



A Report on Competition in the Small Business Economy

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Introduction

The pursuit of fair and open markets has been a priority of federal lawmakers for over a century. In 1890, Congress passed the Sherman Antitrust Act, the inaugural antitrust law in U.S. history designed to ban monopolies and collusion that would harm competition, such as price fixing. In 1914, Congress passed both the Federal Trade Commission (FTC) Act and the Clayton Act. The FTC Act established the FTC as an enforcement agency and outlawed unfair methods of competition or deceptive acts and practices outside of the scope of the Sherman Act. Conversely, Section 7 of the Clayton Act prohibits mergers and acquisitions that might substantially undermine competition. The Clayton Act was amended twice; first in 1936 by the Robinson-Patman Act, prohibiting price discrimination, and second in 1976 by the Hart-Scott-Rodino Act mandating advance notice to the government by merging companies. These three fundamental antitrust laws remain in law today, serving to protect competition and restrict unfair and monopolistic business practices.

The Small Business Administration (SBA) was also created in part as pro-competition policy. The Small Business Act “declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise.”¹ Congress has long recognized the importance of small firms as the key drivers of competition and innovation. By fostering an environment where small businesses can thrive, through providing access to capital, entrepreneurial development programs, and government contracting assistance, the Act seeks to prevent markets from being dominated by a small number of large firms.

Despite the rich history of laws aimed at safeguarding the competitive environment, alarming indicators point towards a stark decline in competition across the U.S. economy. While the robust recovery from the COVID-19 pandemic has driven a surge in new startups, this growth is an anomaly, breaking from a decades-long decline.² Meanwhile, mergers and acquisitions have been accelerating, and industries in every sector have seen increasing concentration.³ As a result, industries are becoming increasingly dominated by a small number of larger and older companies, and economic power has been concentrating into fewer hands.

This concentration in economic power can largely be attributed to a shift in the way courts interpret antitrust laws. Because these laws are interpreted through court rulings, the changing attitudes of judges can control how these laws are enforced. While in the past antitrust laws were seen as a way for the government to protect competition in the free enterprise system, they are now interpreted primarily as a way to protect consumers from high prices. The “Consumer Welfare Standard” is the main legal standard used by judges to rule on these cases, and as a result, if the plaintiff cannot demonstrate harm to consumers, the case is terminated. Through increasing use of economic theory to demonstrate cost savings that result from economies of scale, merging companies have been able to convince judges that proposed mergers will not result in a violation of antitrust laws, even if that is the end result.

¹ 15 U.S.C. §631(a); and P.L. 83-163, the Small Business Act of 1953 (as amended), see <https://www.govinfo.gov/app/details/COMPS-1834>.

² Cong. Budget Office, Federal Policies in Response to Declining Entrepreneurship, Dec. 2020.

³ Gustavo Grullon, Yelena Larkin, Roni Michaely, *Are US Industries Becoming More Concentrated?*, REVIEW OF FINANCE, Volume 23, Issue 4, July 2019, Pages 697–743, <https://doi.org/10.1093/rof/rfz007>

Judged by the recent growth in concentration and the decline in competition in the American economy, it is fair to conclude that the theoretical framework of consumer welfare has failed both to protect consumers and the competitive ecosystem. It has not only resulted in an unjust concentration of economic power, but it has also hollowed out rural towns across the country, lowered business dynamism, weakened the economy in the face of shocks, disruptions, and downturns, and hurt businesses, workers, and consumers.

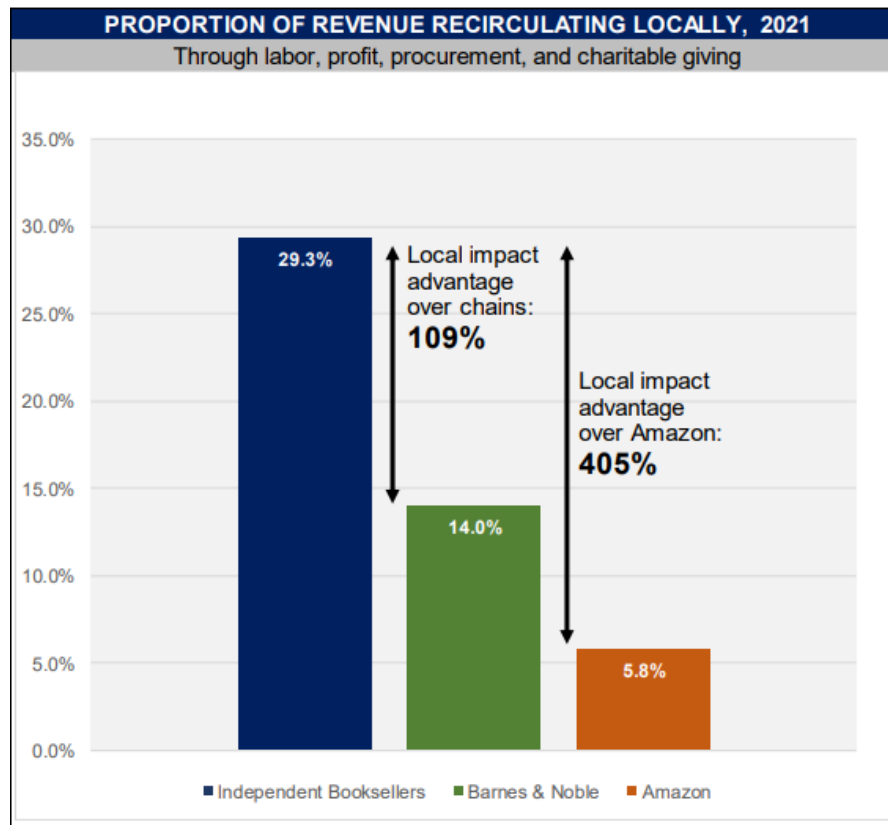
A healthy and prosperous free enterprise economy relies upon a robust level of market competition. When businesses compete against one another on a fair and level playing field, the benefits are broadly shared among consumers, workers, and small businesses alike. A more competitive market can push prices down while improving the quality of products, raise wages for workers, lift the standard of living, and inspire more innovation as businesses race to develop revolutionary products or services.

Part one of this report will focus primarily on the macroeconomic indicators of declining competition and explore the effects it has on small businesses and consumers. The second part will examine how declining competition has affected certain industries and regions within the United States, with a particular focus on how small businesses are being pushed out by the anticompetitive practices of some of the largest companies in the country. Part three will establish a policy framework for addressing the lack of competition and provide recommendations to better use competition policy to help smaller businesses thrive.

Part 1: Declining Competition and the Effect on Small Businesses

Small businesses and entrepreneurship are central to the success of the American economy, providing a catalyst for job growth, innovation, and resilience. With roughly 32 million small firms nationwide, these businesses account for 99 percent of all private sector businesses, create two-thirds of all new jobs, and employ nearly half the entire private sector workforce.⁴ These businesses are crucial to a functioning economy, not only distributing goods and services to even the most rural and underserved areas, but also generating wealth for families and communities across the country and contributing to a more fair and equal economy for workers and business owners.

Locally owned small businesses provide greater returns to their communities than their larger counterparts.⁵ Since the owners of small businesses are often local residents, money created by their venture stays in the community, acting as a source of local job and wealth creation, as well as a source of local investment and tax revenue. One analysis from the American Booksellers Association compared the impact of buying books from independent booksellers vs. chains and Amazon.



SOURCES: Independents: American Booksellers Association, Abacus survey of members, 2020; B&N: 2017 Economic Census and 2020 10-K; Amazon: 2021 analysis by Civic Economics

⁴ SBA OFFICE OF ADVOCACY, *Advocacy Releases 2021 Small Business Profiles for the States*, Aug. 31. 2021.

⁵ Anil Rupasingha, *Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-Being?*, FEDERAL RESERVE BANK OF ATLANTA, August 2013. <https://www.atlantafed.org/-/media/documents/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.pdf>

While small, local firms can help communities build wealth and attract new investment, larger, financialized companies can often act as a source of wealth extraction. Since the late 1970s, large corporations have largely focused on reducing costs and distributing freed up cash toward financial interests.⁶ Rather than reinvesting in workers and capital, they have largely focused on driving up short-term share prices to bolster executive compensation while working to cut labor costs and expand margins. In 2022, stock buyback announcements reached a new record of \$1.22 trillion.⁷ As of early 2023, companies are largely on track to beat this record in 2023.⁸

Among small businesses, newer businesses are critical for economic growth. Research suggests that new businesses allocate economic resources more efficiently and, in turn increase productivity.⁹ They enrich the competitive ecosphere by putting pressure on incumbent firms in their industries to perform better or risk losing business.¹⁰ New starts also introduce new technology at higher rates and provide additional economic resilience to communities in the face of economic downturns.¹¹

Declining Entrepreneurship

While the share of the economy inhabited by small firms seems to indicate a robust and healthy small business economy, new business startups steadily declined from the early 1980s through the beginning of the pandemic in 2020. Despite this trend, the U.S. economy saw an increase in applications for Employer Identification Numbers (EINs) throughout the COVID-19 pandemic.¹² While this is encouraging, some analysts suggest it is an anomaly powered by a robust fiscal response to the pandemic powering consumer demand alongside low interest rates that spurred investment.

According to data from the U.S. Economic Census, the percentage of firms less than a year old decreased from 10 percent in 1982 to 8 percent in 2018.¹³ Over that same period, the share of firms less than five years old slid from 37.6 percent to 29.8 percent and the share of employment by those firms declined from 13.8 percent to 8.9 percent.¹⁴ This decline in new firms has happened in every state and across every economic sector.¹⁵

⁶ William Lazonick, *Profits Without Prosperity*, HARVARD BUSINESS REVIEW, Sept. 2014.

⁷ Nicole Goodkind, *Stock Buybacks Could Beat Last Year's Record \$1.2 Trillion*, CNN, Feb. 10, 2023.

⁸ *Id.*

⁹ *Supra* note 2.

¹⁰ *Id.*

¹¹ Venture Forward. Calculations of economic indicators by Economic Innovation Group (EIG)

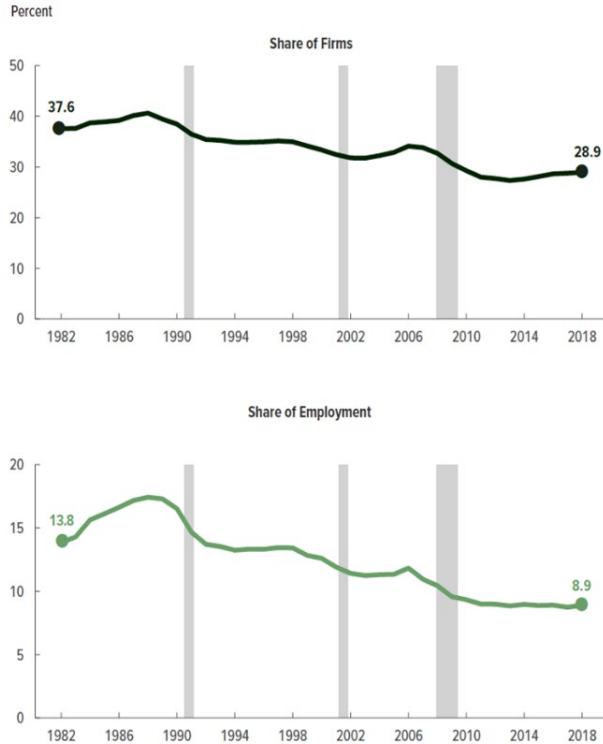
¹² *Supra* note 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

New Firms as a Share of Total Firms and Total Employment, 1982 to 2018



A decline in new business starts has been accompanied by a decline in total small businesses in certain sectors as well. For instance, between 1998 and 2019, the number of retail businesses with fewer than 500 employees dropped by 102,206, a nearly 14 percent drop.¹⁶ The number of manufacturers with fewer than 500 employees dropped 74,408, a 24 percent drop.¹⁷ Agricultural small businesses declined by over 4,000 businesses, constituting a nearly 17 percent drop over the same period.¹⁸ Wholesale trade businesses also declined over that period, from 360,149 firms to 284,167.¹⁹ Since 2001, the number of small transportation and warehousing companies dropped from 342,772 to 194,924, a 43 percent drop.²⁰

Research from the Brookings Institution found two important contributing factors led to the decline. First, areas with lower rates of population growth almost always see lower

rates of startup activity.²¹ Second, areas with higher rates of concentration in an industry have lower rates of startup activity.²²

Increasing Concentration Across U.S. Industries

There are two main methods of measuring the concentration level of an industry. First, the Herfindahl-Hirschman index (HHI) calculates the concentration level by squaring the market share of each firm competing in the market and taking the sum of those numbers.²³ For instance, an industry consisting of four firms with shares of 30, 30, 20, and 20 percent has an HHI of 2,600 ($30^2 + 30^2 + 20^2 + 20^2$).²⁴ Because of the way it is calculated, it accounts for the relative size distribution of firms in the market. The maximum HHI is 10,000, when a single firm controls 100 percent of the market, and approaches zero when a market is occupied by many firms of similar size. According to the Department of Justice (DOJ), markets with an HHI between 1,500 and 2,500 are moderately concentrated and markets with an excess of 2,500 are highly concentrated.²⁵

¹⁶ U.S. Census Statistics of U.S. Businesses, 1998-2019. [SUSB Datasets \(census.gov\)](https://www.census.gov/susb/datasets)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Ian Hathaway and Robert Litan, *Declining Business Dynamism in the United States: A Look at States and Metros*, BROOKINGS INSTITUTION, May 5, 2014.

²² *Id.*

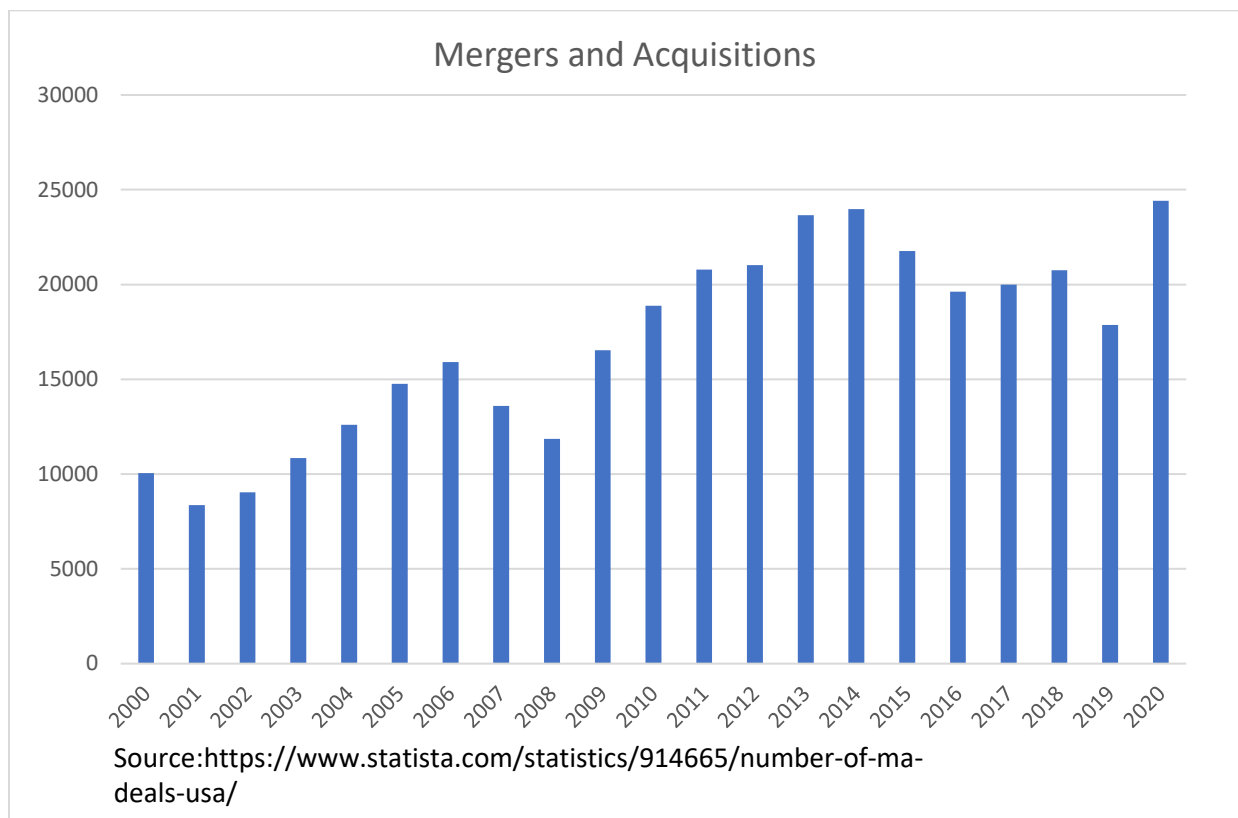
²³ [Herfindahl-Hirschman Index \(justice.gov\)](https://www.justice.gov/antitrust/faq/herfindahl-hirschman-index)

²⁴ *Id.*

²⁵ *Id.*

The second method of calculating market concentration is by using the concentration ratio, or the sum of the market share percentage held by the largest specified number of firms in an industry, usually the top four or five.²⁶ For instance, if a market is controlled by four firms with the market shares of 10 percent, 15 percent, 26 percent, and 33 percent, the concentration ratio is 85 percent.²⁷ Competitive markets generally have concentration ratios below 50 percent, while oligopolies are created when the top five firms have over 60 percent.²⁸

While rates of new firms entering the market have been declining across every sector, and the number of small firms has been decreasing altogether in certain sectors, older, more established firms have been accumulating market power. Over the past several decades, HHI scores and concentration ratios have been growing, indicating a less competitive economy. Since the late 1990s, for instance, 75 percent of U.S. industries have seen an increase in concentration levels and the average firm is roughly three times larger – in real terms – than it was 20 years ago.²⁹ Despite the dramatic increase in aggregate market capitalization, the number of publicly traded firms has declined by nearly 50 percent since the 1996 peak.³⁰ Moreover, the number of mergers and acquisitions taking place each year has been accelerating since 2000 (Figure 2).



²⁶ Will Keaton, *Concentration Ratio Definition, How to Calculate with Formula*, INVESTOPEDIA, September 6, 2020.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Supra* note 3.

³⁰ AMERICAN COUNCIL FOR CAPITAL FORMATION, *New Report: The Declining Number of Public Companies and Mandatory Reporting Requirements*, June 24, 2022. [New Report: The declining number of public companies and mandatory reporting requirements | ACCF](#)

The Economic Census collects data on the concentration of industries at the national level. According to these data, there are 225 industries (in the 6-digit NAICS Code) in which over 50 percent of the market is controlled by the top four companies. Many of these industries impact the daily lives of millions of Americans, and the table below includes a few notable examples:

Industry (6-Digit NAICS)	Example Companies	Market Share of Top Four Companies
Home Centers	Home Depot, Lowes	96.3%
Warehouse Clubs and Supercenters	Sam's Club	94.4%
Couriers and Express Delivery Services (UPS)	FedEx Corporation	91.2%
Tobacco Manufacturing	Phillip Morris International	91.1%
Car Rental	Hertz, Avis	89.5%
Wireless Telecom Carriers	AT&T, T-Mobile	86.3%
Breakfast Cereal Manufacturing	Post Holdings, Kellogg USA	81.8%
Amusement and Theme Parks	Six Flags, Seaworld	79.1%
Department Stores	Wal-Mart, Macys, Kohls	73%
Bottled Water Manufacturing	Ds Waters Holdings, Niagara Bottling	72.5%
Electronics Stores	Verizon, Best Buy	71.1%
Passenger Air Travel	American Airlines, United	71.1%
Pharmacies and Drug Stores	CVS, Walgreens	69.4%
Book Stores	Barnes & Noble, Amazon	69.2%
Breweries	Anheuser-Busch	68.6%

This data does not provide a full picture. For instance, the dataset is only available at the national level and doesn't account for the way certain companies may dominate states or regions. Moreover, it is only available for the top four, eight, 20, and 50 companies, when it is often only two or three companies that are dominating a market. For instance, in home improvement stores, while 96.3 percent of the market is controlled by the top four firms, 81 percent was controlled by the top two, Home Depot and Lowes, in 2017.³¹ While 69.4 percent of the pharmacy and drugstore market is controlled by the top four companies, 67 percent was controlled by the largest 3, and 61 percent was controlled by the top two, Walgreens and CVS, in 2017.³² Recent research from the Federal Reserve Bank of Boston estimated that the U.S. economy is at least 50 percent more concentrated today than in 2005, and that this concentration has a variety of negative effects on the economy.³³

³¹ OPEN MARKETS INSTITUTE, *America's Concentration Crisis*, June 2019.

<https://concentrationcrisis.openmarketsinstitute.org/>

³² *Id.*

³³ Falk Brauning, Jose L. Fillat, and Gustavo Joaquim, *Cost-Price Relationships in a Concentrated Economy*, FED. RESERVE BANK OF BOSTON CURRENT POLICY PERSPECTIVES. May 23, 2022.

<https://www.bostonfed.org/publications/current-policy-perspectives/2022/cost-price-relationships-in-a-concentrated-economy.aspx>

While increasing concentration may not directly mean declining competition - two firms can still ruthlessly compete on the merits – it can lead to dominant firms that exploit their market power at the expense of smaller competitors. As a result, many smaller companies can come to rely on those firms for access to markets, leading to even greater power not only among a captive customer base, but increased negotiating power among a captive producer base. This can have broad impacts on the economy that can affect everything from wages for workers to prices for consumers.

Economic Impact of Declining Competition

Declining competition has been linked to a negative impact on consumers, workers, and small businesses. The COVID-19 pandemic shined a light on the negative impact in the form of high-profile news stories and global economic events. For instance, the supply chain disruptions that occurred during the pandemic can be linked to increasing consolidation among both manufacturers and shipping companies. The recent global increase in consumer prices can be at least partially linked to the pricing power of many large corporations, who reaped some of the highest profit margins in history during this period. Finally, the dramatic increase in income and wealth inequality seen over the past four decades in the U.S. can also be largely attributed to higher levels of concentration across industries.

Consumer and Producer Prices

Since the beginning of 2021, American consumers and businesses have seen inflation rise to the highest levels since the early 1980s – topping at 9.1 percent year-over-year in June 2022. While there are many explanations for this dramatic rise in consumer and producer prices – including supply chain disruptions caused by international responses to the COVID-19 pandemic, increased supply of dollars in the economy due to U.S. fiscal and monetary policy, and the economic sanctions imposed in response to the Russian invasion of Ukraine – research supports that firms with significant market power increased prices simply to pad profits above the cost increases they saw from suppliers. In fact, 2021 brought the largest profit growth for U.S. companies since the 1950s.³⁴ Throughout 2021, pre-tax corporate profits increased 25 percent year-over-year, totaling \$2.81 trillion.³⁵ Post-tax profits were even larger, with a 37 percent increase year-over-year, the largest ever recorded.³⁶

When the market is starved for competition, dominant firms enjoy an unbridled power to dictate prices without fear of losing customers to competitors. Between 1980 and 2017, markups rose steadily alongside the market power of many large firms, from 18 percent above cost to 67 percent above cost.³⁷ This was exacerbated during the pandemic, when firms increased markups at higher rates than before, and lifted average markups to 72 percent above cost (Figure 4).³⁸ According to

³⁴ Will Daniel, *U.S. Companies Post their Biggest Profit Growth in Decades by Jacking Up Prices During the Pandemic*, FORBES, March 31, 2022. <https://fortune.com/2022/03/31/us-companies-record-profits-2021-price-hikes-inflation/>

³⁵ *Id.*

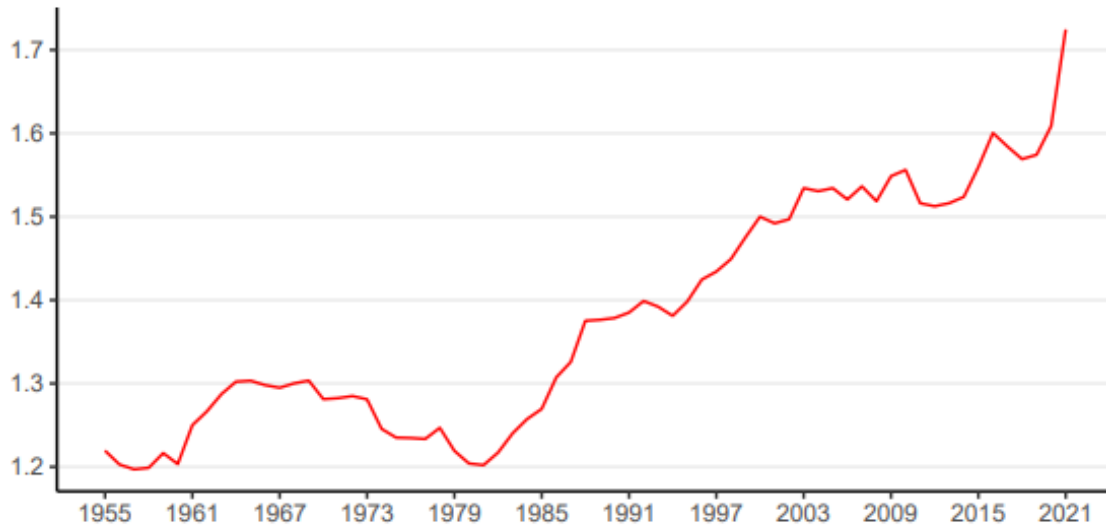
³⁶ *Id.*

³⁷ Jan De Loecker, Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, NAT. BUREAU OF ECON. RESEARCH, Working Paper 23687, Aug. 2017. https://www.nber.org/system/files/working_papers/w23687/w23687.pdf

³⁸ Mike Konczal and Niko Lusiani, *Prices, Profits, and Power: An Analysis of 2021 Firm-Level Markups*, ROOSEVELT INSTITUTE, June 2022. https://rooseveltinstitute.org/wp-content/uploads/2022/06/RI_PricesProfitsPower_202206.pdf

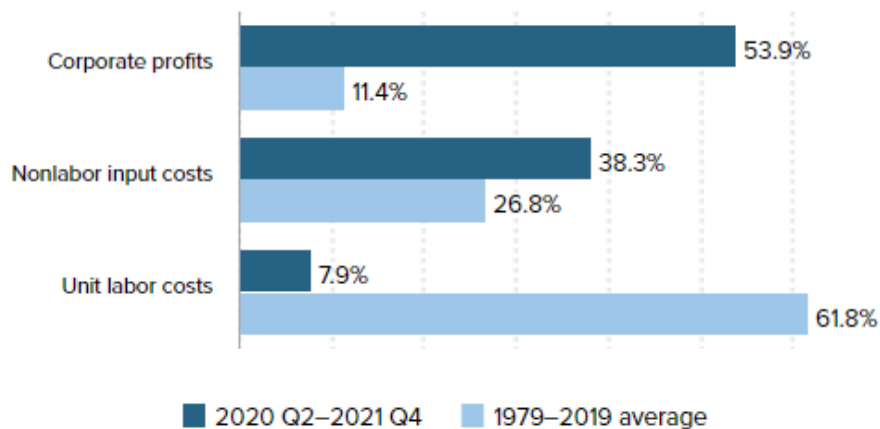
the Federal Reserve Bank of Boston, for industries that saw an increase in concentration similar to the national trend since 2005, they also saw pass-throughs of prices to be 25 percentage points greater.³⁹

Figure 4. Corporate Markups over Time.



The Economic Policy Institute recently analyzed the contributions to growth in unit prices and found that in the period from 1979 to 2019, increased corporate profits accounted for 11.4 percent of the growth.⁴⁰ However, between the second quarter of 2020 and the fourth quarter of 2021, corporate profits accounted for 53.9 percent of price increases (figure 5).⁴¹

Normal and recent contributions to growth in unit prices in the nonfinancial corporate sector

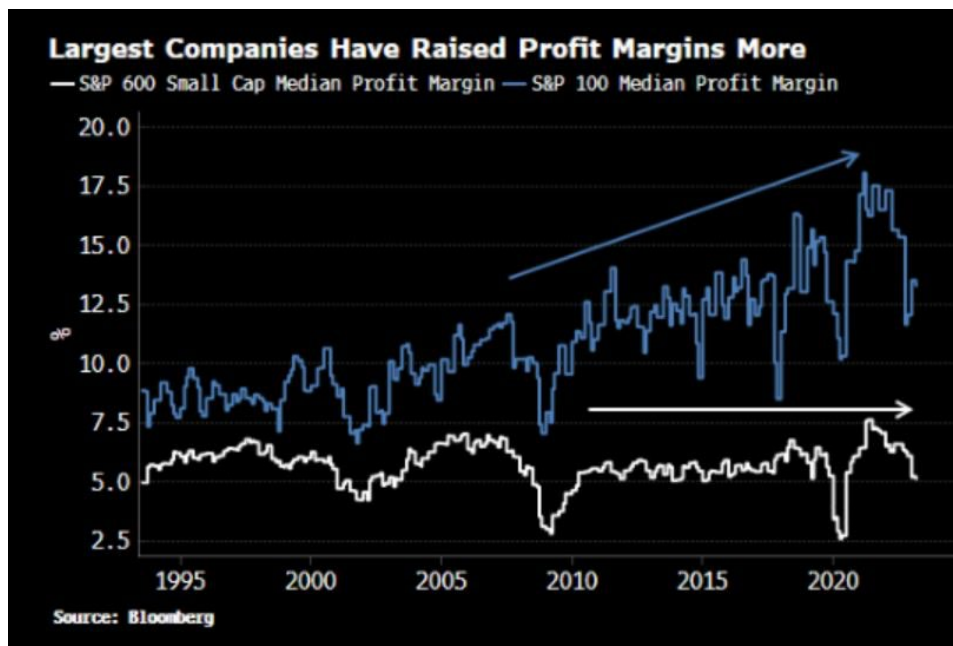


³⁹ *Supra* note 30.

⁴⁰ Josh Bivens, *Corporate Profits have Contributed Disproportionately to Inflation. How Should Policymakers Respond?*, ECONOMIC POLICY INSTITUTE, April 21, 2022.

⁴¹ *Id.*

However, increased margins weren't unanimous among all corporations; many smaller companies didn't get to share in the frenzy. Analysis from Bloomberg shows that recent increases in margins can be attributed primarily to the largest businesses:



In antitrust cases, merging companies often claim that efficiencies resulting from scale will lower prices for consumers. However, the economic literature seems to indicate otherwise. One study found that mergers between companies in concentrated markets result in an average price increase of 7 percent.⁴²

Price increases over the past year have had predictably negative impacts on consumers, particularly those in lower income brackets who spend a higher percentage of their income on consumer goods, like gas and groceries. However, small firms were also impacted by high prices, since many of them do not have the purchasing power to influence prices. While consumer prices rose to a maximum of 9.1 percent year over year, producer prices, otherwise known as the wholesale index, rose to 11.3 percent in June 2022.⁴³

As a result, the prices that small firms paid for inventory, supplies, materials, and fuel all increased. In turn, many had to raise prices and risk losing business to absorb the cost. Unfortunately, nearly half (45%) of small firms must advertise fixed price agreements with customers to remain competitive, hindering their ability to respond to inflationary pressures.⁴⁴ According to a survey

⁴² John Kwoka, "The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?" *ANTITRUST LAW JOURNAL*, vol. 81, no. 3, 2017, pp. 837–72. *JSTOR*, <http://www.jstor.org/stable/26425580>. Accessed 10 Nov. 2022.

⁴³ U.S. BLS, *Producer Prices Increased 8.7 percent From August 2021 to August 2022*, September 20, 2022. <https://www.bls.gov/opub/ted/2022/producer-prices-increased-8-7-percent-from-august-2021-to-august-2022.htm>

⁴⁴ NAT. FEDERATION OF IND. BUS., *Inflation and Small Business*. <https://assets.nfib.com/nfibcom/Inflation-One-Pager.pdf>

by the National Federation of Independent Businesses, 56 percent of small business owners reported that inflation was having a substantial impact on their business, while 35 percent reported that it was having a moderate impact.⁴⁵

Shortages and Supply Chain Disruptions

Throughout the COVID-19 pandemic, one of the chief economic concerns was the disruptions in supply chains that resulted from labor shortages and lockdowns. While new COVID-19 response policy played a role, frail supply chains predate 2020. For decades, industry concentration reduced manufacturing plants for key goods, causing the U.S. economy to lean heavily on fewer production sites. A disruption in the supply chain could trigger bottlenecks, slash production, and inflate prices downstream. Moreover, consolidation led to innovative transportation and “just-in-time” production, keeping inventories lean, but requiring companies to predict demand and place precise orders months in advance. While these changes to supply chains were extremely profitable for investors, they also led supply chains to become vulnerable to disruptions, like natural disasters and public health emergencies.

Component aspects of supply chains are increasingly choked by a handful of players. In 2000, the top ten ocean shipping giants controlled 51 percent of the market.⁴⁶ Today, they command an 82 percent share, bundled into only three major alliances.⁴⁷ Freight rails in the U.S. underwent a similar fate since the 1980s, collapsing from 33 class one railroads to just seven today.⁴⁸ Those seven have carved up regions across the country, leaving only two competing railroads in a given region. Most stations (78%) rely on a single major railroad.⁴⁹ In turn, those customers are charged far more than those who have multiple options.⁵⁰

This consolidation, while efficient and profitable, rendered supply chains susceptible to crises. The pandemic, and the policies aimed at containing it, shut down production of important supplies needed in the United States. Items crucial for pandemic response, such as personal protective equipment (PPE), like masks, gloves, face shields, and gowns almost immediately fell short in the early half of 2020. In order to respond, U.S. consumers and hospitals had to wait until production met demand overseas. Other products like semiconductors and baby formula also saw shortages in 2021 and 2022, and these can be directly linked to the failure of highly concentrated firms during that period.

⁴⁵ *Id.*

⁴⁶ Lars Jensen, *The New Oligopoly of Container Shipping*, JOURNAL OF COMMERCE, July 4, 2019, https://www.joc.com/maritime-news/container-lines/new-oligopoly-container-shipping_20190704.html

⁴⁷ *Id.*

⁴⁸ THE WHITE HOUSE, *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

⁴⁹ Peter Coy, *There’s a Good Reason Biden Singled Out Railroads for Criticism*, BLOOMBERG, July 12, 2021, [There’s a Good Reason Biden Singled Out Railroads for Criticism - Bloomberg](https://www.bloomberg.com/news/articles/2021-07-12/biden-singled-out-railroads-for-criticism)

⁵⁰ *Id.*

1. Semiconductors

Vital components in consumer products, semiconductors are used by about a quarter of 226 manufacturing industries, and these industries represent 39 percent of all manufacturing output.⁵¹ As our lives have become increasingly governed by technology, semiconductor manufacturers have ramped up production. That production has grown primarily overseas, specifically in Taiwan, which now dominates the market for these chips. The Taiwan Semiconductor Manufacturing Company, or TSMC, which supplies companies like Apple, Qualcomm, and Nvidia, controlled roughly 54 percent of revenue for semiconductors in 2020, and Taiwan, as a country, controlled 63 percent.⁵² While this makes things efficient during good times, economic shutdowns in Taiwan to contain the COVID-19 pandemic decreased production, during a period of increased U.S. demand for these products. As a result, consumer and producer prices for companies that produce goods that use these chips increased far more than prices for goods that don't. Notably, the production of cars in the U.S. was cut by more than half between the summer of 2020 and September 2021.⁵³ Producer prices for automobile manufacturers have also more than doubled in that time frame.⁵⁴

2. Baby Formula

Early 2022 saw a panic-inducing shortage of baby formula. In May 2022, the nationwide out-of-stock percentage for baby formula reached 74 percent among U.S. retailers.⁵⁵ This had the potential to cut off a major supply of food for the nation's 3.4 million infants under the age of one.⁵⁶ In fact, as of 2018, more than half (54%) of infants received formula, either exclusively or as a supplement.⁵⁷ Baby formula production in the U.S. is dominated by four companies – Abbott, Perrigo, Nestle, and Mead-Johnson – accounting for 98 percent of U.S. formula sales. This left the market highly vulnerable to a shutdown of just one production facility.⁵⁸ Due to a bacterial outbreak at an Abbott factory in Michigan, 43 percent of that production halted, contributing to the significant shortage experienced.⁵⁹

Wage and Wealth Inequality

A positive correlation exists between the increasing concentration of industries since the early 1980s to that of income and wealth. Over recent decades, wealth disparity has climbed to unprecedented levels. According to a report released by the Congressional Budget Office in

⁵¹ Fernando Leibovici, *Supply Chain Bottlenecks and Inflation: The Role of Semiconductors*, ECONOMIC SYNOPSES, Nov. 28, 2021. <https://research.stlouisfed.org/publications/economic-synopses/2021/12/16/supply-chain-bottlenecks-and-inflation-the-role-of-semiconductors>

⁵² Yen Nee Lee, *2 Charts Show How Much The World Depends on Taiwan for Semiconductors*, CNBC, Mar. 15, 2021. <https://www.cnbc.com/2021/03/16/2-charts-show-how-much-the-world-depends-on-taiwan-for-semiconductors.html>

⁵³ *Supra* note 48.

⁵⁴ *Id.*

⁵⁵ Elizabeth Williams and Samantha Artiga, *Key Characteristics of Infants and Implications of Recent Formula Shortage*, KAISER FAMILY FOUNDATION, June 9, 2022. <https://www.kff.org/medicaid/issue-brief/key-characteristics-of-infants-and-implications-of-the-recent-formula-shortage/>

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Ahmed et al., *The National Baby Formula Shortage and the Inequitable U.S. Food System*, CENTER FOR AMERICAN PROGRESS, June 17, 2022. <https://www.americanprogress.org/article/the-national-baby-formula-shortage-and-the-inequitable-u-s-food-system/>

⁵⁹ *Id.*

September 2022, real total wealth in America has tripled since 1989.⁶⁰ Yet the distribution has become increasingly uneven. The top 10 percent saw their wealth grow from 63 percent to 72 percent, the top 1 percent's portion went up from 27 to 34 percent, while the bottom half of earners saw their share shrivel from four percent to two percent in the same period.⁶¹

Since the late 1970s, inflation-adjusted hourly compensation for middle-class workers has been flat, for low wage workers, these wages are down 5 percent since 1980. Prior to 1979, wages and productivity were similar, with wage growth often outpacing productivity growth. However, post-1979, a shift occurred: wages increased a mere 17.5 percent while productivity surged 61.8 percent.⁶² This decoupling happened alongside a decline in the bargaining power of workers as union membership declined. From 1973 to 2021, union membership declined from 24 percent of all workers to 10.3 percent.⁶³ Furthermore, while corporate profits have been continually rising, workers have received a smaller share of those profits.⁶⁴

A significant factor in this growth of inequality is the expanding market power of large corporations.⁶⁵ When workers have fewer options for employment within their industries or local geographic areas, companies can suppress wages. A 2018 paper in the Harvard Law Review found that median compensation for workers – now only \$33,000 per year – would be more than \$10,000 higher if employers were less concentrated.⁶⁶ In fact, researchers have found an inverse correlation between labor market concentration and average posted wages in that market. One paper found that moving from a highly competitive market (25th percentile in concentration) to a highly concentrated one (75th percentile in concentration) is associated with a 17 percent decline in posted wages.⁶⁷ Not only has this contributed to the growing inequality between higher earners and low ones, but it has also contributed to expanding geographic inequality. Moreover, the most highly concentrated markets are also the most rural ones.⁶⁸

When a market has a single seller, it's a monopoly, which can leverage its power to drive up prices. Similarly, when a market has a single buyer – a “monopsony” – that buyer can suppress wages and prices it pays to suppliers. Recent research conducted on the impact of Walmart Supercenters exercising monopsony power illustrates this point. Counties with Walmart Supercenters were compared with similar counties in which Walmart attempted to open a Supercenter but was blocked by local efforts. It had several important findings, showing a cascading effect due to the presence of a Walmart Supercenter. First, the Supercenter caused aggregate local employment to fall because turnover at these establishments is high, and workers that leave gradually exit the

⁶⁰ CONG. BUDGET OFFICE, *Trends in the Distribution of Family Wealth*, 1989 to 2019, Sept. 2022. <https://www.cbo.gov/system/files/2022-09/57598-family-wealth.pdf>

⁶¹ *Id.*

⁶² ECONOMIC POLICY INST., *The Productivity-Pay Gap*, Oct. 2022. <https://www.epi.org/productivity-pay-gap/>

⁶³ <http://unionstats.com/>

⁶⁴ Simcha Barkai, *Declining Labor and Capital Shares*, UNIVERSITY OF CHICAGO, November 2016. <https://research.chicagobooth.edu/~media/5872FBEB104245909B8F0AE8A84486C9.pdf>

⁶⁵ Jonathan Baker and Steven Salop, *Antitrust, Competition Policy, and Inequality*, GEORGETOWN UNIVERSITY LAW CENTER, 2015. <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2474&context=facpub>

⁶⁶ Naidu, Posner, and Weyl, *Antitrust Remedies for Labor Market Power*, HARVARD LAW REVIEW, Vol. 132:536, https://harvardlawreview.org/wp-content/uploads/2018/12/536-601_Online.pdf

⁶⁷ Azar, Marinescu, Steinbaum, *Labor Market Concentration*, Dec. 10, 2018.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3088767

⁶⁸ *Id.*

labor force.⁶⁹ This led to local aggregate earnings falling 5.2 percent over the first five years, an equivalent of \$758 per worker.⁷⁰ And finally, local businesses producing goods and services outside of retail declined 4.5 percent and 7.5 percent respectively, resulting primarily from doing business with Walmart and its disproportionate buying power.⁷¹

In part one of this report, the multifaceted impacts of the escalating concentration of industries on the U.S. economy have been highlighted. It has not only created formidable barriers to new small business entrants for decades and contributed to declining small business numbers across industries, but it has resulted in higher prices for consumers, left supply chains vulnerable to disruptions, and contributed to the grotesque levels of income and wealth inequality that the American economy sees today. In part two, this report explores specific industries historically known for their small business presence, and the anticompetitive practices employed by large firms to dominate them.

⁶⁹ Justin Wiltshire, *Walmart Supercenters and Monopsony Power: How a Large, Low-Wage Employer Impacts Local Labor Markets*, WASHINGTON CENTER FOR EQUITABLE GROWTH, Nov. 6, 2017, https://static1.squarespace.com/static/5e0fdcef27e0945c43fab131/t/618639fa292dc404223f562a/1636186621526/JustinWiltshire_JMP.pdf

⁷⁰ *Id.*

⁷¹ *Id.*

Part II: Industry Breakdown and Impact on Small Business

To fully grasp the macroeconomic shifts discussed in part one, the dynamics at play within major industries themselves must be analyzed. Part two discusses the realities of how dominant firms exert their power to put small businesses at a disadvantage. While these practices are found in many different sectors, three are the focus – health care, retail, and food and agriculture.

Health Care

Health care is a critical industry in the United States. It employs 11 percent of U.S. workers, with insurance accounting for 26 percent of non-wage compensation.⁷² Health care spending accounts for roughly 17 percent of GDP, absorbing 24 percent of government spending.⁷³ Despite its critical importance, it is riddled with complex challenges. The U.S. spends more on health care than most other Organization for Economic Co-operation and Development (OECD) nations without achieving better outcomes.⁷⁴ It insures fewer people as a percentage of the population and ties that insurance largely to employment. Insured or not, hospital visits can carry hefty financial burdens. In 2017, over 1 in 50 Americans engaging with the health care services faced out-of-pocket costs surpassing \$5,000, while 1 in 200 wrestled with costs over \$10,000.⁷⁵ According to the Kaiser Family Foundation, an estimated 100 million (41 percent) of Americans have health care debt as part of their balance sheet with 12 percent of them owing \$10,000 or more.⁷⁶

This section shines a light on key industries within the health care sector, revealing how anticompetitive behavior is disrupting independent providers and price gouging consumers. First, it will detail how local insurance monopolies can result in higher premiums for individuals and small businesses. Then it will outline how consolidation among hospitals is driving out independent practices and giving way to predatory pricing. Finally, it will explore how insurance middlemen, Pharmacy Benefit Managers, threaten independent pharmacies' survival.

Local Insurance Monopolies

Private health insurance is a distinctive aspect of the American health care system, differentiating it from nations like the U.K., Canada, Italy, and Spain, which have embraced public, single-payer health insurance systems. Despite the Affordable Care Act's progress in bolstering the number of insured Americans, it falls short of the universal coverage achieved by many nations, and still relies heavily on insurance tied to employment.

Insurance markets have become more consolidated since the 1990s. A 2012 study revealed that the proportion U.S. communities in which health insurance has become highly concentrated, or

⁷² Nunn, Parsons, and Shambaugh, *A Dozen Facts about the Economics of the U.S. Health-Care System*, BROOKINGS INST., March 10, 2020. <https://www.brookings.edu/research/a-dozen-facts-about-the-economics-of-the-u-s-health-care-system/>

⁷³ *Id.*

⁷⁴ Papanicolas, Woskie, and Jha, *Health Care Spending in the United States and Other High Income Countries*, JAMA, Mar. 2018. <https://pubmed.ncbi.nlm.nih.gov/29536101/>

⁷⁵ *Supra* note 72.

⁷⁶ Lopes et al., *Health Care Debt in the U.S.: The Broad Consequences of Medical and Dental Bills*, KAISER FAMILY FOUNDATION, June 16, 2022. <https://www.kff.org/report-section/kff-health-care-debt-survey-main-findings/>

has an HHI about 2,500, increased from 68 percent in 1998 to 99 percent in 2006.⁷⁷ A more recent study from the American Medical Association found that 73 percent of Metropolitan Statistical Areas (MSAs) were highly concentrated, averaging an HHI of 3,494.⁷⁸ A single insurer had a market share of 30 percent in upwards of 91 percent of these markets, and in 46 percent of markets, a single insurer had at least 50 percent.⁷⁹ Between 2014 and 2020, the share of highly concentrated markets grew from 71 to 73 percent, and 57 percent of markets saw an increase in HHI.⁸⁰

As of 2019, Alabama, Alaska, South Carolina, and Wyoming all have a single insurer dominating over 90 percent of the market.⁸¹ Alarming, 31 states have one insurer controlling over half of the market, and at the national level, the top insurer controls 59 percent of the market, according to the Kaiser Family Foundation.⁸²

This monopolistic trend exacts a heavy toll on small entities. Premiums, particularly for plans on the ACA marketplace, tend to increase faster in markets where payers have a monopoly.⁸³ Small businesses striving to compete in the labor market often find it imperative to offer insurance benefits, making escalating premiums a significant threat to their financial stability. In fact, small employers consistently rank the cost of health insurance for their employees as a top concern. In a 2021 survey of 500 businesses with fewer than 100 employees, over a third cited insurance costs as a challenge during the pandemic, with a disproportionate impact on minority business owners.⁸⁴ In the same survey, 50 percent of black business owners, 44 percent of Asian American and Pacific Islander (AAPI) business owners, and 43 percent of Latino business owners said it was a challenge.⁸⁵

In addition to driving up costs for consumers and small businesses, insurance monopolies can hurt independent physicians. While payers have monopoly power in how they interact with consumers and businesses that buy insurance, they have monopsony power in the way they interact with physicians and hospitals from whom they buy services. As a result, they have significant negotiating power with smaller offices that are not able to collectively bargain. This lowers the reimbursement rates that physicians can take for their services and incentivizes integration with hospital systems that have greater market power.

⁷⁷ Dafny, Duggan, and Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the U.S. Health Insurance Industry*, AMERICAN ECONOMIC REVIEW, 102(2): 1161-1185, April 2012.

<https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.102.2.1161>

⁷⁸ Jose Guardado and Carol Kane, *Competition in Health Insurance: A Comprehensive Study of U.S. Markets*, AMERICAN MEDICAL ASSN., November 2022. <https://www.ama-assn.org/system/files/competition-health-insurance-us-markets.pdf>

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ KAISER FAMILY FOUNDATION, *Large Group Insurance Market Competition*, 2019.

<https://www.kff.org/other/state-indicator/large-group-insurance-market-competition/>

⁸² *Id.*

⁸³ Jessica Van Parys, *ACA Marketplace Premiums Grew More Rapidly in Areas With Monopoly Insurers Than in Areas With More Competition*, HEALTH AFFAIRS, August 2018.

<https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2018.0054>

⁸⁴ SMALL BUSINESS MAJORITY, *Small Businesses Struggling to Access Healthcare During COVID-19 Pandemic*, March 31, 2021. <https://smallbusinessmajority.org/our-research/healthcare/small-businesses-struggling-access-healthcare-during-covid-19-pandemic>

⁸⁵ *Id.*

Furthermore, while insurance companies have grown their market share, they have also increased utilization management practices, like prior authorizations. Prior authorization is the process in which a physician must obtain advanced approval from a health plan before the delivery of a procedure, device, supply, or medication in order for insurance to offset the cost of that service. To do so, many physicians must prove the medical necessity of the service in advance. Not only can this delay care for patients, or even deny it altogether, it can significantly drive the cost of providing care for patients in the form of compliance costs for physicians. According to a 2019 study, the cost burden on physicians can vary considerably, from \$80,000 annually per physician to between \$2,200 and \$3,400 per physician.⁸⁶

In September 2019, the House Small Business Committee held a hearing on the impact of Prior Authorizations on independent medical providers. The physician panel was nearly unanimous that insurance companies were simply using the practice to lower services rendered and increase profits. Dr. Howard Rogers, testifying on behalf of the American Academy of Dermatology Association, noted:

Unfortunately, there is little or no transparency in how the prior authorizations are judged nor the guidelines by which the reviewers look at the clinical information provided. It seems haphazard and it's designed to wear the physician down to the point where care isn't rendered, which would definitely increase profitability for insurers.

As will be discussed in the next section, additional administrative burden is one of the drivers of physician practice sales to larger hospital systems and private equity groups. In many ways, the actions of insurance companies can contribute to a vicious cycle of consolidation between hospital systems and insurance companies, as they both strive for greater negotiating power.

Hospital Consolidation and the Impact on Independent Medical Providers

Independent medical providers, often viewed as community pillars and guardians of long-standing patient relationships, are becoming increasingly rare across the U.S. The past several decades have brought waves of consolidation to medical providers, leading to the expansion of large hospital chains and the dwindling of private practices. From 2012 to 2020, private practice ownership among physicians slipped from 53.2 percent to 44 percent.⁸⁷ Between 2019 and 2021, 108,700 physicians transitioned to hospital employment, meaning nearly 3 in 4 physicians now choose employment over ownership. Moreover, the number of physician practices owned by hospitals or other corporate entities, like private equity, is now over half (52.1 percent),⁸⁸ and this number has

⁸⁶ Turner, Miller, and Clark, *Impacts of Prior Authorization Health Care Costs and Quality, A Review of the Evidence*, NATIONAL INSTITUTE FOR HEALTH CARE REFORM. Nov. 2019.

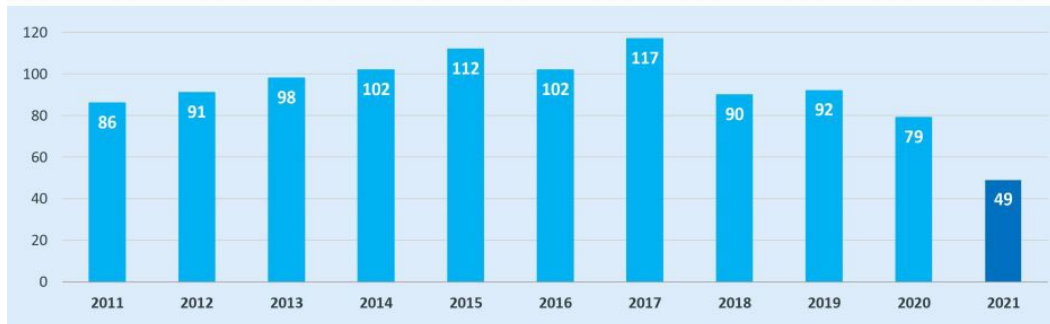
⁸⁷ Carol Kane, *Recent Changes in Physician Practice Arrangements: Private Practice Dropped to Less Than 50 Percent of Physicians in 2020*, AMERICAN MEDICAL ASSN., 2021. <https://www.ama-assn.org/system/files/2021-05/2020-prp-physician-practice-arrangements.pdf>

⁸⁸ PHYSICIANS ADVOCACY INSTITUTE, *Physician Employment Trends*, April 2022.

<http://www.physiciansadvocacyinstitute.org/PAI-Research/Physician-Employment-and-Practice-Acquisitions-Trends-2019-21>

grown nearly 40 percent between 2012 and 2020.⁸⁹ Consequently, by 2021, only three in 10 of the nation’s physicians will remain independent.⁹⁰

Hospital Mergers and Acquisitions, 2011-2021.



Source: Kaufman, Hall & Associates, LLC

While the period between 2010 and 2019 was characterized by a large number of mergers in hospitals, with a peak of 117 in 2017, the period beginning in 2020 to present day has been characterized by fewer mergers but larger in size.⁹¹ In fact, 16.3 percent of mergers in 2021 were “mega mergers” in which the seller or smaller partner by revenue has greater than \$1 billion in annual revenue.⁹² Since 2011, the average size of the smaller partner in these deals has grown 8 percent.⁹³

These merger and acquisition activities have resulted in substantial concentration within hospital markets. From 2000 to 2017, the average HHI for a hospital market grew from 2,054 to 2676.⁹⁴ Concurrently, the proportion of highly concentrated hospital markets rose from 30 percent to 44 percent.⁹⁵ In the figure below, red areas represent markets in which the HHI is greater than 2,500, or “highly concentrated” according to the Department of Justice. In fact, 19 percent of markets are fully controlled by only a single hospital.⁹⁶

⁸⁹ Sally Pipes, *Opinion: Will the Independent Medical Practice Become Extinct in America?*, THE TENNESSEAN, Feb. 7, 2022. <https://www.tennessean.com/story/opinion/2022/02/07/decrease-independent-medical-practice-impacts-americans/6656073001/>

⁹⁰ Samantha Liss, *Nearly Half of Physician Practices Owned by Hospitals, Corporate Entities*, Report Finds, HEALTHCARE DIVE, June 29, 2021. <https://www.healthcaredive.com/news/nearly-half-of-physician-practices-owned-by-hospitals-corporate-entities/602540/>

⁹¹ Jacquelin LaPointe, *Large Hospital Mergers Signal New Phase of Healthcare Deals*, REVCYCLE INTELLIGENCE, Jan. 13, 2022. <https://revcycleintelligence.com/news/large-hospital-mergers-signal-new-phase-of-healthcare-deals>

⁹² *Id.*

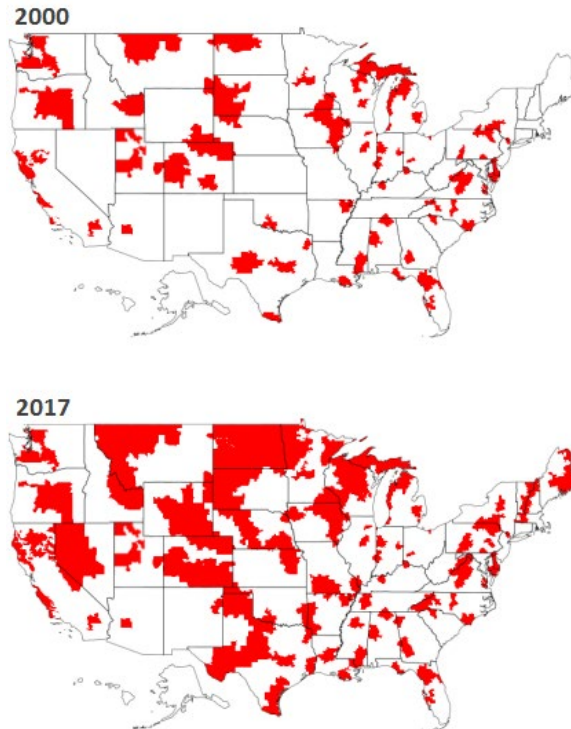
⁹³ *Id.*

⁹⁴ NCCI INSIGHTS, *The Impact of Hospital Consolidation on Medical Costs*, July 11, 2018.

https://www.ncci.com/Articles/Pages/II_Insights_QEB_Impact-of-Hospital-Consolidation-on-Medical-Costs.aspx

⁹⁵ *Id.*

⁹⁶ Garret Johnson and Austin Frakt, *Hospital Markets in the United States, 2007-2017*, HEALTHC (AMST), Sep. 8, 2020. <https://pubmed.ncbi.nlm.nih.gov/32919591/>



Sources: Centers for Medicare & Medicaid Services (CMS);
Dartmouth Atlas of Healthcare

Multiple factors have driven this consolidation trend over the past three decades. Medicare reimbursement rates have increased by 11 percent over the past 20 years, while the overhead costs of managing an independent practice have jumped nearly 40 percent.⁹⁷ Instead of navigating business ownership in these conditions, an owner may choose to sell to a larger system or private equity firm to return their focus to treating patients. One of the central goals of the Affordable Care Act was to increase the integration of medical systems in the U.S. on the basis that it would create more efficiency and thus bring down prices for services.⁹⁸

While the consolidation of hospitals was initially seen as a pathway to reduce costs through increased efficiency, the expected benefits have been elusive. Although economies of scale can decrease administrative costs and streamline patient care, these cost reductions are often not reflected in the prices charged to patients or payers. Some estimate that a merger can lead to 15 to 30 percent cost reductions.⁹⁹ Unfortunately, these cost reductions are often not passed onto patients or payers. Numerous studies have found that mergers can lead to increased prices for consumers. One study showed that hospital concentration raises average annual marketplace insurance premiums five percent higher than less concentrated areas.¹⁰⁰ Another found that hospitals without

⁹⁷ *Supra* note 89

⁹⁸ Kocher, Emanuel, and DeParle, *The Affordable Care Act and the Future of Clinical Medicine: The Opportunities and Challenges*, ANNALS OF INTERNAL MEDICINE, Oct. 19, 2010. <https://www.acpjournals.org/doi/10.7326/0003-4819-153-8-201010190-00274>

⁹⁹ *Supra* note 90.

¹⁰⁰ Boozary et al., *The Association Between Hospital Concentration and Insurance Premiums in ACA Marketplaces*, HEALTH AFFAIRS, April 2019. <https://pubmed.ncbi.nlm.nih.gov/30933578/>

competitors within a 15-mile radius have prices 12 percent higher than markets with four or more competing hospitals.¹⁰¹

Access to care, a vital benefit provided by independent medical providers, is also being compromised. Since 2005, 183 rural hospitals have closed, including 140 since 2010.¹⁰² This has left many rural communities without access to care. As of the end of 2018, there were more than 7,000 areas in the U.S. with a shortage of health care professionals, 60 percent of which were in rural areas.¹⁰³ While in some cases, these mergers can make health care providers more efficient and take the business of managing a business out of the doctor's hands, it can also neglect some of the areas where opening a practice may not be as profitable.

In addition to hospital consolidation trends, the growth of private equity in buyouts of independent providers is becoming increasingly pervasive. Total private equity investments in the health care industry have increased 20-fold from \$5 billion annually in 2000 to \$100 billion in 2018, with annual transactions growing from 78 to 855 over the same period.¹⁰⁴ In the typical acquisition by private equity, 70 percent of the overall cost is financed by debt and the remaining 30 percent equity stake is funded through limited partners who expect an annual return of 20 percent or more.¹⁰⁵ Moreover, these acquisitions are often leveraged buyouts, where the firm pledges the target assets as collateral for the debt to finance the purchase, and the acquired entity bears the responsibility of paying the debt.¹⁰⁶ The short-term focus on revenue and outsized returns are concerning, particularly prioritizing profits over patient care. Additionally, the private equity firms' strategy often revolves around a roll-up strategy in which it maximizes market power in a specialty or geographic region to drive monopoly rents.¹⁰⁷

This has dire effects on prices for consumers and the quality of care they ultimately receive. Private equity firms seek to drive down staff-to-patient ratios.¹⁰⁸ In nursing homes in particular, this led to reduced quality and higher mortality rates despite 11 percent higher Medicare reimbursement rates.¹⁰⁹ One study of private equity owned hospitals found that these hospitals had fewer full time equivalent employees per occupied bed and lower patient satisfaction scores.¹¹⁰

¹⁰¹ Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, NBER, May 2018. https://www.nber.org/system/files/working_papers/w21815/w21815.pdf

¹⁰² University of North Carolina Sheps Center For Health Services Research, *Rural Hospital Closures, 2005-Present*. <https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/>

¹⁰³ Kirk Siegler, *The Struggle to Hire and Keep Doctors in Rural Areas Means Patients Go Without Care*, NPR, May 2019. <https://www.npr.org/sections/health-shots/2019/05/21/725118232/the-struggle-to-hire-and-keep-doctors-in-rural-areas-means-patients-go-without-c>

¹⁰⁴ Sajith Matthews, MD and Renato Roxas, MD, *Private Equity and its Effects on Patients: A Window to the Future*, INT J HEALTH ECON MANAGEMENT, May 23, 2022.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

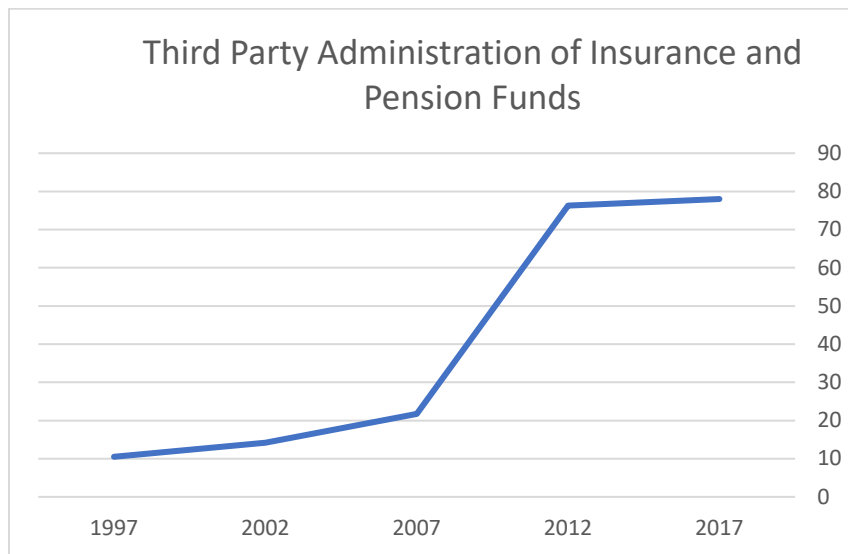
¹⁰⁹ *Id.*

¹¹⁰ Bruch, Zeltzer, and Song, *Characteristics of Private Equity-Owned Hospitals in 2018*, ANN INTERN MED, Sept. 29, 2020.

Pharmacy Benefit Managers and the Decline of Independent Pharmacists

Prescription drugs have become an increasingly important aspect of the American health care system over the past several decades. Since 1980, spending on prescription drugs escalated from \$30 billion¹¹¹ to an astonishing \$603 billion in 2021.¹¹² Over that same period, per capita spending has increased more than tenfold, from \$140 to more than \$1,500.¹¹³ Consequently, the complexity of manufacturing, distributing, and managing the cost of these drugs has increased. Enter Pharmacy Benefit Managers (PBMs), entities introduced in the 1960s to help insurers contain costs and alleviate administrative burden. PBMs negotiate prices with drug manufacturers to determine prices, decide which drugs are covered on health insurance plan formularies, which pharmacies are in and out of a health insurer’s network, and how much the pharmacy is reimbursed for dispensing a certain drug.

Acting as intermediaries between insurance companies, manufacturers, pharmacies, and patients, PBMs have significant influence in prescription drug markets. Over time, considerable consolidation and vertical integration has occurred, leading to potential conflicts of interest and fostering anticompetitive conduct. Despite having 66 PBMs nationwide, the top 3 – Caremark, Express Scripts, and OptumRx – manage 80 percent of the country’s drug claims.¹¹⁴ This is a significant leap from 1997 when the top four firms only controlled 10.5 percent of the market.¹¹⁵ The figure below shows the market share of the top four firms in NAICS Code 524292 (third party administration of insurance and pension funds) from 1997 to 2017.



¹¹¹ CONG. BUDGET OFFICE, *Prescription Drugs: Spending, Use, and Prices*, Jan. 2022. <https://www.cbo.gov/system/files/2022-01/57050-Rx-Spending.pdf>

¹¹² U.S. HHS, *Issue Brief: Trends in Prescription Drug Spending, 2016-2021*. September 2022. <https://aspe.hhs.gov/sites/default/files/documents/88c547c976e915fc31fe2c6903ac0bc9/sdp-trends-prescription-drug-spending.pdf>

¹¹³ Jeff Lagasse, *National Drug Spending Grew Almost 8% in 2021 and is Still Rising*, HEALTHCARE FINANCE, April 13, 2022. <https://www.healthcarefinancenews.com/news/national-drug-spending-grew-almost-8-2021-and-still-rising#:~:text=According%20to%20HHS%20data%2C%20Americans,prescribed%20due%20to%20their%20cost.>

¹¹⁴ Adam Fein, *The Top Pharmacy Benefit Managers of 2021: The Big Get Even Bigger*, DRUG CHANNELS INST., April 5, 2022. <https://www.drugchannels.net/2022/04/the-top-pharmacy-benefit-managers-of.html>

¹¹⁵ 2017 Economic Census, 1997 Economic Census

In addition to their market dominance, these leading PBMs have also pursued vertical integration with insurers, pharmacies, and healthcare providers. Notably, PBM Caremark merged with retail pharmacy CVS, and in 2017, they acquired major health insurer Aetna.¹¹⁶ In 2012, Express Scripts bought Medco Health Solutions and in 2015, UnitedHealthcare bought Catamaran.¹¹⁷ In 2018, Cigna bought Express Scripts for \$67 Billion.¹¹⁸ Below is a diagram of how the major PBMs are integrated with pharmacies, insurers, and providers.



The integration of insurers, PBMs, and specialty pharmacies introduces conflicts of interest that incentivize self-dealing. This can be financially ruinous for independent pharmacies that provide some of the only access to pharmaceuticals in their local areas, and patients that rely on their services. PBMs can steer customers to their own mail-order or in-house specialty pharmacies, restricting access to local, more convenient pharmacies and restricting those local pharmacies from dispensing more profitable medications. Reports from California,¹¹⁹ Minnesota,¹²⁰ New York,¹²¹ and Wisconsin¹²² raised concerns about PBMs steering patients away from independent pharmacies and toward their own affiliate pharmacies.

¹¹⁶ Evan Sweeney, *Lawmakers Ask FTC for Retrospective Review of PBM Mergers*, FIERCE HEALTHCARE, July 30, 2018. <https://www.fiercehealthcare.com/payer/house-energy-and-commerce-ftc-pbm-mergers-healthcare-costs>
¹¹⁷ *Id.*

¹¹⁸ Paige Minemyer, *Cigna to Buy Express Scripts in \$67B Deal*, FIERCE HEALTHCARE, Mar. 8, 2018. <https://www.fiercehealthcare.com/payer/cigna-express-scripts-merger-pharmacy-benefit-management>

¹¹⁹ CALIFORNIA DEPT. OF MANAGED HEALTH CARE, *Task Force on Pharmacy Benefit Manager Reporting*, Feb. 2020. <https://www.dmhc.ca.gov/Portals/0/Docs/DO/PharmacyBenefitManagementLegislativeReportAccessible.pdf>

¹²⁰ OFFICE OF MINN. ATTORNEY GENERAL KEITH ELLISON, *Report of the Minnesota Attorney General's Advisory Task Force on Lowering Pharmaceutical Drug Prices*, Feb. 2020. https://www.ag.state.mn.us/Office/Communications/2020/docs/DPTF_Feb2020Report.pdf

¹²¹ NY STATE SENATE COMMITTEE ON INVESTIGATIONS AND GOVERNMENT OPERATIONS, *Final Investigative Report: Pharmacy Benefit Managers in New York*, May 31, 2019. https://www.nysenate.gov/sites/default/files/article/attachment/final_investigatory_report_pharmacy_benefit_managers_in_new_york.pdf

¹²² STATE OF WISCONSIN GOVERNOR'S TASK FORCE ON REDUCING PRESCRIPTION DRUG PRICES, *Report of the Governor's Task Force on Reducing Prescription Drug Prices*, Oct. 2020. <https://oci.wi.gov/Documents/AboutOCI/RxTaskForceFinalReport.pdf>

In a speech in September 2022, FTC commissioner Alvaro Bedoya recounted a story about a family seeking cancer medication for their sick child. While the retail pharmacy had the medication ready to dispense, the PBM denied the authorization to the family, instead forcing them to use the mail-order service provided by the PBM, which could take up to two weeks.¹²³ Fortunately, the pharmacist contacted the Office of the West Virginia Insurance Commissioner, who elevated the complaint to the insurer's management team, who then authorized the pharmacy to dispense the medication in two hours.

Independent pharmacies also face financial harm due to different reimbursement rates. A report from the state of Florida found that PBMs were reimbursing their affiliate pharmacies at much higher levels for brand-name medication than they were independent pharmacies. The report stated, "when it comes to dispensing brand name drugs, MCO/PBM-affiliated pharmacies are making 18x to 109x more profit over the cost of the drugs than the typical community pharmacy."¹²⁴ A similar study from Oklahoma showed that CVS Caremark reimbursed a CVS Pharmacy \$399.46 for 18 tablets of 5mg Rizatriptan while charging a \$12.68 copay from the patient. For the same medication, an independent pharmacy was reimbursed only \$49.26, and the patient was charged a \$15 copay.¹²⁵

Increasing fees while cutting reimbursement rates to competing pharmacies allows them to use that difference to increase their profits, in what is called spread pricing. For instance, in Ohio, CVS Caremark and OptumRX charged Ohio Medicaid \$223.7 million more than it paid to pharmacists.¹²⁶ In Kentucky, PBMs paid competing pharmacies \$123.5 million less than they charged the state Medicaid program in 2018 alone.¹²⁷

PBMs also exploit the Medicare Part D program's Direct and Indirect Remuneration, or DIR mechanism, to claw back a percentage of the reimbursement that was paid to a pharmacy. While these clawbacks were originally intended to enable PBMs to accurately report pharmacy rebates and price concessions they have grown dramatically in recent years, accounting for roughly \$9.1 billion in 2019. In some cases, they create negative reimbursement for independent pharmacies, taking back not only the reimbursement to pharmacies, but also part of the patient's copay.¹²⁸

¹²³ Prepared Remarks of Commissioner Alvaro M. Bedoya, Returning to Fairness, Federal Trade Commission, Sept. 22, 2022.

https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf

¹²⁴ 3 AXIS ADVISORS, *Sunshine in the Black Box of Pharmacy Benefits Management*, Jan. 30, 2020.

<https://static1.squarespace.com/static/5c326d5596e76f58ee234632/t/5e384f26fc490b221da7ced1/1580748598035/F+L+Master+Final+Download.pdf>

¹²⁵ IS-21-002 Interim Study Agenda, Oklahoma Pharmacists Association

¹²⁶ Catherine Candisky, *State report: Pharmacy middlemen reap millions from tax-funded Medicaid*, THE COLUMBUS DISPATCH, (2018), <https://stories.usatodaynetwork.com/sideeffects/state-report-pharmacy-middlemen-reap-millions-from-tax-funded-medicaid/>.

¹²⁷ Lisa Gillespie, *Pharmacy Middlemen Overcharged Medicaid \$123.5 Million, State Says*, 89.3 WFPL, Feb. 23, 2019, <https://wfpl.org/pharmacy-middlemen-overcharged-medicaid-123-5-million-state-says/>.

¹²⁸ Adam Fein, *Pharmacy DIR Fees Hit a Record \$9 billion in 2019 – That's 18% of Total Medicare Part D Rebates*, DRUG CHANNELS INST., Feb 13, 2020.

The cumulative impact of this consolidation and anti-competitive behavior is the steady decline of independent pharmacies, particularly in rural areas where access is sparse. This can lead to “pharmacy deserts,” where citizens cannot access prescription medication within a reasonable distance. From 2003 to 2019, 1,231 of the nation’s 7,624 independent rural pharmacies closed,¹²⁹ leaving 630 communities with no independent or chain retail drug store.¹³⁰

Figure 1. Monthly Count of Rural Independently Owned Pharmacies, 2003-2018

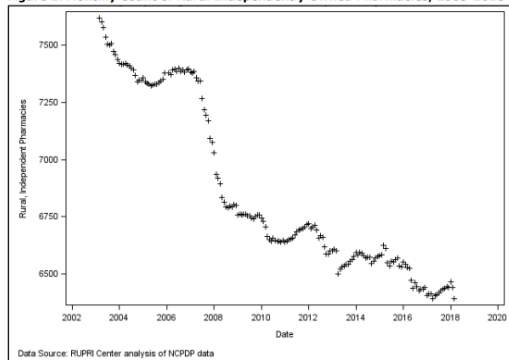
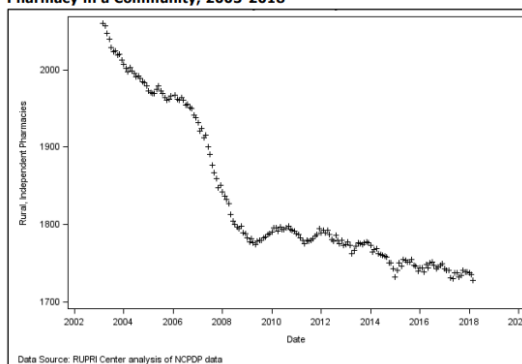


Figure 2. Monthly Count of Rural Independently Owned Pharmacies That Were the Only Pharmacy in a Community, 2003-2018



At the same time, the top retail drug stores have been capturing larger and larger segments of the market. In 1997, the top four retail pharmacies earned 46.6 percent of revenue in the industry.¹³¹ That grew to 52.8 percent in 2002, 63 percent in 2007, and 69.5 percent in 2012.¹³²

Retail

A flourishing retail sector is a vital part of any economy, particularly for independent businesses. It’s where people allocate a significant portion of their earnings, buying food, clothing, and engaging in recreational activities. American culture has a long-standing connection to retail shopping, with bustling Main Streets often being essential attractions, making a town appealing to live and work. However, over the past three decades, this sector has witnessed substantial consolidation. Small businesses have continually been on the decline, while superstores have gained significant market shares in areas like grocery stores, bookstores, breweries, and hardware stores across the U.S. The retail sector presents some of the most pronounced examples of market concentration and some of the clearest evidence of illegal anti-competitive behavior in the form of price discrimination and predatory pricing.

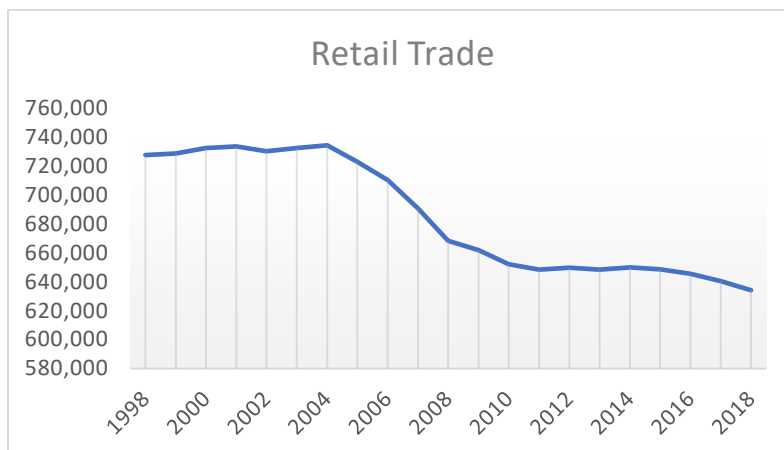
¹²⁹ Salako, Ulrich, and Mueller, Update: *Independently Owned Pharmacy Closures in Rural America, 2003-2018*, RUPRI CENTER FOR RURAL HEALTH POLICY ANALYSIS, July 2018. <https://rupri.public-health.uiowa.edu/publications/policybriefs/2018/2018%20Pharmacy%20Closures.pdf>

¹³⁰ Markian Hawryluk, *How Rural Communities are Losing their Pharmacies*, KAISER FAMILY FOUNDATION, Nov. 15, 2021. <https://khn.org/news/article/last-drugstore-how-rural-communities-lose-independent-pharmacies/>

¹³¹ 1997 Economic Census

¹³² 2002, 2007, 2012 Economic Census.

As noted in the first part, the total number of firms in the retail sector has been consistently decreasing since the 1990s. In 1998, the retail trade sector had 736,491 firms with fewer than 500 employees, according to the Census Statistics of U.S. Businesses.¹³³ By 2019, the sector had lost over 100,000 small businesses, standing at 634,285. This decline is demonstrated in the graph below.



Groceries

Grocery stores play a vital role in communities nationwide, being essential for supporting local workers and their families. They act as economic anchors, attracting consumers and stimulating foot traffic for other retail businesses. Over the past few decades, larger chains have grown more influential, leading to a 30 percent decrease in the number of grocery stores from 1994 to 2019.¹³⁴ Giants like Walmart and Kroger hold substantial segments of the national grocery market, and dominate local markets throughout the country. In 2022, Walmart accounted for nearly 21 percent of grocery sales in the U.S.¹³⁵ As of 2019, it held 50 percent or more of grocery sales in 43 metropolitan areas and 160 smaller markets.¹³⁶ Indeed, the market share controlled by the top 4, 8, and 20 supermarket firms has trended upward since 1990.¹³⁷

¹³³ Census Statistics of U.S. Businesses 1998-2019.

¹³⁴ FOOD AND WATER WATCH, *The Economic Cost of Food Monopolies: The Grocery Cartels*, November 2021. [IB_2111_FoodMonoSeries1-SUPERMARKETS.indd \(foodandwaterwatch.org\)](https://www.foodandwaterwatch.org/IB_2111_FoodMonoSeries1-SUPERMARKETS.indd)

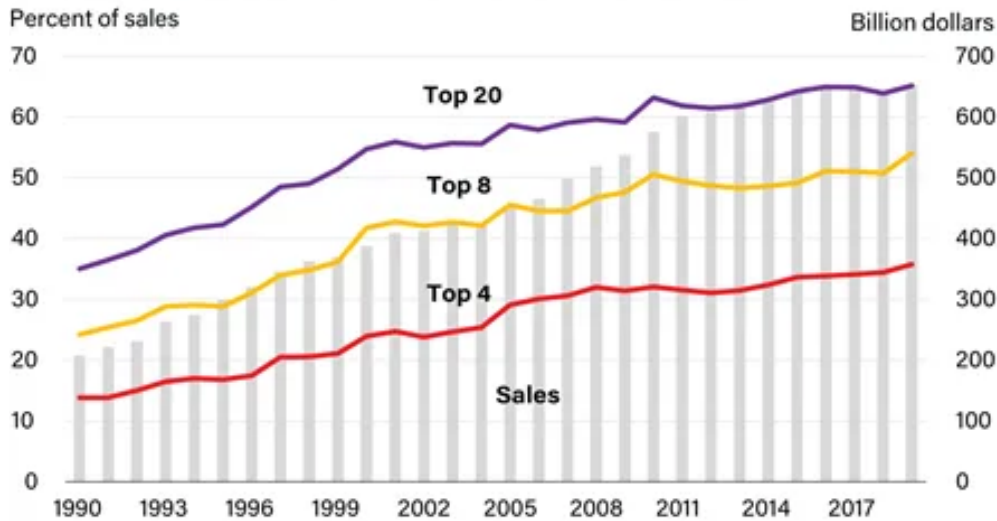
¹³⁵ Errol Schweizer, *Why a Kroger/Albertsons Merger Is a Bad Idea*, FORBES, Oct. 13, 2022. <https://www.forbes.com/sites/errolschweizer/2022/10/13/why-a-krogeralbertsons-merger-is-a-bad-idea/?sh=2415ccfb53af>

¹³⁶ Stacy Mitchell, *Report: Walmart's Monopolization of Local Grocery Markets*, ILSR, June 26, 2019. <https://ilsr.org/walmarts-monopolization-of-local-grocery-markets/>

¹³⁷ USDA Economic Research Service, Retail Trends. <https://www.ers.usda.gov/topics/food-markets-prices/retailing-wholesaling/retail-trends/>

Top 4, 8, and 20 firms' share of U.S. food sales, 1990–2019

The share of food sales at supermarkets, other grocery stores, warehouse clubs, and supercenters of the top 4, 8, and 20 retailers trended upwards for the last three decades



Notes: Sales are estimated based on the sales per employee ratio calculated by firm size and North American Industry Classification System (NAICS) code. NAICS codes included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the Economic Census product lines statistics on the percentage of sales on food (on and off premises).

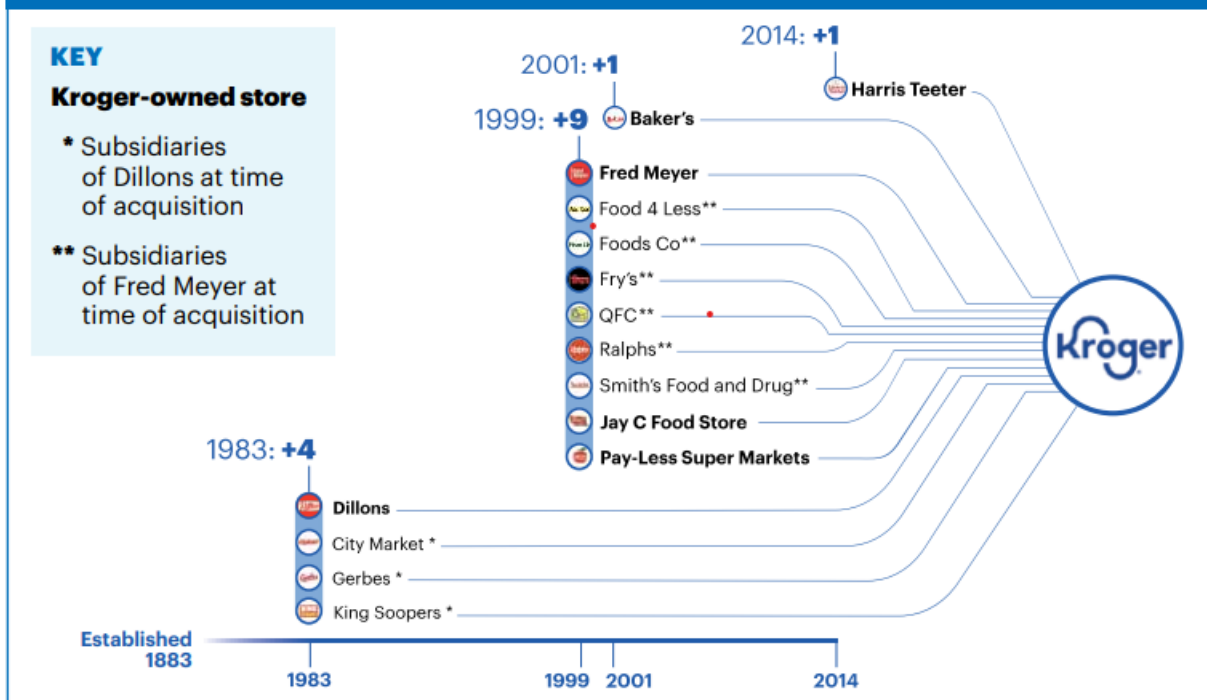
Source: USDA, Economic Research Service using data from U.S. Department of Commerce, Bureau of the Census, and National Establishment Time Series.

Following Walmart, Kroger is the second-largest player, controlling about 10 percent of the national grocery market, operating over 2,800 stores nationwide under the names of Fred Meyer, Harris Teeter, and Smiths. In October 2022, Kroger announced a merger with Albertsons, the fourth largest grocer in the U.S. and owner of Safeway.¹³⁸ Together they would own roughly 16 percent of the national market.¹³⁹ Below is a diagram of how Kroger became the largest grocery chain in the U.S.

¹³⁸ Kroger Company Release, *Kroger and Albertsons Companies Announce Definitive Merger Agreement*, Oct. 14, 2022. <https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx>

¹³⁹ *Supra* note 125.

FIG. 2: How Kroger^b became the largest U.S. supermarket chain



Greater consolidation in the grocery sector has led to amplified buyer power. Retailers can negotiate bigger discounts and demand more substantial fees from suppliers, reflecting monopsony power. While these lower costs for retailers could theoretically result in savings for consumers, whether this happens depends on the competitiveness of the local market.¹⁴⁰ Increased buyer power could negatively impact small suppliers unable to afford the discounts and fees demanded by large retailers like Walmart and Kroger. Independent grocers would be adversely affected, unable to match the prices these major players could offer, and often contending with the “waterbed effect” in which the lower prices offered to power buyers must be balanced out through higher prices to independent retailers.

In a House Subcommittee hearing, an independent grocer testified about the detrimental effects of price and package discrimination. Small and independent grocers are not able to obtain certain price promotions or packaging with a lower, per-unit cost.¹⁴¹ As a result, they see large grocers, like Walmart and Kroger, charge retail prices far below the wholesale prices they can get.¹⁴² In some cases, the savings that are afforded to large chains are made up for in sales to independent grocers.¹⁴³ Moreover, the cost savings afforded to Walmart are not a direct result of efficiency (it may be cheaper to ship greater quantities at once), but rather a direct result of the market power that Walmart has obtained. Suppliers must deal with Walmart to reach the maximum number of customers.

¹⁴⁰ *Id.*

¹⁴¹ Power Buyers, Economic Discrimination, and the Grocery Supply Chain, Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. On Judiciary, 117th Cong. (2022).

<https://docs.house.gov/meetings/JU/JU05/20220119/114345/HHRG-117-JU05-Wstate-NeedlerM-20220119.pdf>

¹⁴² *Id.*

¹⁴³ *Id.*

The COVID-19 pandemic highlighted the market power of these large retailers. During lockdowns, many stores struggled to source high-demand products, like hand sanitizer, paper towels, toilet paper, and various food items. Walmart, however, was able to demand suppliers provide on time and in full deliveries 98 percent of the time, punishing suppliers that didn't by charging a penalty of 3 percent of the cost of goods sold.¹⁴⁴ Large retailers were thus fully stocked due to their purchasing power while smaller stores struggled to maintain inventory.

The leverage of these large retailers to secure discounted goods allowed them to further accumulate market power, thus granting them additional pricing power. Over the past two years, consumers have seen some of the highest increases in grocery prices in American history. A KPMG study reported a 22 percent increase in grocery bills compared to pre-COVID prices.¹⁴⁵ While the wholesale cost of goods has risen across the board for a variety of reasons, including supply chain disruptions, increasing input costs, and even the market power of suppliers, retail prices have risen faster than the increase of costs, resulting in higher margins. Kroger, Albertsons, Target, and Dollar General all saw double digit net income growth over 2020.¹⁴⁶ One retailer, Ahold Delhaize, had a 25 percent increase in net income in 2020, despite seeing a 5 percent decline in sales.¹⁴⁷

Big Tech Gatekeepers

The digital age ushered in unprecedented opportunities for small retailers. Now, even rural companies can access buyers nationwide and potential markets abroad. In the past, a brick-and-mortar presence on Main Street may have been a prerequisite; now, all that's required is a well-structured website and a workspace that could be in a living room or garage. Overall, this trend has lowered the barrier to entry for many entrepreneurs. Unfortunately, the ability to penetrate new markets and perform well online often hinges on successful selling on large technology platforms as a third-party vendor. By 2016, over half of American shoppers went to Amazon first when looking for a product, rather than a search engine.¹⁴⁸ In 15 of 23 major product categories, Amazon is capturing more than 70 percent of online transactions in 2019.¹⁴⁹ As of 2021, 56.7 percent of all online retail purchases were made on Amazon, doubling from 28.1 percent since 2014.¹⁵⁰ The next largest online retailer is Walmart, at only a 6.2 percent share of sales volume.¹⁵¹

¹⁴⁴ *Id.*

¹⁴⁵ Diane Adam, *Groceries Will Cost 14% more This Year, KPMG Survey Reveals*, WINSIGHT GROCERY BUSINESS, Jan. 1, 2022. <https://www.winsightgrocerybusiness.com/retailers/groceries-will-cost-14-more-year-kpmg-survey-reveals>

¹⁴⁶ Errol Schweitzer, *Why Food Price Inflation Is Not Inevitable*, FORBES, Jan. 4, 2022. <https://www.forbes.com/sites/errolschweitzer/2022/01/04/why-food-price-inflation-is-not-inevitable/?sh=b7716b2649fa>

¹⁴⁷ *Id.*

¹⁴⁸ Spencer Soper, *More than 50% of Shoppers Turn First to Amazon In Product Search*, BLOOMBERG, Sept. 27, 2016. <https://www.bloomberg.com/news/articles/2016-09-27/more-than-50-of-shoppers-turn-first-to-amazon-in-product-search#xj4y7vzkg>

¹⁴⁹ GLOBAL NEWSWIRE, *An eCommerce Year In Review: Jumpshot Reveals Winners, Losers and Amazon Data Report*, Jan. 31, 2019. <https://www.globenewswire.com/en/news-release/2019/01/31/1708244/0/en/An-eCommerce-Year-in-Review-Jumpshot-Reveals-Retail-Winners-Losers-and-Amazon-Data-Report.html>

¹⁵⁰ PYMNTS, *Amazon's Share of US eCommerce Sales Hits All-Time High of 56.7% in 2021*, Mar. 14, 2022. <https://www.pymnts.com/news/retail/2022/amazons-share-of-us-ecommerce-sales-hits-all-time-high-of-56-7-in-2021/>

¹⁵¹ *Id.*

Amazon's growth as a retail behemoth has been explosive since its founding in 1995. By 2000, it already had \$2.7 billion in sales, and by 2021, that figure approached \$470 billion.¹⁵² It also commands significant market share in cloud computing, where Amazon Web Services holds 33 percent of the market, more than its top three competitors, Microsoft Azure, Google Cloud, and IBM cloud combined.¹⁵³ Moreover, it governs 60 percent of the U.S. e-commerce third-party logistics market.¹⁵⁴ With a dominant presence in both first-party online retail and as a third-party marketplace for small businesses, Amazon has leveraged its market strength to extract escalating fees from small enterprises and, in some cases, drive them out of business using data gathered from their marketplace. Below is a brief overview of Amazon's practices that bolster its supremacy and harm small businesses:

1. *Fees*

One of Amazon's most lucrative revenue sources is the fees it charges third-party sellers. Amazon charges fees for third-party brands to use its services. In 2020 alone, it accumulated \$90 billion in seller fees.¹⁵⁵ According to a report by the Institute of Local Self-Reliance (ILSR), Amazon was taking up to 34 percent of revenue from third-party sales through the fees it charges, up from 19 percent in 2014.¹⁵⁶ That number is a combination of the base fee of 15 percent, as well as advertising revenue crucial to landing a product on the top page of search results.¹⁵⁷ This advertising fee has continually grown from 1.1 percent in 2016 to 3.4 percent in 2020 to 4.6 percent in 2021.¹⁵⁸ Additional fees include those to pay for Amazon's warehouse and shipping services, which Amazon sellers are compelled to use.¹⁵⁹ As a result, these fees now account for a quarter of Amazon's revenue – a sharp increase from 14 percent in 2014.¹⁶⁰

It's important to mention the benefits Amazon and other platforms bring to many online sellers – not only does the platform open up new markets, but their data collection and algorithms help expand markets and simplify logistics services for sellers. At the same time, this can create dependence among sellers, fueling their ability to raise fees indiscriminately. Additionally, the profits from this part of the business are used to subsidize unprofitable parts, like Amazon Prime, which further hooks consumers.

However, Amazon isn't the only platform that charges exorbitant fees to small business owners using services. Independent app developers stress the overarching power of the Google Play store and Apple App store in charging exorbitant fees for using their platforms. Both companies demand

¹⁵² MARKETPLACE PULSE, *Amazon Net Sales 1996-2022*. <https://www.marketplacepulse.com/stats/amazon/amazon-net-sales-94>

¹⁵³ Molly Bond and David Grogan, *American Monopoly: Amazon's Anti-Competitive Behavior is in Violation of Antitrust Laws*, AMERICAN BOOKSELLERS ASSN., Nov. 2020.

¹⁵⁴ *Id.*

¹⁵⁵ Stacy Mitchell, *Amazon's Toll Road: How the Tech Giant Funds Its Monopoly Empire By Exploiting Small Businesses*, ILSR, Dec. 2021. https://cdn.ilsr.org/wp-content/uploads/2021/11/ILSR-AmazonTollRoad-Final.pdf?_gl=1*1ryepgn*_ga*MjEzMzMzMyNjQzLjE2NjQ4MjExNjA.*_ga_M3134750WM*MTY2NjExMTI4OS40LjEuMTY2NjExMjU5MS4wLjAuMA..&_ga=2.147812862.899274443.1666025323-213332643.1664821160

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

gate keeper power – being the sole place to buy apps – on Android and iPhones, respectively, and can charge arbitrary fees for any paid downloads or in-app purchases. According to the House Judiciary Committee’s report on big tech, Google charges developers of paid apps a 30 percent commission for downloads from the play store, and a 30 percent fee on in-app purchases.¹⁶¹ The same fees are taken by Apple’s App store.¹⁶²

2. *Predatory Pricing*

While third-party sellers make up a large portion of the sales on Amazon, it also holds significant market power through its own private label products, such as its apparel company AmazonBasics, or through the reselling of inventory that a retailer or wholesaler has sold to Amazon. However, because of the data it can collect on which third-party products are best-selling on its site, it can use that data to determine which products to sell from its own first-party brands. In turn, it can sell those products below cost, just as it does with Prime, subsidized by other parts of its business, in order to acquire its major competitors and monopolize the market. For instance, in 2010, Amazon acquired Quidsi, an e-commerce company with holdings such as Diapers.com and Soap.com.¹⁶³ When Quidsi declined an acquisition offer in 2009, Amazon slashed its prices for diapers and other baby products by up to 30 percent.¹⁶⁴ When Diapers.com’s growth slowed and investment dried up, it had no choice but to sell to Amazon.¹⁶⁵

3. *Self-Preferencing*

Just as Amazon uses predatory pricing to put competitors at a disadvantage, it also uses its power as the owner of its own platform to steer customers toward its own private label products. Since many consumers tend to buy the top result in a product category, having the ability to put its own product at the top gives it a competitive advantage. Many sellers spend a significant amount in advertising fees to appear as the top result, as discussed above, but for many competitors of Amazon’s own products, the ability to buy the ad space is unavailable. For instance, Roku, a streaming device that competes with Amazon’s Fire TV, was unable to buy ads on the platform.¹⁶⁶ Moreover, Amazon’s own products, like Alexa, will direct you to Amazon brand items when you ask it to buy something.

Self-preferencing is not a strategy that Amazon alone exploits. Other tech platforms, like Google, have been found to prioritize their own products through the power of owning the platform. For instance, when users search for videos on Google, it preferences sources to YouTube at the top of the page over other video platforms.¹⁶⁷ Moreover, Google has prioritized its own travel sites over competitors when people search for things like flights. As a result, choices like Expedia or Booking.com are moved toward the bottom of the search results.¹⁶⁸

¹⁶¹ *Investigation of Competition in Digital Markets*, HOUSE COMMITTEE ON THE JUDICIARY, 2020.

¹⁶² *Id.*

¹⁶³ *Supra* note 153.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Dana Mattioli, Patience Haggin, Shane Shifflet, *Amazon Restricts How Rival Device Makers Buy Ads on Its Site*, WALL STREET JOURNAL, Sept. 22, 2020. <https://www.wsj.com/articles/amazon-restricts-advertising-competitor-device-makers-roku-arlo-11600786638>

¹⁶⁷ *Supra* note 161.

¹⁶⁸ *Id.*

Main Street Retail Stores

The appeal of quaint boutiques and unique retail stores scattered across towns is gradually being eroded by the encroaching presence of larger national brands. Anticompetitive practices such as price discrimination go beyond grocery stores and e-commerce, affecting a wide range of retailers and small business startups.

Consider craft brewers vying for market space against beer monopolies like Anheuser-Busch InBev (AB InBev) and Molson Coors. These small brewers often need to purchase their aluminum cans from suppliers such as Ball, the largest can manufacturer in the world. However, in 2021, Ball significantly raised its minimum order for non-contract customers, many of whom are small brewers, from one truckload to five truckloads.¹⁶⁹ Moreover, it ceased storing surplus cans for these customers and increased the price-per-can by nearly 50 percent.¹⁷⁰ Not only does this negatively affect small breweries, but it raises prices on consumers downstream.

In the first hearing of the 118th Congress, the House Small Business Committee heard testimony from Mr. Drew Davis, a 17-year-old with Cerebral Palsy and owner of Crippling Hot Sauce. One component of his testimony was the problem of being a small business and obtaining hot sauce bottles from a manufacturer. In his testimony, he stated, “Another challenge was manufacturing. Because I only had \$3,000 to my name, finding one with a low enough order quantity was difficult. I had to call about 15.”

The problem isn’t limited to the food and beverage industry. Independent home goods and hardware stores encounter similar discrimination. In 2021, Whirlpool declared it would no longer sell its line of KitchenAid stand-mixers and other small appliances to independent home goods stores, favoring big box stores and Amazon instead.¹⁷¹ In an earnings call in November 2020, Home Depot announced that its market share gave it significant leverage in the supply chain that competitors lacked, forcing vendors to steer limited supplies to its stores rather than independent hardware stores.¹⁷²

In summary, smaller, independent retailers are increasingly feeling the pressure from larger national brands. The anticompetitive practices these bigger players employ are exacerbating the struggle for these businesses and further tipping the scales in favor of corporate giants. But these issues aren’t confined to direct-to-consumer sales, they work their way all the way up the supply chain to the origin of many products, on the farm and in the factory.

¹⁶⁹ Alicia Wallace, *Craft Beer Might Get Even More Expensive*, CNN, Nov. 27, 2021. <https://www.cnn.com/2021/11/27/economy/ball-craft-beer-can-disruption/index.html>

¹⁷⁰ *Id.*

¹⁷¹ Stacy Mitchell and Ron Knox, *Boxed Out*, ILSR, Sep. 2022. https://cdn.ilsr.org/wp-content/uploads/2022/09/Boxed-Out-Report-ILSR-2022.pdf?_ga=2.32809977.63214670.1666628452-213332643.1664821160&_gl=1*1gl4rv3*_ga*MjEzMzMyNjQzLjE2NjQ4MjExNjA.*_ga_M3134750WM*MTY2NjYyODQ1Mi41LjEuMTY2NjYyODQ1NC4wLjAuMA..

¹⁷² *Id.*

Food and Agriculture

For a substantial part of American history, farming was characterized by numerous small operations and family-run farms. However, the advent of the 20th century introduced mechanization through agricultural technology. This development paved the way for enhanced efficiency in planting, irrigating, fertilizing, and harvesting crops. Although this change was beneficial in terms of producing cheaper food for larger populations and generating significant export value, it led to the gradual decline of small farms. Over the second half of the 20th century, we've seen increased farm consolidation due to the lack of profitability for small farms. Recent statistics show that 51 percent of the value of U.S. farm production comes from farms with at least \$1 million in sales,¹⁷³ a notable increase from 31 percent in 1991.¹⁷⁴ Concurrently, the portion of U.S. farmland on farms with at least 2,000 acres has risen from 15 percent in 1987 to 36 percent in 2012.¹⁷⁵

Animal agriculture has also witnessed a similar trend. The number of dairy farms in the U.S, has dripped from an estimated 640,000 in 1970¹⁷⁶ to only 34,000 in 2019.¹⁷⁷ Since the mid-1990s, 70 percent of hog farmers have exited the business, leading to a significantly consolidated industry where only 7 percent of hogs are sold into competitive markets.¹⁷⁸ Ranchers and chicken farmers face similar monopolies for meat processing. In 1986, the largest four poultry processing firms held 35 percent of the market.¹⁷⁹ In 2015, that number was 51 percent.¹⁸⁰ In 1977, the largest four beef packing firms held 25 percent of the market, up to 85 percent in 2015.¹⁸¹

The consolidation isn't simply happening because of a lack of interest, given the growth in the number of small farms in recent years. Rather, many farmers hoping to compete in the marketplace are getting squeezed on both sides by large agribusiness. Essential inputs like seeds, pesticides, machinery, and fertilizer are all controlled by a select few companies employing anticompetitive practices to siphon money from dependent farmers. Power buyers that process both livestock and crops dictate the prices they pay to farmers, making significant profits in the processing or resale. Moreover, consolidation in grocery has suppressed the prices that farmers can charge. Consequently, farmers, farm workers, and rural communities all bear the brunt, while large corporations engage in less sustainable practices that pose considerable harm to the environment.

¹⁷³ James MacDonald, Robert Hoppe, and Doris Newton, *Three Decades of Consolidation in U.S. Agriculture*, USDA ECONOMIC RESEARCH SERVICE, March 2018. <https://www.ers.usda.gov/webdocs/publications/88057/eib-189.pdf?v=7257.7>

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ OPEN MARKETS INST., *Memorandum – Stop Agricultural Monopolies*, November 16, 2020.

<https://www.openmarketsinstitute.org/publications/memorandum-stop-agricultural-monopolies>

¹⁷⁷ Pramod Acharya, *Graphic: There Are Now Half As Many Dairy Farms Today Than in 2003*, MIDWEST CENTER FOR INVESTIGATIVE REPORTING, Sept. 23, 2020. <https://investigatamidwest.org/2020/09/23/graphic-there-are-now-half-as-many-dairy-farms-today-than-in-2003/>

¹⁷⁸ Claire Kelloway and Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, Open Markets Inst., Mar. 2019.

https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea9fa6c2c1e9c460038ec5b/1588198002769/190322_MonopolyFoodReport-v7.pdf

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

Farming Inputs: Seed, Fertilizer, Pesticide and Machinery Monopolies

Before farmers can even get seeds in the ground, they need to contend with large monopolies that have been spiking prices in recent years. From the seeds they plant, to the fertilizer in the soil to the machinery that allows them to make it all happen at scale, the price they pay at every step is at the whim of a handful of companies.

1. Seeds and Pesticides

The seed industry is vital to the nation's food system. Technological advances have led to genetically modified seeds, fostering higher yields and feeding larger populations on limited land. However, while these seeds contribute to higher yields for farmers, they are often modified not to germinate after a single harvest, thus cultivating a dependence by farmers to buy more every season. Increasingly, over the past several decades, the creation of these seeds has become dominated by a handful of companies, some with a significant market share of specific types of seeds like corn and soybeans. Often, the seeds these companies produce are paired with specific pesticides and herbicides produced by those same companies. As pests and weeds become increasingly resistant to these products, farmers are pushed into a "pesticide treadmill" in which they are dependent on a corporation's evolving seed and chemical inputs to produce a healthy crop.¹⁸²

From 1975 to 2015, the market share for the four largest corn seed firms increased from 59 percent to 85 percent.¹⁸³ From 1988 to 2015, the market share of the four largest soybean seed firms increased from 42 percent to 76 percent.¹⁸⁴ From 2008 to 2015 alone, the market share for the largest four global herbicide and pesticide firms increased from 59 percent to 65 percent.¹⁸⁵ Recently, German chemical and pharmaceutical giant Bayer acquired Monsanto for \$63 billion.¹⁸⁶ Monsanto already had massive power in agriculture, with their patented traits found in 80 percent of U.S. corn and over 90 percent of U.S. soybeans.¹⁸⁷ Since the late 1980s, Monsanto acquired more than 60 independent seed companies to accumulate patents in the industry.¹⁸⁸

The significant consolidation of these inputs has squeezed farmers, who are now dealing with increasing costs as a result. The per-acre cost of soybean and corn seed has seen a dramatic spike over the past few decades, with yields only increasing along its longer-term trend line. Between 1995 and 2014, these prices increased by 351 percent and 321 percent, respectively.¹⁸⁹

In 2022 alone, farmers are seeing these input costs skyrocket far past the rate of inflation. Chad Lee, a professor of agronomy at the University of Kentucky said that it costs about 40 percent

¹⁸² PESTICIDE ACTION NETWORK, *Pesticides 101*, Accessed Nov. 2022.

¹⁸³ *Supra* note 174.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Ruth Bender, *How Bayer-Monsanto Became One of the Worst Corporate Deals – in 12 Charts*, WALL STREET JOURNAL, Aug. 28, 2019.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ FARM AID, *Fair and Competitive Markets for Family Farmers & Our Food*, April 15, 2016.

more to grow crops compared to two years ago.¹⁹⁰ One farmer reported he paid about \$16 for a gallon of Bayer's Roundup, the most used weedkiller in the world, in 2021. That number is now up to \$60 a gallon.¹⁹¹

During a June 7, 2023, Small Business Committee Hearing, the Committee heard from Mr. Dave Zittel, President of Amos Zittel & Sons, a farming company in New York State. He spoke about the consolidation in Agriculture:

When I got out of college back in the late '80s, there was expansion. More people were getting in. We had more tractor dealerships; we had more fertilizer plants; we had more seed companies. The consolidation has certainly happened over the past 20 or 30 years. I'm not seeing it getting any better going the other way, it seems like its getting worse. . . A perfect example would be: we had upwards of five or six seed companies, and now we're down to two or three seed companies. You're forced to go to those houses, there's less competition, some of them don't even carry the varieties you want. So, if you want that variety, you've only got a sole house to go to. They name the price, pretty much.

Farmers aren't the only ones contending with the market power of seed and fertilizer behemoths. Smaller seed suppliers have also begun to feel the pinch as these companies tend to favor their largest buyers. ILSR recently published a report in which they detailed the story of Hensel Seed Solutions, an independent seed distributor in Illinois. They bought much of their seed from Monsanto, which increased prices for smaller distributors after its merger with Bayer.¹⁹² Hensel reported that it was charged \$100 more per bag than it charged larger farm supply chains.¹⁹³ Not only are captive farms subject to price gouging by companies with significant market power, but independent distributors along the supply chain are now being boxed out by price discrimination.

2. Fertilizer

Fertilizer is a vital input for farmers, particularly in an agricultural landscape characterized by large-scale monocultures and nutrient-depleted soil. Due to hefty capital investment requirements to compete in the marketplace for commodity crops like corn and soybeans, farmers are often unable to prioritize crop cycles and cover crops aimed at replenishing nutrients in the soil. Moreover, the market for other regenerative crop cycles is not as widespread, and the infrastructure by major processors is set up primarily for commodity crops. As a result, many farmers are dependent on fertilizer coming from just a few companies, which not only have the market power to control supply and increase prices, but are also subject to fluctuations in energy prices, since the process of manufacturing fertilizer is highly energy intensive.

¹⁹⁰ Sarah Bowman, 'Most Expensive Crop in Decades': Farmers Face Higher Stakes than Ever with Inflation, INDIANAPOLIS STAR, Sep. 30, 2022. <https://www.indystar.com/in-depth/news/environment/2022/09/30/stakes-higher-than-ever-for-farmers-as-they-feel-squeeze-of-inflation/69520689007/>

¹⁹¹ Patrick Thomas, *Farmers Feel the Squeeze of Inflation*, WALL STREET JOURNAL, Feb. 15, 2022. <https://www.wsj.com/articles/farmers-feel-the-squeeze-of-inflation-11644921180>

¹⁹² Stacy Mitchell and Ron Knox, *Boxed Out*, ILSR, Sep. 2022. https://cdn.ilsr.org/wp-content/uploads/2022/09/Boxed-Out-Report-ILSR-2022.pdf?_ga=2.32809977.63214670.1666628452-213332643.1664821160&_gl=1*1gl4rv3*_ga*MjEzMzMyNjQzLjE2NjQ4MjExNjA.*_ga_M3134750WM*MTY2NjYyODQ1Mi41LjEuMTY2NjYyODQ1NC4wLjAuMA..

¹⁹³ *Id.*

The nitrogen fertilizer production industry has undergone sweeping consolidation since the 1980s. Between the 1980s and mid-2000s, market conditions caused the industry to contract from 59 to 22 production facilities and the number of firms consolidated from 46 to 13.¹⁹⁴ As of 2019, four firms controlled 75 percent of nitrogen fertilizer production – CF Industries, Nutrien, Koch, and Yara-USA.¹⁹⁵ Other forms of fertilizer production, like phosphorus and potash are even more concentrated. Just two companies, Nutrien and Mosaic, supply the entirety of North America with potash, and Mosaic controls approximately 90 percent of phosphorus production in the U.S.¹⁹⁶

In 2021, all major types of fertilizer used in crop production, Nitrogen, Phosphorus, and Potassium (or potash), saw record-breaking price increases. Compared to 2020, for instance, nitrogen fertilizers like ammonia, urea, and liquid nitrogen saw increases of 210 percent, 155 percent and 159 percent, respectively.¹⁹⁷ Moreover, phosphorus prices rose over 100 percent, and potash rose over 134 percent.¹⁹⁸ These prices have continued to rise throughout 2022.

While the industry claims attribute price surges to the war in Ukraine, global shortages, and soaring energy prices, the financial statements of these firms tell a different story. Prices were climbing even before the war in Ukraine, and profit margins often expanded far beyond the increase in production costs. For instance, while Nutrien’s cost of goods sold increased by 58 percent compared to 2020, their gross manufacturing margin was up 669 percent.¹⁹⁹ CF industries saw gross margin increase by 298 percent in 2021 and Yara’s 2021 report indicated that their 76 percent increase in U.S. earnings was due to higher production margins.²⁰⁰

The price of fertilizer is more closely linked to farmers’ potential earnings from their produce than to supply-demand dynamics. This situation eroded farmers’ profits despite increased commodity prices. One study calculated it resulted in an average loss of income of \$94,000 per farm, and another said it would lower farm incomes by 34 percent.²⁰¹ Smaller farmers, who usually lack the capital access of larger operations, are disproportionately impacted.²⁰²

These financial pressures on small farms may accelerate farmland consolidation, as struggling farmers sell land and assets to larger corporations and investors. This cycle exacerbates wealth extraction from rural farming communities and accelerates competitive decline in the U.S. economy.

¹⁹⁴ Bekkerman, A, G.W. Brester, and D. Ripplinger, *The History, Consolidation, and Future of the U.S. Nitrogen Fertilizer Production Industry*, CHOICES. QUARTER 2., 2020. <https://www.choicesmagazine.org/choices-magazine/submitted-articles/the-history-consolidation-and-future-of-the-us-nitrogen-fertilizer-production-industry>

¹⁹⁵ *Id.*

¹⁹⁶ FARM ACTION, *Comments on Access to Fertilizer: Competition and Supply Chain Concern (87 FR 15191)*, June 10, 2022. <https://farmaction.us/wp-content/uploads/2022/06/Farm-Action-Fertilizer-Competition-Comments-6.10.22.pdf>

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

3. *Machinery*

Machinery is another essential pillar of modern agriculture, facilitating large-scale operations with high efficiency. However, this sector, encompassing both machinery production and local dealerships, has experienced considerable consolidation. According to data from the U.S. economic census, the top four farm equipment manufacturers control 53.1 percent of the market. As of 2019, only two companies controlled nearly half the sales of farm machinery in the U.S and John Deere alone produces 32 percent of farm machinery.²⁰³

Farm machinery is increasingly mechanized and software-dependent. For instance, a report from U.S. PIRG found that a modern John Deere combine harvester has as many as 125 interconnected sensors.²⁰⁴ In some cases, a malfunction in one of those sensors can trigger an immobilizer, sending the machine into “limp mode”.²⁰⁵ Farmers often lack diagnostic software tools that would allow them to resolve the issue, forcing them to either haul the machine to a local dealership or rely on a field technician to make repairs. The restriction of access to diagnostic software and repair tools creates a de-facto service monopoly by manufacturers, through which they can price-gouge farmers desperate to get their machinery working in the height of the season. U.S. PIRG’s report, “Deere in the Headlights,” details the experience of a Missouri farmer, Jared Wilson, who lost \$30,000-\$60,000 in revenue because his machine sat at the dealer’s lot for 32 days during crucial planting season.²⁰⁶

Repair restrictions are not unique to the agriculture machinery industry. A 2021 report from the FTC found these restrictions occur across a variety of industries, including consumer electronics, automobiles, and medical devices. As a result, “right to repair” bills have become increasingly popular in states. In September 2022, the Small Business Committee held a hearing on the issue, in which it heard from a Maine potato farmer, Jim Gerritsen, about his reluctance to upgrade his machinery to more modern and fuel-efficient machines:

We would never choose to place ourselves in the vulnerable position of being at the mercy of malfunctioning electronic sensors, then being involuntarily forced into “limp mode,” and becoming locked out from using equipment we “own” until an expensive dealer mechanic arrives at their convenience with their rescuing computer software. When a problem as common as minor as water condensation in a diesel tank can cause a sudden “limp mode” restriction during peak planting or harvest, not only is an individual farmer placed at risk, but extrapolating the system vulnerability, so is our nation’s food security.²⁰⁷

Processing Middlemen

Farmers are caught in a power struggle. On one side, they face a consolidated oligopoly of sellers providing critical inputs like seeds, pesticides, fertilizers, and machinery. On the other hand, they contend with monopsony buyers who dictate the terms of purchase. This not only affects farmers

²⁰³ *Supra* note 176.

²⁰⁴ Kevin O’Reilly, *Deere in The Headlights*, U.S. PIRG EDUCATION FUND, Feb. 2021.

https://publicinterestnetwork.org/wp-content/uploads/2022/07/WEB_USP_Deere-in-the-Headlights_V3-1.pdf

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Right to Repair and What it Means for Entrepreneurs, Before Subcomm. On Underserved, Agricultural, and Rural Business Dev. Comm. On Small Business, 117th Cong., Sep. 14, 2022.

that grow grain, it also particularly impacts meat producers like ranchers who raise cattle, and chicken and hog farmers that often contract for large, vertically integrated meat processing companies.

These markets, once robust and competitive, have undergone substantial consolidation since the early 1970s. From 1972 to 1992, the average four firm concentration levels for meat and poultry processing, dairy processing, flour milling, corn milling, feed, and soybean processing rose by 50 percent, while the number of plants in these industries declined by about a third.²⁰⁸ Not only does this hurt small farmers who produce the grain, meat, and dairy that is sold to large processors, it also negatively impacts workers who were paid 25 percent less in relation to the CPI between 1972 and 1992.²⁰⁹

1. Grain Middlemen

The global grain trade has become significantly consolidated in recent decades, as just four corporations – Archer-Daniels-Midland, Bunge, Cargill, and Louis Dreyfus – known as the ABCD companies, control nearly 90 percent of the global grain trade.²¹⁰ Cargill alone is the U.S.’s largest privately held company and is the largest food trading firm, with its food processing and shipping network spanning 70 countries.²¹¹

When American farmers produce crops like corn and soybeans, they often have the option to sell their crops either to end users like ethanol plants and feed mills, or to a local grain elevator, which stores and aggregates grain for later transport. To maintain a fair deal for U.S. farmers, the owners of these grain elevators, such as Bunge, Cargill, or Zen-Noh Corp., must compete for the farmers’ business by offering them the best price. However, when the owners of these elevators have market power in the local areas, they can exercise monopsony power against farmers looking to sell their grain. In 2020, the DOJ blocked Zen-Noh from acquiring 35 active elevators from Bunge along the Mississippi River. The complaint stated, “If the proposed transaction proceeds in its current form, farmers located in these areas are likely to receive lower prices and lower quality services, and have fewer choices for the sale of their crops.”²¹²

²⁰⁸ Ollinger et al., *Structural Change in the Meat, Poultry, Dairy, and Grain Processing Industries*, USDA ECONOMIC RESEARCH SERVICE, March 2005. <http://www.themarketworks.org/sites/default/files/uploads/studies/Structural-Changes-Meat-Poultry-Dairy-and-Grain-Processing-Industries-Economic-Research.pdf>

²⁰⁹ *Id.*

²¹⁰ Sophia Murphy, David Burch, Jennifer Clapp, *Cereal Secrets: The World’s Largest Grain Traders and Global Agriculture*, OXFAM RESEARCH REPORTS, Aug. 2012. https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-cereal-secrets-grain-traders-agriculture-30082012-en_4.pdf

²¹¹ *Supra* note 176.

²¹² Complaint at 5, *United States v. Zen-Noh Grain Corp. and Bunge North America, Inc.*, Case 1:21-cv-01482, (2021).

2. *Beef and Cattle Processors*

The consolidation of cattle production and processing has increased since the 1980s, shifting away from an open market model. Back in 1977, the four largest beef packing firms controlled just 25 percent of the market.²¹³ Today, a single firm raises more than a third of U.S. cattle. The top four processing firms – JBS, Tyson Foods, Cargill, and National Beef – control 85 percent of the market.²¹⁴ For independent ranchers, selling options have dwindled and buyer prices have contracted, even in the face of soaring meat prices nationwide. From 2016 to 2021, wholesale beef prices steadily rose, while the value of cattle sold to processors stagnated or even diminished.



Consequently, ranchers are taking home a smaller share of beef sales while processors see record profits. In 1970, farmers earned 64.1 cents out of every dollar in beef sales. By 2020, their share was only 37.5 cents.²¹⁵

²¹³ Brian Deese, Sameera Fazili, and Bharat Ramamurti, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, THE WHITE HOUSE, Sep. 8, 2021.

<https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>

²¹⁴ Packers and Stockyards Division, *Protecting Fair Trade Practices, Financial Integrity, and Competitive Markets for Livestock, Meat, and Poultry*, USDA AGRICULTURAL MARKETING SERVICE, 2019.

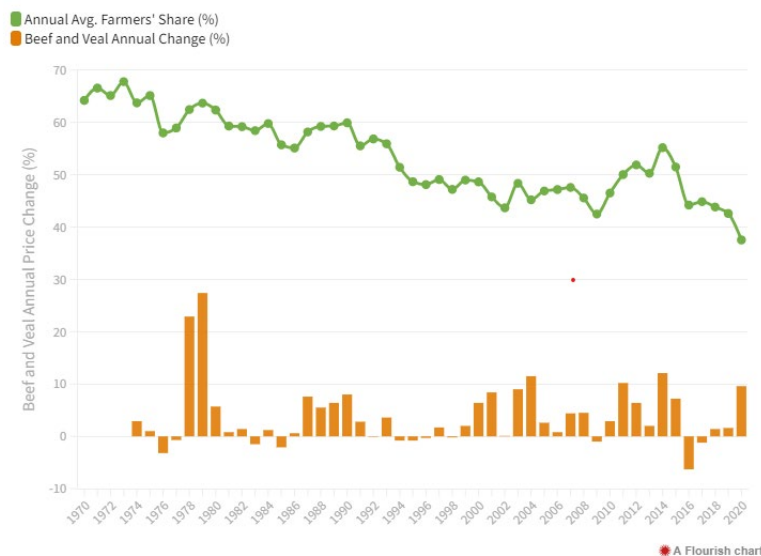
<https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2019.pdf>

²¹⁵ Mary Hennigan, *A Consolidated Market Leaves Ranchers Wondering What's Next*, MIDWEST CENTER FOR INVESTIGATIVE REPORTING, July 21, 2021. <https://investigatamidwest.org/2021/07/21/a-consolidated-market-leaves-ranchers-wondering-whats-next-2/>



Annual Farmers' Share and Beef, Veal Prices

Data from 1970-2020



The disparity is largely due to the market power that processors hold against farmers. Instead of purchasing cattle in cash trades like auctions, many processors use alternative market agreements as longer-term contracts between ranchers and buyers.²¹⁶ While these agreements give farmers more stability in the prices they can sell their cattle, they are often private and prevent farmers from gauging fair market rates for their cattle. Over the past 15 years, these agreements have become increasingly common, and the share of cash trades declined from 52 percent to 20 percent on average.²¹⁷

²¹⁶ Abby Vesoulis, *Why This Bipartisan Group of Senators Has Beef with the Big Meat Industry*, TIME, April 28, 2022. <https://time.com/6171326/meat-beef-industry-congress/>

²¹⁷ Mikkel Pates, *U.S. Senate Tackles the Issue of Packer Concentration and the Impact on Cattle Markets*, AG WEEK, April 27, 2022. <https://www.agweek.com/news/policy/u-s-senate-tackles-the-issue-of-packer-concentration-and-the-impact-on-cattle-markets>

3. *Chicken and Pork Integrators*

In the first half of the 20th century, raising chickens, known as “broilers,” for meat was spread across 1.6 million locally based, independent farms. Over the course of the 1950s, the industry largely shifted from an open-market system to one of extensive vertical integration. In 1950, 95 percent of broiler producers were independent; five years later, the number of independent growers had plummeted, accounting for only 10 percent of broiler production. Since that time, the number of chickens raised in the U.S. has skyrocketed by over 1,400 percent, while the number of poultry farmers has plunged by 98 percent.²¹⁸

The broiler supply chain has grown increasingly vertically integrated, with production and processing tightly controlled by integrators. Often, large conglomerates such as Tyson will own and operate hatcheries and deliver flocks of chicks to small farmers, who grow the chickens to maturity then sell those chickens back to the integrators’ processing plants for slaughter and marketing. Because these conglomerates often dominate local markets, small farmers are largely dependent on one or two major integrators. According to the June 2014 USDA Economic Research Service Report, 21.7 percent of growers reported there was only a single integrator in the area, and another 30.2 percent reported only two integrators in the area.²¹⁹

Growers often make large and long-lived investments to construct, operate, maintain, and upgrade broiler houses, sometimes relying on SBA 7(a) small business loans to finance them. However, broiler contracts are often short term. A majority of broiler production contracts are for less than a year, including 42 percent of which are on a “flock-to-flock” basis.²²⁰ As a result, small growers are reliant on only one or two integrators to renew contracts after a new flock is grown, and that contract can increasingly favor the integrator over the grower, trapping them in debt. A 2017 lawsuit by growers in multiple states alleges that integrators colluded to not compete for the grower’s business, driving down the prices growers can charge.²²¹

Pork has seen similar integration over the years and even greater concentration in processing firms. In 1993, 87 percent of U.S. hogs were sold into competitive markets, but today that figure is less than 7 percent.²²² By 2001, more than 8 in 10 hogs were controlled by large meat-packing conglomerates, either through long-term contracts with smaller farmers or through direct ownership of growers.²²³ Moreover, 70 percent of U.S. hog farmers have gone out of business since the mid-1990s, largely due to concentrated feeding operations known as CAFOs.²²⁴

²¹⁸ FARM AID, *A Look at the Poultry Industry – How Does Chicken Get on Your Plate?*, May 18, 2015. <https://www.farmaid.org/issues/industrial-agriculture/a-look-at-the-poultry-industry-how-does-chicken-get-on-your-plate/>

²¹⁹ James MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA ECONOMIC RESEARCH SERVICE, June 2014.

²²⁰ FARMECON LLC, *Live Chicken Production Trends*, April 26, 2016.

²²¹ Brianna J. Schroeder, *Poultry Farmers File Federal Antitrust Lawsuit Against Integrators*, JANZEN SCHROEDER AG LAW, Feb. 17, 2017. <https://www.aglaw.us/schroeder-ag-law-blog/2017/2/7/poultry-farmers-test-gipsa-with-new-ag-data-case>

²²² *Supra* note 176.

²²³ *Id.*

²²⁴ *Id.*

Throughout the past three years, American consumers have seen a surge in the prices they pay for meat at the supermarket. Between July 2020 and August 2022, Americans saw meat prices increase 17 percent.²²⁵ According to the USDA, this has reduced household economic well-being for many Americans.²²⁶ While many in the industry claim that the surge in prices is due to increased input costs, it is more of a reflection of the market power of large processors. Profit margins from meat processors have soared during the pandemic, with a report from the White House underscoring that gross profits have collectively increased for large meat processors by more than 120 percent since before the pandemic, with net margins growing nearly 300 percent.²²⁷ Tackling the immense consolidation that has happened in this industry over the past few decades could go a long way to reducing costs and slowing cost growth for consumers, particularly during times of crisis.

Government Contracting and the Defense Industrial Base

The U.S. Federal government is the largest purchaser of goods and services in the world. As such, it is an important customer for small businesses across the country – particularly for business owners from diverse backgrounds who are underrepresented in business. One of the ways in which Congress aims to preserve competition by helping small businesses is “to ensure that a fair proportion of the total purchases and contracts or subcontracts for property and services in the government be placed with small business enterprises, to ensure that a fair proportion of total sales of government property be made to such enterprises, and to maintain and strengthen the overall economy of the nation.”²²⁸

As a result of policies promoting fair competition, the federal government has long promoted a robust small business industrial base. However, as private industry has become increasingly consolidated, government contracts are being swallowed up by larger and larger companies. This has happened both in terms of general goods and services bought by the federal government and particularly in defense contracting, where private companies have consolidated significantly over the past three decades.

General Contracts and Category Management

From 2010 to 2019, the number of small businesses providing common goods and services to the federal government shrank by 38 percent.²²⁹ This is caused in part by government policies aimed at cost saving, such as category management. Created in 2014, Category Management sought to “manag[e] commonly purchased goods and services – approximately half of the Federal Government’s overall spend – through common categories like information technology.”²³⁰ While

²²⁵ Abha Bhattarai, *Half Cows, Entire Pigs: Families are Buying Meat In Bulk to Save Money*, WASHINGTON POST, Aug. 27, 2022.

²²⁶ Xiao Dong, *Higher Retail Meat Prices Reduced Household Economic Well-Being During the COVID-19 Pandemic*, USDA, Oct. 2022.

²²⁷ Brian Deese, Sameera Fazili, and Bharat Ramamurti, *Recent Data Show Dominant Meat Processing Companies are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, THE WHITE HOUSE, Dec. 10, 2021.

²²⁸ *Supra* note 1.

²²⁹ Gov’t Accountability Off., GAO-21-40, *Federal Buying Power: OMB Can Further Advance Category Management Initiative by Focusing on Requirements, Data and Training* (Nov 2020). (Hereinafter “GAO-21-40”)

²³⁰ Office of Management and Budget, Office of Federal Procurement Policy, Memorandum for Chief Acquisition Officers and Senior Procurement Executives: *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings* (Dec. 4, 2014).

initially created to manage government spending, it largely incentivizes contract bundling and consolidation, pushing out the number of small businesses eligible for contracts. In 2020, the Government Accountability Office (GAO) issued a report noting that while dollars and contract actions had grown for small businesses within the Category Management Initiative, the overall number of small business vendors receiving awards had declined from 95,237 in FY2016 to 79,114 in FY2019 – a 17 percent drop in just three years.²³¹

Defense Industrial Base

Since the 1990s, aerospace and defense companies that make up the defense industrial base (DIB) have seen significant consolidation. According to the Department of Defense (DoD), aerospace and defense prime contractors have dropped from 51 to 5 since the 1990s. Suppliers of major weapons systems have also declined substantially – tactical missile suppliers have declined from 13 to 3, fixed-wing aircraft have declined from 8 to 3, and satellite suppliers have been cut in half, from 8 to 4.²³² Over the past ten years, the percentage of competitive contracts awarded has declined a small amount from 57.1 percent in 2012 to 52 percent in 2021.²³³

Not only does this consolidation have the effect of pushing up prices that taxpayers pay for defense, it also can put the manufacturing of defense systems at risk. According to DoD, competitive markets for defense contracts result in improved cost, schedule and performance for the products and services needed to support national defense.²³⁴ It also incentivizes contractors to innovate and increase industrial capacity to deliver systems, key technologies, materials, services, and products the DoD requires to support its mission.²³⁵ On the flip side, insufficient competition may result in higher barriers to new entrants and higher costs for taxpayers. Moreover, a single source or small number of suppliers can pose mission risk and even national security risks.²³⁶

²³¹ *Supra* note 222.

²³² Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, *State of Competition within the Defense Industrial Base* (Feb. 2022).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

Part III: Conclusion and Recommendations

Much of the American economy has seen extensive concentration over the past several decades, jeopardizing small businesses and raising barriers to entry. The resulting decline in competition not only raises prices on consumers, leaves the economy vulnerable to supply chain disruptions, and contributes to growing income and wealth inequality, it also puts the American dream of financial independence out of reach for broad swaths of the middle class. Moreover, it erodes public trust in institutions that are supposed to protect them from concentrated economic power.

This report detailed how the decline in competition contributed to a weaker small business ecosystem and bred anticompetitive conduct by dominant firms harnessing excess market power. It showed how consolidation in the healthcare sector has led to increasing insurance premiums for small firms and declining access to healthcare through the closure of independent medical practices and pharmacies. It demonstrated how giants in retail, like Walmart and Amazon, use their market power to extract wealth from small firms and put them at a disadvantage with suppliers. It also outlined how small farmers are being squeezed by large agribusiness, both from whom they buy their supplies and to whom they sell their products. But this report is far from exhaustive, and only scratches the surface of how pernicious the problem of declining competition is for small business and the overall economy.

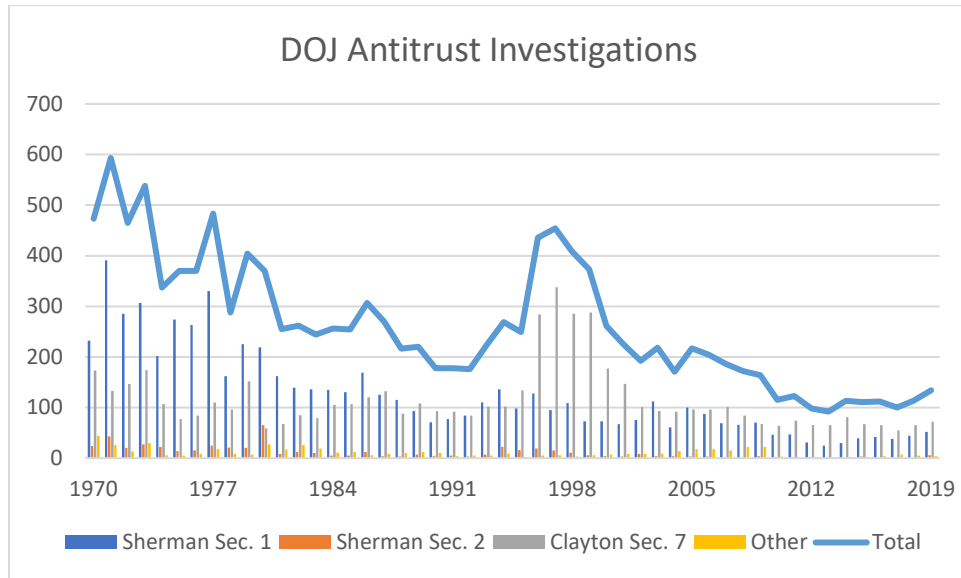
Addressing all the factors that lead to the increasing concentration of wealth and power requires policy action in a diverse set of areas. From antitrust law to tax law to labor law to campaign finance and ethics rules, protecting small businesses from concentrated economic power and bolstering the competitive ecosystem requires a whole-of-government approach and a concerted effort by Congress and the Administrative State. As such, establishing a comprehensive set of policy recommendations is difficult, however, Committee staff has worked to provide recommendations in a variety of areas. The U.S. has a long history of using public power to curb the excesses of private power and the following section will provide several ideas as to how it can do so again.

Increase Enforcement of Antitrust Laws

One of the clearest methods of restoring competition that can be used by the Federal Government is to increase challenges to mergers and acquisitions proposed by large companies. The Federal Trade Commission and the Antitrust Division of the Department of Justice both have the power to investigate and challenge mergers and acquisitions that have anticompetitive effects on markets and that negatively harm consumers and businesses. There are several areas in which the committee thinks improvements can be made:

Increase Antitrust Enforcement Actions

It's no secret that antitrust enforcement has declined over time. That's partially to blame for the increasing concentration outlined throughout this report. According to the Department of Justice's (DOJ) data, from the early 1970s to the late 2010s, antitrust investigations launched by the DOJ declined from 500-600 per year to the lower 100s. This is shown in the figure below:



While there has been a decades-long trend of declining enforcement, there are some encouraging signs that this is beginning to reverse. Between 2021 and 2022, antitrust merger complaints nearly doubled from 8 to 13 and more than doubling from the average of 6 in the previous five years. Additionally, the Biden Administration’s strong position has led to a decline in mergers and acquisition announcements since 2021 and led to the increasing abandonment of many deals.

Strengthen Merger Guidelines

Increasing federal antitrust enforcement cannot be done without clear and transparent guidelines that determine what level of concentration in a market is acceptable to the government. In July 2023, the FTC and DOJ jointly issued proposed merger guidelines that would better reflect the enforcement of the Antitrust laws as written and provide a clear framework for how the law is intended to be interpreted. It provides thirteen guidelines, listed below:

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.

12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

These guidelines, if finalized, could go far to protect the marketplace for small businesses and promote competition far into the future.

Reviving Federal Enforcement of the Robinson-Patman Act

One of the main anticompetitive practices discussed above that has a direct impact on small businesses is price discrimination. This was particularly discussed in the sections on grocery stores and pharmacy benefit managers, however, it affects other industries as well. The Robinson-Patman Act, passed in 1936 as an amendment to the Clayton Antitrust Act outlaws this practice. Dubbed the “Magna Carta for small businesses” this Act was created specifically to protect small firms from the concentrated power of large chain stores with more negotiating power with suppliers. Unfortunately, the FTC has not brought a case under the Act since 2000. As antitrust enforcement has leaned more toward the consumer welfare standard and upholding efficiency above fair competition, enforcers have tossed this law to the wayside since enforcement could diminish the power large grocery chains have in negotiations with suppliers.

The Federal Trade Commission should conduct an extensive investigation of large retail chains, particularly over the past year, and bring Robinson-Patman Cases to protect independent retailers and signal to the market that anticompetitive conduct will not go unchallenged.

Strengthen the Packers and Stockyards Act

Just over one hundred years ago, in 1921, Congress passed the Packers & Stockyards Act in response to excessive concentration and abusive practices in the meatpacking industry. Also known as the “Farmer and Rancher Bill of Rights,” the law was established to protect livestock and poultry producers from unfair and anticompetitive practices by large meatpacking monopolies.²³⁷ For decades, the Packers & Stockyards Act was used by the DOJ, FTC, and USDA to level the playing field for farmers and ranchers. Over time, it was able to chip away at the power of meatpackers. For instance, in 1918, the country’s five largest beef meatpacking companies controlled 55 percent of the meat market.²³⁸ By 1976, the market share of the four largest companies had been reduced to 25 percent.²³⁹

In 2022, the USDA announced that it was working to modernize and reinvigorate the oversight of livestock and poultry markets by proposing a modern set of rules under the Packers & Stockyards Act. For instance, this action targets poultry contracting and tournaments, unfair practices, unjustly discriminatory prices, and deceptive practices. For instance, Senator Cory Booker introduced the Farm System Reform Act, which strengthens the Packers & Stockyards Act, protecting family

²³⁷ Sarah Carden, *The Fall of Antitrust and the Rise of Corporate Power: Impacts of Market Concentration on Farmers and Ranchers*, FARM ACTION, March 1, 2022.

²³⁸ United States Department of Agriculture, Packers and Stockyards Programs, Grain Inspection Packers and Stockyards Administration, *Assessing Competition in Meatpacking: Economic History, Theory, and Evidence*, Azzedine M. Azzam & Dale G. Anderson. Washington: USDA, 1996, 30-31.

²³⁹

farmers and ranchers from monopolistic practices, while providing funds to buyout contract farmers that wish to transition to more sustainable and humane practices.

Require the SBA to Reflect Small Business Views on Antitrust

As mentioned in the introduction, the Small Business Act was originally passed with the intention of preserving a fair and competitive free-enterprise system. By giving lenders the security needed to make riskier loans to small firms that may not be able to obtain credit elsewhere, as well as providing programs to expand access to government contracts, the SBA can help strengthen the small business economy and provide opportunities to competitive enterprises where they may not have had any. However, the SBA rarely has any input on the ways larger firms may abuse market power to the disadvantage of small firms, particularly in the realm of competition policy and antitrust law.

The Office of Advocacy, an independent advocate for small businesses in the federal government, has a mission to work to advance legislation, regulation, and programs needed to ensure that small businesses can compete effectively and expand to their full potential. Through economic research, policy analysis, and small business outreach, the Office of Advocacy works to advance the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Advocacy has a broad mandate and limited resources, and those resources have been focused primarily on commenting on proposed regulations rather than carrying out their full mission.

While working to cut down unnecessary red tape that creates barriers to entry for entrepreneurs is an important job, it often disregards the red tape created by concentrated corporate power outlined above. As a result, the SBA Office of Advocacy could expand its advocate role outside of regulatory proposals to include issues of fair competition and antitrust. Recently, the Committee unanimously passed H.R. 5424, the Main Street Competes Act, which requires the FTC and DOJ to submit data to the SBA Office of Advocacy, which Advocacy can then use to generate a report on the competitive landscape for small businesses. This is an important first step in ensuring the Office of Advocacy fulfills its duty to “recommend specific measures for creating an environment in which all small businesses will have the opportunity to compete effectively and expand to their full potential.”

Pass New Antitrust Laws Aimed at Strengthening Competition in New Industries

Since 2019, Congress has worked on creating and passing several new antitrust laws aimed at new industries in the technology sector. While the report above does not extensively discuss some of the largest issues related to information, privacy, and interoperability of big tech platforms, many of the proposed laws would have a positive impact on small firms. For instance, some proposed legislation would prohibit large technology platforms from preferencing their own first-party products over those sold by independent third-party sellers. Others would break up large technology firms, discontinuing their ability to operate multiple lines of business that create conflicts of interest. Finally, similar legislation would block their ability to buy up competitors indiscriminately and require them to become interoperable in ways that provide consumers with more choice without creating specific network effects that trap them in one platform or another. Prioritizing legislation that adapts antitrust laws to the 21st century could help protect consumers and small businesses as the economy evolves far into the future.

Reform the Tax Code to Level the Playing Field for Smaller Firms

For decades, the tax code has been skewing ever more in favor of large corporations and wealthy individuals, furthering the concentration of economic power into the hands of fewer firms and individuals. Many small businesses hope only to comply with a complex and convoluted tax system, while many large corporations take advantage of every resource available to them, including loopholes and tax havens.

Reinstate a Graduated Corporate Income Tax and Raise Top Marginal Rates

While there is a common misconception that small businesses all operate as pass-through entities while large companies are organized as C-Corporations, the truth is that the majority of all businesses are small. For example, in 2014, firms with \$500,000 or less in receipts accounted for 68 percent of C-corporation tax returns. The largest single reform in the 2017 Tax Cuts and Jobs Act was establishing a flat tax rate of 21 percent on corporate earnings. This aspect of the law was a permanent cornerstone of the law. Not only did this provide a windfall tax cut for the largest corporations – whose top marginal rate stood at 35 percent at the time – but it did so while raising rates on smaller corporations from 15 percent to 21 percent. Congress should restore the progressive taxation system to give advantages to small start-up firms while taxing large corporations in proportion to the benefits they enjoy simply by the merit of their bigness.

Tax Monopoly Rents

Throughout the inflation crisis that came out of the COVID-19 pandemic, it has become clear that companies with larger market share were able to increase their margins while using inflation as an excuse to raise prices or keep them high even as costs fell. As a result, corporate profits reached record heights in 2022, further fueling the additional costs for gas and groceries that American consumers faced. While productive profits, or returns on past investment, innovation, or risk taking are generally a good thing, leveraging market power to accrue rents has powered much of the increase in corporate margins. Congress should send the message that this behavior is unacceptable.

One idea for taxing unearned income could be an excess profits tax. Congress could implement this by taxing corporate income over a certain level (\$10 billion) at an extraordinarily high rate (80+ percent). Not only would this benefit consumers by disincentivizing price hikes, but it would also incentivize corporate behemoths to split up to avoid needing to pay it.

Simplify the Tax Code and Lower Compliance Costs

Many main street businesses do not have tax lawyers and accountants on staff to help them devise elaborate schemes to shelter money from taxes through offshoring profits or incorporating in Delaware. Rather, many simply seek to comply with the law as it stands and take advantage of the credits and deductions available to them. Unfortunately, navigating this system is extremely challenging for most small business owners, and the continual changes to the tax code implemented by Congress through phase outs and sunsets can make it even more unpredictable. Small business owners should be able to simply file their own taxes through the IRS and have a direct line to accountants through the IRS who can assist if needed.

Continue Investments in Domestic Manufacturing and Infrastructure

Creating fair and competitive markets in the U.S. includes providing adequate government investment in strengthening supply chains and building infrastructure that benefits all enterprises. Three vital pieces of legislation passed in the 118th Congress, including in the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, and the Inflation Reduction Act, which presented a new path of industrial policy that will make American businesses more competitive on the global stage while also creating a more competitive economy within the U.S. As discussed in Part I, supply chains have become increasingly streamlined and vulnerable to disruptions over the years. Ensuring domestic manufacturers can compete globally will require continued federal incentives through tax and trade policy that benefits them. Prioritizing policy objectives that create more domestic manufacturing will not only create a more secure economy, filled with good-paying union jobs, but also build the foundation for which entrepreneurs can start their own Main Street firms. One estimate from the White House indicates that every high-skilled manufacturing job created in an urban area translates to 2.5 jobs in other sectors in the surrounding areas.

In addition, investments in domestic infrastructure that strengthen roads, bridges, ports, seaports, local water systems, and rural broadband connectivity expand opportunities for new market entrants and a more mobile workforce. These investments create more competition in the economy as entrepreneurs start new firms and challenge incumbents.

Conclusion

The pervasive issue of market concentration is not unique to our time. It has been experienced time and time again throughout American history. For decades, forms of economic thought have led our policymakers astray and led to significant growth in concentrated economic and financial power. This concentration has now been revealed to pose grave threats, not only to small businesses, but to the very tenets of American entrepreneurship and the principles of fair competition that underpin our economy. The enduring resilience and innovative spirit of small businesses across the country have been severely compromised by the barriers to entry and survival created by dominant firms across various sectors. These firms manipulate markets, exploit loopholes, and leverage their immense power to squeeze their smaller competitors. As a result, the American economy has seen decades of growing income and wealth inequality during a period of dwindling dynamism.

It is imperative that policymakers act to reverse this trend and utilize the full extent of the legislative arsenal to reestablish a competitive landscape while safeguarding those main street businesses that act as the foundation of our communities. The future of the American economy and the restoration of the American dream depends on the ability of folks to take their destiny into their own hands without the threat of being squashed by concentrated economic power.