Unintended Consumption: The Effects of Four E-commerce Dark Patterns*, 11 CLEANER & RESPONSIBLE CONSUMPTION 100145, 100145 (2023) (showing that less sophisticated users are particularly vulnerable to dark patterns); Amit Zac, Yu-Chun Huang, Amédée von Moltke, Christopher Decker & Ariel Ezrachi, *Dark Patterns and Consumer Vulnerability*, BEHAVIOURAL PUB. POL'Y (forthcoming) (manuscript at 26) (on file https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4547964) (showing that even sophisticated users are affected by dark patterns).

153. *See* Gregory M. Dickinson, *Privately Policing Dark Patterns*, 57 GA. L. REV. 1633, 1637 (2023); *see also* Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*, 72 ALA. L. REV. 1, 14–16 (2020) ("Aided by attention, an array of platforms deploy dark patterns and similar forms of online manipulation to drive decision-making.").

154. *See* Supavich (Fone) Pengnate, Jeffrey Chen & Alex Young, *Effects of Clickbait Headlines on User Responses: An Empirical Investigation*, 30 J. INT'L TECH. & INFO. MGMT. 1, 2 (2021). Alarmingly, almost all of the top twenty Google results for "clickbait headlines" were websites telling you how to write and use clickbait to attract attention. Enshittification indeed.

to allow tracking cookies on websites, for instance.[155] And they go to great lengths to make sure you stay on their page as long as possible, even when you are trying to leave. Facebook, for example, has gone so far as to essentially stop showing users posts that link to external pages because people might follow those links and therefore leave the Facebook site.[156] The upshot of all of this is that, as Gregory Dickinson explains, "[i]t is impossible to navigate today's apps and websites without routinely encountering counterintuitive default settings, pressured choices, and deceptively structured interfaces, all designed to benefit their creators at the expense of the customer."[157]

All of these tactics are designed to make money from users not by giving them what they want, but by *preventing* them from getting what they want. And they succeed; one recent study found that companies can as much as triple their revenues by relying on subscriptions inattentive consumers forget to cancel.[158] Dark patterns and auto-renews are another way of making short-term revenue by imposing search and switching costs, reducing the efficiency of the market.

E. CO-OPTING PRICE INTERMEDIARIES

Incumbent firms have also grown adept at co-opting intermediaries designed to facilitate market competition, just as they have co-opted consumer-friendly innovations like review sites. A great example is pharmacy benefit managers (PBMs). PBMs were set up in response to the radical increase in drug prices driven in part by the manipulation of the patent and regulatory systems mentioned above.[159] The idea was that PBMs would serve as purchasing

155. Midas Nouwens, Ilaria Liccardi, Michael Veale, David Karger & Lalana Kagal, *Dark Patterns After the GDPR: Scraping Pop-Ups and Demonstrating Their Influence*, *in* 'CHI 20: PROC. OF THE 2020 CHI CONFERENCE ON HUM. FACTORS IN COMPUTING SYS. 1, 3 (2020); Dickinson, *supra* note 153, at 1639–40. Empirical evidence suggests that these dark patterns are effective in reducing privacy opt-outs. *See* Chiara Farronato, Andrey Fradkin, & Tesary Lin, Data Sharing and Website Competition: The Role of Dark Patterns 25–26 (Sept. 24, 2024) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4920040).

156. *See* Gracey Joyce, *[Case Study] Where to Place Links for Greater Engagement in Facebook Posts: Based on a Survey of 51,054,216 Posts*, LIGHTSPAN DIGIT., https://lightspandigital.com/blog/case-study-place-links-engagement-facebook-survey (last visited Nov. 22, 2024) (conducting a study that found Facebook posts without external links receive more than double the engagement of similar posts with external links).

157. Dickinson, *supra* note 153, at 1641.

158. Liran Einav, Benjamin Klopack & Neale Mahoney, *Selling Subscriptions* 14 (Nat'l Bureau Econ. Rsch., Working Paper No. 31547, 2023), https://www.nber.org/system/files/working_papers/w31547/w31547.pdf ("Inattention (relative to 'perfect' attention) modestly increases revenues for some services . . . but *triples* revenues for others . . . . It is plausible to suspect that this subscription service would not be viable from a business perspective if not for its subscribers' inattention.").

159. *See* Elizabeth Seeley & Aaron S. Kesselheim, *Pharmacy Benefit Managers: Practices, Controversies, and What Lies Ahead*, THE COMMONWEALTH FUND (Mar. 26 2019), https://www.commonwealthfund.org/publications/issue-briefs/2019/mar/pharmacy-benefit-managers-practices-controversies-what-lies-ahead ("To help manage their pharmaceutical costs, health insurers frequently contract with pharmacy benefit managers (PBMs), third-party administrators that manage the prescription drug benefit on behalf of the insurer. PBMs help health plans negotiate payment rates with manufacturers through the use of formularies and utilization management tools.").

intermediaries, giving pharmacies (and therefore end-payer customers and insurance companies) the benefits of negotiating power.[160]

The reality, however, turned out to be very different. Pharmaceutical companies quickly co-opted PBMs, striking deals in which the pharmaceutical company raises drug prices even further, then gives the PBM a substantial "discount" back to the original, already-high price.[161] The PBM gets paid for obtaining a "discount," while the pharmaceutical company maintains its high price.[162] Insurers pay more, not less, because they also have to pay the PBM for negotiating the "discount."[163] Consumers lose out too because many of these PBM deals come with a promise of exclusivity: in exchange for the supposedly lower price, insurance companies will only fully reimburse for one drug in the class, leaving consumers and doctors unable to obtain more affordable treatment options.[164] And because PBMs drive out independent pharmacies,[165] patients end up with even less choice.

When companies cannot eliminate competition altogether, they have done their best to make it difficult to compete. By perverting technologies designed to assist consumers in finding what they want and switching suppliers, companies have made it harder to compete and have helped lock consumers into products when they would be better off switching.

III. CAPITAL AND LABOR

The third leg of the triad insulating capitalists from market competition involves not consumers but workers. Capitalism is, as its name suggests, focused on encouraging the investment of capital. In theory, capital investment drives employment and economic growth by allowing entrepreneurs to build new companies that, in turn, employ workers, increase productivity, and improve products for consumers. A rising tide lifts all boats, including those carrying workers.

In practice, however, capitalists have found ways to tip the boat, making sure that capital benefits at the expense of labor. Some of that imbalance results from the increasing market power discussed in Part I. Some of it comes from legal efforts to prevent effective bargaining power by employees. And some of it comes from structural ways the law favors capital over labor.

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160. *Id.*

161. *See, e.g.*, Robin Feldman, *Perverse Incentives: Why Everyone Prefers High Drug Prices—Except for Those Who Pay the Bills*, 57 HARV. J. ON LEGIS. 304, 326–27 (2020).

162. *See id.* at 327 ("[T]he drug company can offer a sweeter deal to a PBM, without absorbing the full cost of that sweetener. The drug company collects the same final price for the drug, but the PBM can command a higher fee from the health plan in light of the greater discount.").

163. *See id.* at 326 ("Insurers pay their PBMs based on the extent of the discount that a PBM can negotiate with individual drug companies.").

164. *See id.* at 337–39 (explaining how rebate programs obtained by PBMs have sometimes resulted in insurance plans only covering brand-name medications).

165. See Christopher R. Leslie, *Pharmacy Deserts and Antitrust Law*, 104 B.U. L. REV. (forthcoming 2024).

A. MARKET POWER, EMPLOYEE BARGAINING, AND MERGERS

We have witnessed industry after industry consolidating through a wave of unchecked mergers. As I discussed, this has largely been due to a lack of antitrust enforcement against mergers that threaten to reduce competition.

That increased concentration doesn't just raise prices for consumers. It also reduces wages.[166] In part, that is because of bargaining inequality. Labor unions have declined to a vanishingly small part (6 percent) of the private U.S. workforce[167] while at the same time, corporate concentration is higher than at any time in recent memory[168] Non-unionized employees have fewer options in a more concentrated market, which makes it harder to negotiate better wages or to demand raises. The result is, not surprisingly, that wages have stagnated over the past forty years in real terms even as the return on capital has grown.[169] As labor-management bargaining power has become more unequal, economic growth is no longer benefiting the vast majority of Americans.

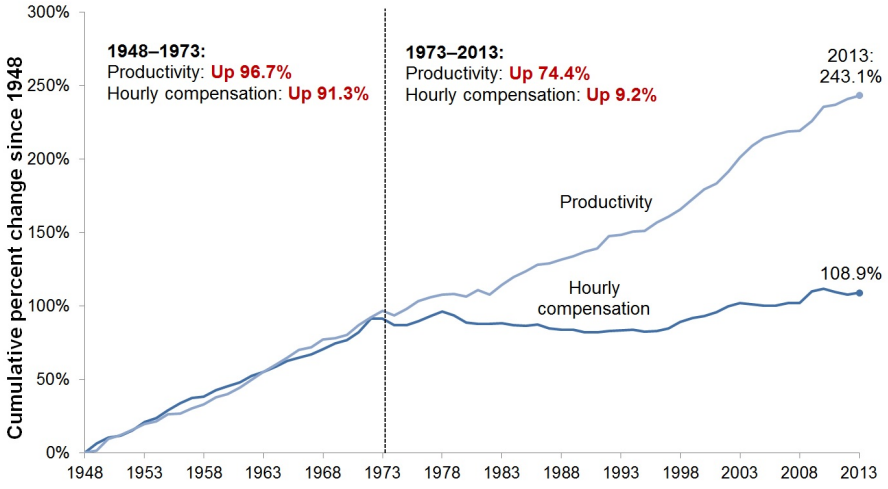
This is not just a structural problem. Our legal rules reinforce this inequality. For instance, a significant reason courts and agencies have allowed mergers to proceed over the past forty years is that they have been persuaded

166. *See* Herbert Hovenkamp, *The Structure of Merger Law*, 100 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 57) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4851593) ("a merger that limits output in a product market can harm labor as well as consumers.").

167. Kerry Ferrell, *Union Membership, Activity, and Compensation in 2022*, U.S. BUREAU OF LAB. STAT. (July 2023), https://www.bls.gov/spotlight/2023/union-membership-activity-and-compensation-in-2022.

168. *See supra* Subpart I.A.

169. LAWRENCE MISHEL, ELISE GOULD & JOSH BIVENS, ECON. POL'Y INSTIT., WAGE STAGNATION IN NINE CHARTS 4 fig.2 (2015);



see also Lancieri et al., *supra* note 10, at 500 ("While median earnings of male full-time workers in the United States grew 36% in real terms from 1960–1980, they did not change at all from 1980–2016." That was not true for workers in other western countries.).

that those mergers will generate "efficiencies."[170] It turns out, however, that most of those "efficiencies" actually reflect the exercise of market power upstream, generally in the labor market.[171]

While antitrust normally focuses on the risk of hurting consumers by exercising monopoly power downstream, a parallel economic theory worries about "monopsony," or the exercise of buyer market power against employees and suppliers.[172] Just as a monopoly can reduce output and raise prices for consumers, a monopsony can reduce demand for labor and lower wages below the market-clearing price.[173] The effects largely parallel those with monopoly. Monopsony is inefficient because it reduces production and employs fewer people at lower wages than would be justified by market demand. While a monopsonist drives wages down, because it has market power, it doesn't pass those lower wages on in the form of lower prices to consumers, as a competitive firm might.[174] Rather, the monopsonist takes the "savings" as profit, just as a monopolist does when it reduces output and raises prices.[175] In fact, things are even worse than that. A firm with monopsony power will act as if its marginal costs are higher, not lower, in the downstream market. As a result, while wages go down, the firm makes business decisions as if its costs have gone up, reducing labor inputs and therefore reducing downstream output.[176]

But in our modern antitrust world, we have all but forgotten the problems with monopsony that parallel the problems with monopoly.[177] There are very few buyer market power cases and virtually none that involve labor as opposed

170. *See* Herbert Hovenkamp, *Selling Antitrust*, 73 HASTINGS L.J. 1621, 1625–28 (2022) (discussing how the "consumer welfare" theory promoted by Robert Bork has influenced many to believe that "any efficiencies associated with a firm's size are very likely to outweigh any restriction of output on the consumer welfare scale" (internal citation omitted)); Patrice Bougette, Marc Deschamps & Frédéric Marty, *When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law*, 16 ENTER. & SOC'Y 313, 341 (2015) ("[T]he diffusion of Chicago models first affected the enforcement agencies before the Supreme Court. . . . From that time on, mergers have been seen as efficiency enhancers, benefiting the competitiveness of firms and consumers who enjoy lower prices.").

171. Glick et al., *supra* note 51, at 792 ("'[C]laimed "efficiencies" premised on a reduction in buy-side competition [such as monopsony or increased power in bilateral bargaining] are not efficiencies at all.' . . . an 'efficiency' which, for *any* reason, even in a perfectly competitive input market, reduces economic rent in that market, overstates 'efficiency' because it does not account for the reduction in the input market's surplus." (footnote omitted)).

172. *See* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549–53 (2018) (discussing the intellectual history of monopsony); ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 1 (2010).

173. *See* Naidu et al., *supra* note 172, at 556.

174. *See* Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting Out-of-Market Benefits*, 90 U. CHI. L. REV. 273, 281 (2023) ("The classical monopsonist realizes that if it restricts the number of workers it hires, it will be able to pay less to those fewer hired workers, and it calculates its marginal cost of labor based on this assumption. As a result, it maximizes profits by setting a lower wage and hiring fewer workers.").

175. *See id.*

176. *See* BLAIR & HARRISON, *supra* note 172, at 48.

177. Eric Posner is one of the few who has been calling attention to this problem. *See, e.g.*, Naidu et al., *supra* note 172, at 559; Hovenkamp, *supra* note 170, at 1623; Alexander & Salop, *supra* note 174, at 280.

to suppliers.[178] The creation of monopsony power has been recharacterized not as an antitrust harm but as an "efficiency" that allows the merged firm to underpay workers and capture the resulting profit.[179] A focus on "consumer welfare" rather than social welfare has come to dominate antitrust, largely as a historical accident rather than for any plausible economic reason.[180] The result is that antitrust law not only doesn't stop efforts to create labor or supplier monopsonies; it affirmatively encourages them.

That is particularly problematic because labor monopsonies transfer money from poorer people (workers) to richer ones (corporations and shareholders).[181] While the Chicago School approach to antitrust focuses on market efficiency, it makes the decidedly unrealistic assumption that rich people and poor people value an additional dollar equally. They don't. The diminishing marginal utility of money is well established.[182] Ignoring it makes for bad antitrust policy; affirmatively preferencing transfers from the poor to the rich makes for even worse policy.

B. AGREEMENTS TO PREVENT WAGE COMPETITION

Companies haven't stopped at monopolizing labor markets and reducing wages. They regularly enter into contracts designed to prevent employees from changing jobs. Some of those agreements do so directly; more than 20 percent of the American workforce are subject to noncompete agreements that literally prevent them from quitting their job and going to work for a competitor, generally for a period of one or two years.[183] Many noncompetes even bind low-wage employees, such as Jimmy John's sandwich makers, who aren't developing or using trade secrets.[184] Noncompetes are sometimes enforceable even if the employee doesn't leave voluntarily; in some states, a company can fire an employee and still prevent them from taking another job.[185]

178. A rare exception is *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 317 (2007). The current FTC action against Amazon promises to be another. *See* Press Release, *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, FTC (Sept. 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power.

179. *See* Alexander & Salop, *supra* note 174, at 308–09; Glick et al., *supra* note 51, at 792–96.

180. *See* Mark Glick & Darren Bush, *Breaking Up Consumer Welfare's Antitrust Policy Monopoly*, 56 SUFFOLK U. L. REV. 201, 203–07 (2023).

181. *See* Laura Alexander, Note, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1616–17 (2007).

182. Glick & Bush, *supra* note 180, at 222–25; Glick et al., *supra* note 35, at 780–86.

183. *Non-Compete Clause Rulemaking*, FTC (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

184. *See* Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113, 122 (2022) ("The sandwich chain Jimmy John's included a broad non-compete clause in the hiring packet given to store employees.").

185. *See* Kenneth J. Vanko, "*You're Fired! And Don't Forget Your Non-Compete": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 1–2 (2002) (discussing the different approaches different states have towards the enforceability of noncompetes in the case of termination).

While California and an increasing number of states refuse to enforce noncompetes,[186] many other states do enforce them[187] The result is depressed wages and reduced employee mobility.[188] And while noncompetes are theoretically supposed to protect investments in innovation, evidence shows that they reduce innovation by making it harder for an employee with a good idea to start a new company.[189] In fact, innovation has flourished in states that ban noncompetes compared to those that enforce them.[190] Furthermore, an alarming number of employees are required to sign noncompetes even in states where they are illegal.[191] Employees may not know they are illegal or may not have the time and money to challenge them, so these illegal contracts still deter people from changing jobs.[192]

Even without noncompetes, employers also frequently require employees to sign nonsolicitation agreements that prevent them from hiring their fellow employees or working for the clients they had at a former firm.[193] They even impose "stay or pay" clauses that require employees to pay tens of thousands of dollars in order to leave their jobs—a particularly noxious form of exit tax.[194]

Noncompetes are not the only agreements that prevent wage competition. Many employees (even in states that ban noncompetes) are subject to nondisclosure agreements (NDAs) designed to prevent the loss of trade

186. *See* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 296 (Cal. 2008).

187. *See* 1 PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 134 (2023).

188. *See* MARK A. LEMLEY & ORLY LOBEL, SUPPORTING TALENT MOBILITY AND ENHANCING HUMAN CAPITAL: BANNING NONCOMPETE AGREEMENTS TO CREATE COMPETITIVE JOB MARKETS 2 (2021), https://fas.org/wp-content/uploads/2021/01/Microsoft-Word-Supporting-Talent-Mobi...mpetitive-Job-Markets_LobelLemley.pdf; EVAN STARR, ECON. INNOVATION GRP., THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS 6–11 (2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf (collecting studies).

189. *See, e.g.*, On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, HARV. BUS. REV. (Jan.–Feb. 2014), https://hbr.org/2014/01/how-noncompetes-stifle-performance; Matt Marx & Lee Fleming, *Non-compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 1, 51 (2012) ("[I]n the biotech industry, the enforcement of non-competes discouraged the founding of new firms following liquidity events such as acquisitions or initial public offerings, which should enable senior executives and key technical personnel to leave and start a new company."); Vaheesan & Buck, *supra* note 184, at 161 ("Relatively easy labor mobility across firms promotes innovation and invention."); Matthew S. Johnson, Michael Lipsitz & Alison Pei, *Innovation and the Enforceability of Noncompete Agreements* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31487, 2023).

190. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 602–13 (1999) (arguing that California's refusal to enforce noncompetes is a primary reason why it became an innovation leader in the United States). For a more general overview of the differences between U.S. states with and without noncompetes, see ANNALEE SAXENIAN, REGIONAL ADVANTAGE (1st ed. 1996).

191. *See* Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L., ECON. & ORG. 633, 634 (2020).

192. *Id.* at 665 ("[A] noncompete is associated with both a longer tenure and a reduced propensity to leave for a competitor even when the noncompete in question is unenforceable under state law.").

193. *See* MENELL ET AL., *supra* note 187, at 125–27.

194. *See* Robin Kaiser-Schatzlein, *Pay Thousands to Quit Your Job? Some Employers Say So.*, N.Y. TIMES (Nov. 20, 2023), https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html.

secrets.[195] Camilla Hrdy and Christopher Seaman have shown that many of those NDAs actually reach far beyond trade secrets, precluding the disclosure of any information about the employer.[196]

Most outrageously, a large number of companies (including most of the major tech companies) have entered into no-poach agreements in which they promised not to hire each other's employees.[197] Those agreements are unquestionably illegal per se under any rational antitrust system; they are agreements not to compete.[198] Indeed, they are likely criminal.[199] But that didn't stop people like Steve Jobs and other highly-placed tech executives from deciding that they didn't want to face competition for their employees. [200]After all, if employees could change jobs at will, they could negotiate higher salaries. While the antitrust agencies have started cracking down on no-poach agreements, courts have been surprisingly resistant to enforcing the law,[201] and enforcing the law doesn't seem to have stopped the practice.[202] Companies seem willing to break the law if they can drive down employee wages by doing so.

C. TAXING LABOR, NOT CAPITAL

Finally, our tax system fundamentally encourages investment in capital, not labor. We tax revenue from capital at a substantially lower rate than revenue

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195. Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 YALE L.J. 669, 683 (2024) ("Confidentiality agreements are extremely common in the workplace. While comprehensive data is lacking and usage varies by industry, it is assumed confidentiality agreements 'are widely and increasingly used in employment contracts of all types.'").

196. *See id.* at 681.

197. *See* Tom Krazit, *DOJ Settles No-recruit Claims Against Tech Companies*, CNET (Sept. 25, 2014, 10:00 AM PDT), https://www.cnet.com/culture/doj-settles-no-recruit-claims-against-tech-companies.

198. *Cf.* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 704–05 (7th Cir. 2023) (reversing dismissal of per se claim in franchise no-poach agreement).

199. *See* Cooper Spinelli & Eric A. Tate, *No-Poach Case Alert: DOJ's No-Poach Strategy Dealt Another Blow as Court Tosses Case Before It Reaches Jury*, JDSUPRA (May 12, 2023), https://www.jdsupra.com/legalnews/no-poach-case-alert-doj-s-no-poach-3641250/#:~:text=Overview%20of%20DOJ%20No%2DPoach%20Enforcement&text=Criminal%20liability%20under%20the%20Sherman,to%2010%20years%20in%20prison.&text=The%20DOJ%20brought%20its%20first,no%2Dpoach%20agreements%20in%202021 (listing several cases in which the Department of Justice has brought criminal charges in connection with no-poach agreements).

200. Alex Wilhelm & Sarah Buhr, *Apple, Google, Other Silicon Valley Tech Giants Ordered To Pay $415M in No-Poaching Suit*, TECHCRUNCH (Sept. 3, 2015, 10:02 AM PDT), https://techcrunch.com/2015/09/03/apple-google-other-silicon-valley-tech-giants-ordered-to-pay-415m-in-no-poaching-suit.

201. Matt Modell & Harlan Rosenson, *DOJ Suffers Historic Defeat in its Fourth Failed Criminal No-Poach Prosecution but Shows No Sign of Letting Up Enforcement*, NAT'L L.J. (May 24, 2023, 9:00 AM), https://www.law.com/nationallawjournal/2023/05/24/doj-suffers-historic-defeat-in-its-fourth-failed-criminal-no-poach-prosecution-but-shows-no-sign-of-letting-up-enforcement; Bryan Koenig, *DOJ Abandons Last Remaining No-Poach Prosecution*, LAW360 (Nov. 14, 2023, 6:10 PM EST), https://www.law360.com/articles/1766482/doj-abandons-last-remaining-no-poach-prosecution. For a discussion of the case law, see Eric A. Posner & Sarah Roberts, *No-Poach Antitrust Litigation in the United States* (U. Chi. Coase-Sandor Inst. L. & Econ., Working Paper No. 933, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4620378.

202. *See* Rochella Davis et al., *No-poach agreements—Closing the Enforcement Gap*, CONCURRENCES: COMPETITION L. REV., Nov. 2023, at 2–4.

from wages.[203] Not surprisingly, our society encourages investing in buildings and computers over investing in employees. This system compounds the problems I just discussed, driving down wages by rewarding companies for replacing employees with technology.

The tax discrepancy is one reason why we have lost the middle class, concentrating all the returns to economic growth in capital (and the top 1 percent) at the expense of the vast majority of Americans.[204] And it is one of the reasons for the moral panic over new technologies that threatens to displace workers, from self-driving cars to generative AI.[205] Workers rightly worry that we have set up economic incentives to reward capitalists for eliminating their jobs. And when they do, employees will find it harder to get other jobs, both because they may be bound by noncompetes or their like and because there are fewer competitors to work for.

Taxing labor more than capital is fundamentally regressive. Rich people pay much less in taxes than poor people, largely because their income comes in the form of capital gains taxed at a lower rate.[206] While in theory, the lower tax rate for capital gains is justified by the economic value of capital reinvestment, in practice, that is no longer true. Vast swaths of capital gains are passive, reflecting the holding of stock or real property in the hands of rich people and corporations that do nothing productive with them.[207] Rewarding the rich both encourages the incentives of capitalists to avoid competition and amplifies the negative effects on the working class.

A robust market does not only need competition to provide goods and services to customers. It also requires vigorous competition in the labor market. However, companies, aided by government policy, have found ways to short-circuit the labor market, increasing their own returns at the expense of their employees.

IV. FREEING THE MARKET

The co-opting of capitalism didn't happen by accident. The drive by capitalists to eliminate the threat of market competition may or may not be

203. Ingraham, *supra* note 10.

204. *See* Nick Buffie, *5 Little-Known Facts About Taxes and Inequality in America*, CTR. FOR AM. PROGRESS (Aug. 30, 2022), https://www.americanprogress.org/article/5-little-known-facts-about-taxes-and-inequality-in-america (explaining how the lower tax rate for capital gains and qualified dividends contribute to income inequality).

205. *See* Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 510–15 (2015) (discussing the implications of an economy with decreases scarcity and need for labor).

206. *See* Zach Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 547 (2022).

207. Anthropic's Claude 3.5 Sonnet estimates that 30% of U.S. wealth is held in the form of stock and another 35-40% is held in real estate. Both are passive investments. They aren't producing new investment in the way that a bank loans money for development or investment in building a factory does. *See* Dani Lynn Robison, Stock Market vs. Real Estate: The Right Approach for Passive Investors, FORBES (Apr. 11, 2018, 8:00 AM EDT), https://www.forbes.com/sites/forbesrealestatecouncil/2018/04/11/stock-market-vs-real-estate-the-right-approach-for-passive-income-investors (describing both as "passive investments").

inherent in capitalism itself. But even if it is inevitable for capitalists to try to rig the game, giving in is not. We have the tools to ensure that competition flourishes in a free market, and a surprising number of them are legal tools. In many cases, they are tools we have long used but have abandoned in the past several decades. We just need to pick them up again to ensure that the free market actually works.

We should begin by ensuring that a competitive market has what it needs most: competitors. Mergers among competitors should be disfavored. The empirical data suggests that most of the claimed efficiencies of such mergers are either illusory or in fact reflect disruption in an upstream supply market[208] Mergers between companies with significant market shares and even small competitors should be presumptively illegal. Indeed, perhaps the only legitimate justification for a large company buying its competitor is if it can show that otherwise it would have gone out of business.[209] Even then, a competitor purchase should be a last resort after other merger options have failed.[210]

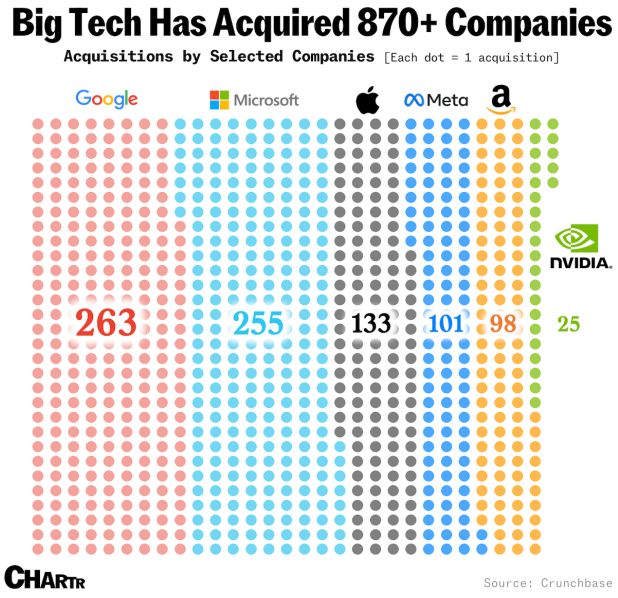
Courts and agencies also need to take a closer look at a series of small transactions that have flown under the radar. The six largest internet companies have acquired at least 870 companies between them.[211] Even if no single merger

208. *See* Glick et al., *supra* note 51, at 792–93.

209. Lemley & McCreary, *supra* note 45, at 96 ("[I]n many cases, the alternative to merger is not continued competition by the acquired firm but watching that firm fail.").

210. *Id.* at 97 ("We propose applying this principle to create a strong rebuttable presumption against incumbent acquisitions of direct competitors and a weak rebuttable presumption against incumbent acquisitions of other firms.").

211. Chartr (@chartrdaily), *Where Did All the Stocks Go?*, INSTAGRAM, https://www.instagram.com/p/C6eM3dYo73d (last visited Nov. 22, 2024).



in a private equity roll-up or a big tech startup acquisition strategy seems to pose an imminent competitive threat, the combination of hundreds of such acquisitions is a problem.[212]

The Biden Administration has shown an admirable willingness to challenge mergers that would have passed without question in prior administrations, including going after private equity roll-ups.[213] The Department of Justice and the FTC have issued commendable new merger guidelines that will subject problematic mergers to much more serious scrutiny.[214] But the agencies don't themselves get to decide what the law is. Time and again in the last two years, the government has brought meritorious merger challenges, only to lose in court.[215]

The hostility of courts to those challenges suggests that we need to educate courts steeped in decades of Chicago ideology. That is a long-term process. Congress may need to help it along by passing laws that make it harder for companies to buy their competitors, creating a presumption against horizontal mergers, or even placing a flat ban on mergers by companies above a certain size or market share.[216] Senator Klobuchar's Competition and Antitrust Law Enforcement Reform Act (CALERA Act) would do just that.[217] We should drastically cut back on merger law's reliance on efficiency claims, distinguishing true productive efficiencies from the far more common claim that a merger will reduce labor costs by creating a monopsony that is actually economically inefficient.[218] And we need to be willing to revisit the worst

212. *See* Robin C. Feldman & Mark A. Lemley, *Atomistic Antitrust*, 63 WM. & MARY L. REV. 1869, 1873 (2022).

213. *See, e.g.*, FTC v. U.S. Anesthesia Partners, Inc., No. 4:23-CV-03650, 2024 WL 2137649, at *8–9 (S.D. Tex. May 13, 2024) (allowing antitrust case to proceed against rolled-up entity, though not against the private equity firm that funded and profited from it); Jade Martinez-Pogue, *FTC Chair Decries PE's Healthcare Impacts as Probe Starts*, LAW360 (Mar. 5, 2024, 6:53 PM EST), https://www.law360.com/articles/1797967/ftc-chair-decries-pe-s-healthcare-impacts-as-probe-starts.

214. *See generally* U.S. DEP'T JUST. & FTC, MERGER GUIDELINES (2023) (discussing the new merger guidelines as of Dec. 18, 2023).

215. To be fair, that record may be turning around with government wins in challenges to the Illumina-Grail and JetBlue-Spirit mergers, see *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1061–62 (5th Cir. 2023), *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 163 (D. Mass. 2024), and several other recent deals fell apart without the need for litigation after the government challenged them. Matt Stoller, *Anti-Trust Hurdles Awaiting 'Warnermount,'* THE ANKLER (Dec. 21, 2023), https://theankler.com/p/anti-trust-hurdles-awaiting-warnermount. And the sheer number of merger challenges—the largest in recent history—has made mergers a riskier prospect than they were four years ago. That's a good thing. *See* Leah Nylen, *FTC's Khan and DOJ's Kanter Beat Back Deals at Fastest Clip in Decades*, BLOOMBERG (Dec. 18, 2023, 6:30 AM PST), https://www.bloomberg.com/news/articles/2023-12-18/biden-antitrust-enforcers-set-new-record-for-merger-challenges.

216. *See* Morton et al., *supra* note 6, at 66–68.

217. S. 225, 117th Cong. (2021).

218. *See* Eric A. Posner, *Introduction to the Symposium on Labor Market Power*, 90 U. CHI. L. REV. 261, 262 (2023) ("Monopsony like monopoly thus results in two types of harm—deadweight loss (or loss of economic efficiency) and maldistribution.").

mergers allowed during the period of underenforcement, like Facebook's purchase of Instagram and LiveNation's purchase of Ticketmaster.[219]

At a bare minimum, Congress and the agencies should impose severe limits on the current practice of entering into a facially anticompetitive merger while promising to behave in ways that mitigate some of the merger's harmful effects. These conduct-based remedies have become increasingly popular as antitrust reviews of mergers have become more permissive.[220] But conduct-based remedies almost never work, and there are plenty of examples of companies facing no consequences after going back on their promises after the merger.[221] We should favor structural remedies over conduct remedies, stopping mergers when we can. Even if we can't, the conduct promises should be binding; a failure to abide by the promise should automatically invalidate the merger, no matter the inconvenience to the company that broke the rules. Will that be hard? Sure. That's a reason not to allow the merger in the first place. But if we aren't willing to do that, it ought to be the merging companies who bear the risk of breaking their promises, not the rest of us.

Next, we should limit the power that companies that hold chokepoints have over competition in adjacent markets. The ideal way to do this is to open industry standards to competition, making the standards themselves available to all comers on equal terms—or at least allowing what Cory Doctorow calls "adversarial interoperability" through practices like scraping price data and linking to a user's social graph from a competing company.[222] Some things may be so important that we treat them as infrastructure to which everyone must have access, as we currently do with phone and text protocols.[223] For others, we can target the effects of such chokepoint control. We could ban vertical integration by the owners of standards altogether, as FTC Chair Lina Khan has suggested.[224] Alternatively, we could ban self-preferencing by vertically integrated companies

219. Both are currently the subject of antitrust challenges. *See* FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 56 (D.D.C. 2022); FTC v. Meta Platforms, Inc., No. 20-3590, 2024 WL 4772423, at *6 (D.D.C. Nov. 13, 2024) (sending case challenging Instagram and WhatsApp mergers to trial); Complaint at 7, United States v. Live Nation Ent., Inc., No. 24-cv-3973 (S.D.N.Y. May 23, 2024) (No. 1). For discussion of the need for breakups in certain cases, see Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1958 (2020).

220. *See* Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L.J. 1, 4 (2023) (documenting the rise of successful efforts to persuade courts to accept an anticompetitive merger with proposed modifications); *see generally* Steven C. Salop & Jennifer Sturiale, *Fixing "Litigating the Fix*,*"* 85 ANTITRUST L.J. 619, 653 (2024) (discussing effectiveness of conduct-based remedies).

221. *See* Salop & Sturiale, *supra* note 220; KWOKA, *supra* note 36, at 108–09.

222. Cory Doctorow, *Adversarial Interoperability: Reviving an Elegant Weapon from a More Civilized Age to Slay Today's Monopolies*, ELEC. FRONTIER FOUND. (June 7, 2019), https://www.eff.org/deeplinks/2019/06/adversarial-interoperability-reviving-elegant-weapon-more-civilized-age-slay. Adversarial interoperability refers to practices like reverse engineering or data scraping to make a product compatible with another company's product without the permission of the other company.

223. *See* BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 145, 319 (2012).

224. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1015 (2019).

that own standards, as a bill considered in the last Congress would have done.[225] though doing so is more challenging to enforce than a complete ban. Even if we don't do either, we should be less willing to allow vertical mergers by incumbents. If we do allow those mergers, we could condition them on a robust mandate that the company allow interoperability and avoid self-preferencing. Perhaps we could go even further, introducing a general interoperability principle in regulated industries.[226] Finally, we could restore the net neutrality mandate that was the informal norm for the early decades of the internet and the rule during the Obama administration.[227] The goal, as Jim Speta puts it, is "to address concerns about the currently dominant platforms by using law to make it easier to have *more platforms*."[228]

Third, we should protect the rights of resale and repair. Courts and, if necessary, Congress, must hold the line against efforts to twist IP law to prevent the resale of physical products. Congress should amend the Copyright Act to extend that resale right to digital goods as well. States should enact right to repair legislation of the sort that has recently passed in Colorado, Massachusetts, Minnesota, and California.[229] And we should target efforts that discourage repair that is permissible. The FTC recently threatened companies over claims that repairs would void their warranty, for example.[230] Protecting the rights to repair and resell used goods not only preserves a form of competition, but it also helps the environment. Our culture of making disposable goods that we replace with new ones every few years may benefit the companies that sell those new goods, but it's not sustainable in a world of diminishing resources.[231]

Fourth, we should limit or eliminate regulatory exclusivity and licensing barriers to entry wherever possible. Regulation for health and safety is often a

225. American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022).

226. *See* Fiona M. Scott Morton, Gregory S. Crawford, Jacques Crémer, David Dinielli, Amelia Fletcher, Paul Heidhues & Monika Schnitzer, *Equitable Interoperability: The "Supertool" of Digital Platform Governance*, 40 YALE J. ON REG. 1013, 1016 (2023) (arguing that interoperability can help drive competition in industries that naturally tend towards concentration).

227. *See supra* note 65 and accompanying text.

228. James B. Speta, *The Past's Lessons for Today: Can Common Carrier Principles Make for a Better Internet?*, 106 MARQ. L. REV. 741, 743 (2023).

229. *See* WBZ-News Staff, *Right to Repair Law Can Now Be Enforced in Massachusetts as Feds Reverse Course*, CBS NEWS (Aug. 23, 2023, 5:59 AM EDT), https://www.cbsnews.com/boston/news/right-to-repair-law-massachusetts-auto-repair-nhtsa; Kevin Purdy, *Minnesota Enacts Right-To-Repair Law That Covers More Devices Than Any Other State*, ARS TECHNICA (May 25, 2023, 9:35 AM), https://arstechnica.com/gadgets/2023/05/minnesota-enacts-right-to-repair-law-that-covers-more-devices-than-any-other-state; Victoria Song, *California Passes Right-To-Repair Act Guaranteeing Seven Years of Parts for Your Phone*, THE VERGE (Sept. 13, 2023, 9:01 AM PDT), https://www.theverge.com/2023/9/13/23871712/california-right-to-repair-act-sb-244; H.B. 1121, 74th Gen. Assemb., Reg. Sess. (Colo. 2024). For further discussion about the right to repair, see generally, PERZANOWSKI, *supra* note 96, and Aaron Perzanowski, *Mandating Repair Scores*, 37 BERKELEY TECH. L.J. 1123 (2022).

230. Seena Gressin, FTC Says Companies' Warranty Restrictions Were Illegal, FTC (July 7, 2022), https://consumer.ftc.gov/consumer-alerts/2022/07/ftc-says-companies-warranty-restrictions-were-illegal.

231. *See* Dianna Cohen, *Single Use Plastic Explained, Health & Environmental Impacts of Single-Use Plastic*, PLASTIC POLLUTION COAL., https://www.plasticpollutioncoalition.org/guides/singleuseplastics/healthimpacts (last visited Nov. 22, 2024).

good thing; regulation that creates an exclusive supplier almost never is. Even where we need exclusive rights to encourage invention, as in the pharmaceutical industry, we should police the boundaries of those rights carefully. The law should not be afraid to deprive companies of patents or regulatory exclusivity if they abuse those exclusive rights. The Biden Administration has begun using its new power under the Inflation Reduction Act (IRA) as the largest buyer of drugs to negotiate prices for a few drugs, something every other country has been doing for decades.[232] But we can still do more to fix the tangled mess that pharmaceutical regulatory exclusivity has become. We should reform the patent system to prevent evergreening, adopting Robin Feldman's "one and done" proposal under which a company gets a patent for a term of years but no power to artificially extend it with follow-on patents.[233] We should aggressively target other efforts to use regulatory capture to delay generic drug entry, as the FDA has begun to do by targeting the false listing of irrelevant patents in the FDA's "Orange Book."[234] That targeting must encompass more than just injunctions against market delay years after the fact; the government needs to be able to force disgorgement of profits obtained through unlawful acts.[235]

Fifth, once we have competitors, we need to make the process of actually competing swift and painless. The internet offers powerful tools in this regard, but they have been co-opted. Here too, regulations that make the market work can help. For example, regulators can ensure price transparency by making it easy to find the prices of goods and preventing companies from hiding additional fees and costs.[236] They can target misbehavior by price intermediaries like PBMs that actually raise rather than lower drug prices, as the FTC has recently done.[237] They can regulate the behavior of review sites, requiring disclosure of any reviews that are connected to the company being reviewed and any

232. Press Release, *HHS Selects the First Drugs for Medicare Drug Price Negotiation*, U.S. DEP'T HEALTH & HUM. SERVICES (Aug. 29, 2023), https://www.hhs.gov/about/news/2023/08/29/hhs-selects-the-first-drugs-for-medicare-drug-price-negotiation.html.

233. *See* Robin Feldman, *'One and Done' for New Drugs Could Cut Patent Thickets and Boost Generic Competition*, STAT NEWS (Feb. 11, 2019), https://www.statnews.com/2019/02/11/drug-patent-protection-one-done; S. Sean Tu & Mark A. Lemley, *What Litigators Can Teach the Patent Office About Pharmaceutical Patents*, 99 WASH. U. L. REV. 1673, 1713–15 (2022).

234. *See* Christopher Yasiejko, *Teva, Boehringer Drugs Among FTC Targets Threatening Exclusivity*, BLOOMBERG L. (Nov. 7, 2023, 3:55 PM PST), https://news.bloomberglaw.com/ip-law/teva-boehringer-drugs-among-ftc-targets-threatening-exclusivity. For other suggestions to target regulatory gaming, see Jorge L. Contreras & Arti K. Rai, *Orange Book Over-Declaration of Pharmaceutical Patents: The Advantages of Ex Ante Over Ex Post Review*, HEALTH AFFS. (Dec. 13, 2023), https://www.healthaffairs.org/content/forefront/orange-book-over-declaration-pharmaceutical-patents-advantages-ex-ante-over-ex-post, and Michael A. Carrier, *A Simple Solution to the Problem of "Product Hopping*," HARV. HEALTH POL'Y REV., Dec. 23, 2021, at 1, 2–3.

235. The Supreme Court took away the FTC's authority to order disgorgement in *AMG Cap. Mgmt. v. FTC*, 593 U.S. 67, 70 (2021). But Congress could and should restore it.

236. *See* Rory Van Loo, *Inflation, Market Failures, and Algorithms*, 96 S. CAL. L. REV. 825, 871 (2023) (proposing a "Price Transparency Act").

237. Press Release, *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices*, FTC (Sept. 20, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-sues-prescription-drug-middlemen-artificially-inflating-insulin-drug-prices.

payments the review site receives. Disclosure rules have worked well in other industries, from food labeling to energy efficiency—as long as they are quite prominent[238] They can ban fake reviews altogether, as the FTC has just done.[239] And they can regulate "drip pricing" by requiring full disclosure of "junk fees" upfront, as the FTC has recently proposed doing.[240] California has recently required full disclosure of hotel fees[241] and prevented companies to say you can "buy" something they reserve the right to take away from you.[242]

Regulators can also strictly control auto-renewals and junk fees and make it easier to cancel subscriptions. The FTC has recently finalized new rules to do just that.[243] Both the FTC and the Department of Justice have recently brought suits against large tech companies alleging they deliberately make it hard to cancel their subscription services.[244] The Consumer Financial Protection Bureau (CFPB) adopted a new rule restricting credit card late fees.[245] The CFPB can restrict anticompetitive patterns by limiting the use of some particularly deceptive practices and by requiring the identification of advertisements and conspicuous links. Once again, the FTC is on the job.[246] The Biden

238. *See* Dariush Mozaffarian & Siyi Shangguan, *Do Food and Menu Nutrition Labels Influence Consumer or Industry Behavior?*, STAT NEWS (Feb. 19, 2019), https://www.statnews.com/2019/02/19/food-menu-nutrition-labels-influence-behavior.

239. Press Release, *Federal Trade Commission Announces Final Rule Banning Fake Reviews and Testimonials*, FTC (Aug. 14, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials.

240. Press Release, *Biden-Harris Administration Announces Broad New Actions to Protect Consumers From Billions in Junk Fees*, WHITE HOUSE (Oct. 11, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees.

241. Derek M. Norman, In *California, Hotels and Rentals Must Reveal Fees Upfront. What Does That Mean for You?*, N.Y. TIMES (June 19, 2024), https://www.nytimes.com/2024/06/19/travel/california-hotel-rentals-junk-fees.html.

242. Emma Roth, *California's New Law Forces Digital Stores to Admit You're Just Licensing Content, Not Buying It*, THE VERGE (Sept. 26, 2024, 6:53 AM PDT), https://www.theverge.com/2024/9/26/24254922/california-digital-purchase-disclosure-law-ab-2426.

243. Press Release, *Federal Trade Commission Announces Final "Click-to-Cancel" Rule Making It Easier for Consumers to End Recurring Subscriptions and Memberships*, FTC (Oct. 16, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/federal-trade-commission-announces-final-click-cancel-rule-making-it-easier-consumers-end-recurring.

244. Press Release, *FTC Takes Action Against Amazon for Enrolling Consumers in Amazon Prime Without Consent and Sabotaging Their Attempts to Cancel*, FTC (June 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their; McCabe, *supra* note 148 (discussing U.S. case against Adobe).

245. Jon Hill, *CFPB Adopts Rule to Slash Credit Card Late Fees By Billions*, LAW360 (Mar. 5, 2024, 7:02 AM EST), https://www.law360.com/articles/1809881/cfpb-adopts-rule-to-slash-credit-card-late-fees-by-billions.

246. Press Release, *FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers*, FTC (Sept. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers; Lindsay Wilson, Note, *Is There a Light at the End of the Dark-Pattern Tunnel?*, 91 GEO. WASH. L. REV. 1048, 1053 (2023); Chris O'Malley, *FTC Sues Doxo, Signaling 'Dark Patterns' Crackdown Still Underway*, NAT'L L.J. (May 7, 2024, 5:21 PM), https://www.law.com/nationallawjournal/2024/05/07/ftc-sues-doxo-signaling-dark-patterns-crackdown-still-underway-398-131380; *cf.* Dickinson, *supra* note 153, at 1636 (recommending the use of private tort suits to combat dark patterns).

Administration has also taken positive steps to target autorenewals and practices that make refunds hard or require them to be in credits for future purchases.[247] Government can regulate the misbehavior of intermediaries like pharmacy benefit managers. The FTC is proposing to do that too.[248] If they don't ban vertical integration by monopolists, they can impose rules regulating self-preferencing by those monopolists.[249] The FTC is aggressively taking positive steps on consumer protection issues, using an expansive view of its authority to prevent unfair competition. But right now, the FTC can't require bad actors to disgorge their ill-gotten gains; they can only order future bad behavior to stop.[250] If the FTC is hamstrung by courts,[251] Congress may have to step in to tackle some of these issues.

None of this will completely prevent the enshittification of the internet. The only real way to do so is to ensure competition among platforms and restrict or eliminate vertical integration or preferencing. But at a minimum, we can regulate the means by which dominant platforms line their own pockets by making it harder, not easier, for consumers to find what we are looking for.

Sixth, we should ban agreements designed to make it harder for employees to take new jobs. Noncompete agreements and overbroad NDAs and nonsolicitation agreements do far more social harm than good, and we should ban them, as the FTC recently proposed.[252] No-poach agreements are already illegal,[253] but we should be even more aggressive in enforcing the law. And the government should crack down on union-busting efforts by companies eager to prevent efforts to give workers more bargaining power.[254]

Seventh, we need to fix our tax system. The historic justification for favoring capital over labor is that capital investment will increase productivity, benefiting labor and consumers too. That's no longer happening. Companies and

247. *See, e.g.*, Hannah Sampson, *What Fliers Need to Know About New Refund Rules for Airlines*, WASH. POST. (Apr. 24, 2024, 7:26 PM EDT), https://www.washingtonpost.com/travel/2024/04/24/canceled-flight-refund-lost-bag-rules.

248. Celine Castronuovo, *FTC Walks Back Years of Support for Pharmacy Benefits Middlemen*, BLOOMBERG L. (July 20, 2023, 10:40 AM PDT), https://news.bloomberglaw.com/health-law-and-business/ftc-adopts-policy-statement-rescinding-drug-middlemen-advocacy.

249. Khan, *supra* note 224, at 981; Lina M. Khan, Chair, FTC, Remarks at the Charles River Associates Conference (Mar. 31, 2022).

250. *See* AMG Cap. Mgmt. v. FTC, 593 U.S. 67, 70 (2021) (barring equitable remedies in FTC lawsuits in district court); Wilson, *supra* note 246, at 1051–53.

251. That is a real risk. While the FTC has been around for more than a century, that has not stopped an activist conservative judiciary from attacking both its structure and its remedial powers as unconstitutional. *See generally* Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023) (allowing constitutional challenge to the independent nature of the FTC itself to proceed).

252. Press Release, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

253. *See* Spinelli & Tate, *supra* note 199.

254. *See, e.g.*, Justin Stabley, *Why Scrutiny of Starbucks' Alleged Union Violations Is Boiling Over Now*, PBS NEWS HOUR (Mar. 29, 2023, 6:00 AM EST), https://www.pbs.org/newshour/economy/the-union-busting-practices-that-landed-starbucks-in-hot-water.

rich individuals spend money buying (or buying back) stock and buying and shutting down competitors rather than investing in building companies. Our tax system then rewards them for buying and trading stock rather than employing people.[255]

That doesn't mean we don't need capital investment; we do. But we need labor too. More importantly, we need a social system that actually pays employees enough that they can join the middle class. Not punishing those who earn revenue in the form of wages seems like a sensible first step towards leveling the playing field.

Finally, the government needs to reinvest in scientific research. Government spending on research and development in the twentieth century paid enormous dividends for decades.[256] Indeed, much of what we think of as the successes of private entrepreneurship—including the internet and the smartphone—traces back to government research projects.[257] Public funding for basic research has declined dramatically in recent decades as a percentage of GDP, from over 2 percent in the 1960s to barely over 0.5 percent today,[258] as we turned the pursuit of innovation over to capitalists. Private investment in research and development is great, and we should encourage it. But it is a complement to, not a substitute for, government funding of research.

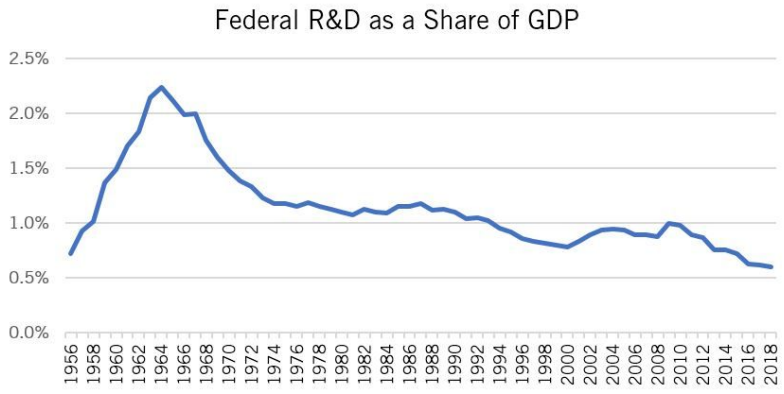
The problems capitalism faces are big and daunting. There is no magic solution. But there are a number of fixes that will help, and some that will help quite a lot. Perhaps surprisingly for a problem that is fundamentally economic,

255. *See supra* notes 203–207 and accompanying text.

256. *See, e.g.*, Molly McElroy, *Societal Impacts of R&D Investments: Not Just Job Creation, but Also a Boost to Business*, AAAS (May 27, 2010), https://www.aaas.org/news/societal-impacts-rd-investments-not-just-job-creation-also-boost-business.

257. *See* MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE-SECTOR MYTHS 76 (Rev. ed. 2014).

258. Caleb Foote & Robert D. Atkinson, *Federal Support for R&D Continues Its Ignominious Slide*, INFORMATIONAL TECH. & INNOVATION FOUND. (Aug. 12, 2019), https://itif.org/publications/2019/08/12/federal-support-rd-continues-its-ignominious-slide.



the fixes are almost all legal rules. Some of these fixes are easy; some are hard. Some of these changes—to the tax system, the more radical antitrust changes—may require legislation. And we live in an era when the idea of passing anything through Congress, much less sensible policy, seems old-fashioned and faintly ludicrous. But many of these solutions are already in the law, reflecting the balanced capitalism that worked so well in the post-World War II era. They can work again if we have the guts to use the tools that are already in our hands.

Indeed, it is remarkable how many of the solutions to free the market are things the FTC, the Department of Justice Antitrust Division, and other government agencies have been trying to implement under the Biden Administration. Government agencies have, for the first time, been taking merger enforcement seriously, targeting dark patterns and auto-renewals, seeking to ban noncompetes, and targeting the enshittification of the internet. These aren't (or shouldn't be) partisan initiatives, but rather efforts to ensure that the market has a chance to work for everyone.

Not surprisingly, this has upset a lot of capitalists.[259] The headwinds against reform are substantial because the capitalists who have hijacked capitalism have everything to lose from the prospect of the FTC freeing the market. The odds are that the dominant capitalists will kill the reform movement and preserve their monopolies, continuing to insulate themselves from competition. And those odds have gone up with Trump's election. There is a real risk that the Trump administration will reflexively undo consumer protections just because it was the Biden administration that put them in place. Nonetheless, there are some reasons for cautious optimism. The FTC is an independent agency, so it might not be subject to the same "pay to play" dynamics we might see in other agencies. And the nominee to head the Antitrust Division, Gail Slater, seems inclined to keep at least some of the division's aggressive antitrust focus on tech industries.

In any event, the reforms I propose are not things that should depend on ideology. Those who believe in capitalism ought to support them regardless of party. The verdict is in from forty years of our return to robber barons, and it's not pretty. If we are to save capitalism—and indeed to save our democracy—we need to make sure the capitalists don't succeed. The law offers us the tools to do just that. And the time for us to do it is now.

259. Cory Doctorow, *Why They're Smearing Lina Khan*, PLURALISTIC (July 14, 2023), https://pluralistic.net/2023/07/14/making-good-trouble.

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