"ANTI-MONOPOLY" ANTITRUST ENFORCEMENT: LESSONS LEARNED FROM THE BIDEN ADMINISTRATION

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In this paper, Diana L. Moss reflects on the legacy of the Biden Administration's "Anti-Monopoly" agenda and its implications for the future of U.S. antitrust enforcement. While recognizing the movement's ambition to challenge concentrated economic power, she argues that its departure from the consumer welfare framework and its reliance on expansive legal theories ultimately produced limited success in the courts. The article offers a broader assessment of how ideological swings in enforcement philosophy can affect both legal certainty and the long-term credibility of antitrust institutions.

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I. THE ANTI-MONOPOLY MOVEMENT IN CONTEXT

In 2021, the Biden administration installed "Anti-Monopoly" advocates at the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC"). The movement, which emerged in the mid-2010s, is rooted in the idea that antitrust is a critical tool for solving the economic, political, and social problems, and threats to liberty, that flow from corporate power. Anti-Monopoly ideology rejects the consumer welfare standard that has played a central role in antitrust for decades, advocating instead for bright line tests for corporate "bigness."[2]

The practical effect of the Anti-Monopoly movement's repudiation of the consumer welfare standard is the dissolution of antitrust's "effects-based" approach for determining violations. That analysis links anticompetitive consolidation and business practices to harm to consumers, through higher prices, lower quality, less variety, or slower innovation. Without effects-based analysis, decisions on antitrust violations would revert simply to thumbs-up or thumbs-down findings based on mandated threshold criteria.

The role and interpretation of the consumer welfare standard has been vigorously debated for decades. The standard earned a questionable reputation under conservative "Chicago School" doctrine that commandeered the antitrust enterprise for almost 40 years beginning in the 1970s. For example, *laissez faire* enforcers erroneously focused almost exclusively on the short-term price effects of anticompetitive consolidation and conduct. Such threats are easily overcome by the promise of efficiencies, such as cost savings or expanded R&D capability, from mergers or business practices that otherwise limit competition. The damage to competition and consumers wrought by Chicago-School conservatism is still felt by consumers today.

Backlash to lax Chicago-School enforcement sparked the center-left "Post-Chicago" movement in the late 1990s. The Obama administration issued the first ever Executive Order on Competition,[3] pursued aggressive cartel enforcement, and withdrew conservative past policy guidance on monopolistic conduct.[4] On the merger front, Obama administration antitrust enforcers blocked highly concentrative mergers such as *AT&T-T-Mobile* (2011), *Staples-Office Depot* (2016), *Sysco-U.S. Foods* (2015), *Halliburton-Baker Hughes* (2016), *Aetna-Humana* (2016), and *Anthem-Cigna* (2017).[5] These deals eliminated head-to-head competition or encouraged anticompetitive coordination, invoking the "structural presumption" of illegality, under which no efficiencies claims could possibly save the day.[6]

Against the backdrop of major shifts to far-right antitrust conservatism and far-left antitrust progressivism over the last 50 years, the pragmatism and effectiveness of the center-left Post-Chicago approach is under-recognized. For Anti-Monopoly advocates, deployment of the full scope of the consumer welfare standard and the structural presumption (to knee-cap efficiencies defenses) was not really relevant. Rather, embracing the Chicago School's inaccurate interpretation of the standard and deference to efficiencies is central to the Anti-Monopoly argument that the standard should be rejected outright.

Control of the enforcement agenda under the Biden administration thus provided a platform to advance wholesale antitrust reform. This article empirically unpacks results from the Biden enforcement era, strengthening the case for why swings in antitrust ideology impose risks and high opportunity costs on enforcement, with a direct impact on promoting competition and protecting consumers.

II. "TOLERANCE-TESTING" THE ANTITRUST LAWS

The Biden enforcers set an ambitious agenda to advance Anti-Monopoly goals by tolerance-testing the U.S. antitrust laws. A leading example is the FTC's labor non-compete rulemaking. Despite economic evidence supporting a limited ban for low-wage and unskilled labor, the

2 Barry Lynn, The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt? Testimony before the Senate Committee on the Judiciary: Subcommittee on Antitrust, Competition, and Consumer Rights, Open Markets Institute, Dec. 13, 2017, https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf.

3 "Executive Order – Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy," The White House, Apr. 15, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers/.

4 "Justice Department Withdraws Report on Antitrust Monopoly Law," Department of Justice, May 11, 2009, https://www.justice.gov/archives/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

5 See 2d Amend. Compl. *United States v. AT&T Inc.*, No. 1:11-cv-01560 (ESH), (D.D.C. 2011); See also *Federal Trade Commission Et Al v. Staples, Inc. Et Al*, No. 1:15-cv-2115 (EGS), (D.D.C. 2015);); See also Admin. Compl., *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015). See also Compl., *United States v. Halliburton Co. Et Al*, No. 1:16-cv-233 (UNA), (D. Del. 2016); See also *United States v. Aetna Inc.*, No. 1:16-cv-01494 (JDB), 2016 U.S. Dist. LEXIS 191730 (D.D.C. Sep. 5, 2016). See also *United States v. Anthem, Inc.*, 428 U.S. App. D.C. 403, 855 F.3d 345 (2017).

6 See 15 U.S.C. § 18.

proposed rule sought to ban *all* non-compete clauses. It was ultimately rejected by the courts on the basis that the Commission overstepped its authority.[7] Another example is the effort to revise the Merger Guidelines in 2023. A public draft issued by the DOJ and FTC included numerous non-rebuttable presumptions of illegality (i.e. bright line tests) that generated pushback in public comments. The changes were subsequently dropped.[8]

The Biden enforcers also set their sights on large players in the digital sector, raising concerns that the agencies were diverting resources away from competition problems and high prices in consumer-facing sectors that were quickly becoming front page news. Anti-Monopoly enforcers brought a number of experimental digital merger cases. For example, in *FTC v. Meta/Within* (2022), the FTC attempted to enjoin the merger on the theory that it eliminated Meta as a potential competitor in virtual reality fitness apps. Similarly, in *U.S. v. United Healthcare-Change Health* (2023), the DOJ challenged the deal on a major theory that UHC could disadvantage rivals operating on the Change claims processing platform. In *FTC v. Microsoft/Activision* (2022), the FTC sued to block on the theory that Microsoft would withhold Activision's video game products from rivals. In all three cases, courts found the government had failed to adequately support its claims.[9]

On the non-merger front, the *FTC v. Amazon* monopolization case was inspired by FTC Chair Lina Khan's 2017 student article in the Yale Law Journal.[10] As the case moves forward to trial, it is clear that the FTC is struggling to define a market to support its claim that the online retail and technology company "exploits its monopolies in ways that enrich Amazon but harm its customers."[11] In the transition from the Biden to Trump 2.0 administrations, the Biden enforcers inherited and litigated the *U.S. v. Google* search case, brought originally by the Trump 1.0 DOJ. After prevailing on liability, the Biden DOJ asked the court for sweeping remedies, including breaking up the company and quasi-regulating the remaining search platform.[12]

The court rejected much of what the DOJ asked for, finding that some remedies did not address the specific competitive harm resulting from illegal conduct, or that their severity could adversely affect consumers. These cases reveal the Anti-Monopoly strategy to push the boundaries of antitrust norms and standards, an effort that yielded relatively little forward movement.

III. STRATEGICALLY SLOWING DOWN CONSOLIDATION

Merger control is the most active area of antitrust enforcement in the U.S., accounting for a significant portion of agency budgets. As a "first line of defense" in preventing the emergence of monopolies and tight oligopolies, strong merger control can minimize the need for future enforcement under Sections 1 and 2 of the Sherman Act. A first prong of the Biden enforcers' strategy for invigorating merger enforcement was to move to enjoin more mergers, with far less progress on the digital (v. non-digital) front. For example, the DOJ blocked the mergers of Spirit and JetBlue airlines and grocery giants Kroger and Albertsons,[13] highly concentrative, presumptively illegal deals that would have been blocked by all but the most permissive enforcers.[14]

7 "Federal Court Strikes Down FTC Rule Banning Worker Noncompetes," *Sidley*, August 21, 2024, https://www.sidley.com/en/insights/newsupdates/2024/08/federal-court-strikes-down-ftc-rule-banning-worker-noncompetes.

8 See U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines (Draft)," July 19, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf. See also Information Technology & Innovation Foundation, "Comments of IFIF," https://www2.itif.org/2023-ftc-doj-draft-merger-guidelines.pdf.

9 See *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023). See also FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023). See also *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 2022 U.S. Dist. LEXIS 170934, 2022 WL 4365867, https://www.justice.gov/d9/2023-08/415418.pdf

10 Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale Law Journal 710 (2017), https://yalelawjournal.org/note/amazons-antitrust-paradox.

11 "ICYMI: The FTC Struggles to Define Markets in Case Against Amazon," Springboard, https://springboardccia.com/2025/04/09/icymi-the-ftc-struggles-to-define-markets-in-case-against-amazon/. See also Economics Day Transcript, Document 441, *Federal Trade Commission Et Al v. Amazon.com Inc*, 2:23-cv-01495-JHC (W.D. Wash. 03/07/2025). See also Compl., *Federal Trade Commission Et Al v. Amazon.com Inc*, 2:23-cv-01495-JHC (W.D. Wash. 10/31/2024).

12 *United States v. Google LLC*, No. 20-cv-3010 (APM), 2025 U.S. Dist. LEXIS 251831 (D.D.C. Dec. 5, 2025).

13 See Findings of Fact and Conclusions of Law, *U.S. and Plaintiff States v. JetBlue Airways Corporation and Spirit Airlines, Inc.*, January 16, 2024, https://www.justice.gov/atr/media/1380311/dl. See also Joint Motion to Dismiss the Complaint, *In the Matter of Kroger Company/Albertsons Companies,* Inc., December 12, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/612381.2024.12.16_joint_motion_to_dismiss_the_complaint_public.pdf.

14 See, e.g. Steve Salop, "The Biden Competition Policy Paradigm Has Been Primarily Post-Chicago, Not Anti-Monopolyian," *ProMarket.org*, Nov. 26, 2024, https://www.promarket.org/2024/11/26/the-biden-competition-policy-paradigm-has-been-primarily-post-chicagonot-Anti-Monopolyian/.

A second prong of the Biden enforcers' merger control strategy was more intense early stage scrutiny of merger proposals to force the abandonment of potentially harmful deals (i.e. before the government files a complaint). Many "second request" inquiries asking for more information to evaluate how a merger will affect competition stretched on for a period of months, especially at the FTC.[15] The FTC forced the abandonment of several harmful hospital mergers, including John Muir Health with Tenet Healthcare, RWJ Barnabas Health with Saint Peter's Healthcare System, and HCA Healthcare with Steward Health.[16] But there were also some questionable calls, including forcing the abandonment of Amazon's acquisition of autonomous vacuum cleaner manufacturer, iRobot. Both the FTC and European Commission overlooked the entry of new competitors and iRobot's declining financial viability, leading iRobot to exit the industry shortly thereafter.[17]

The third prong of the Anti-Monopoly merger control strategy was moving to enjoin more mergers rather that settling them with remedies such as divestitures and/or behavioral conditions. The DOJ broadly advertised its "no settlement" policy, which undoubtedly discouraged a number of deals.[18] However, there were several cases where companies called the government's bluff and took their deals to court, embroiling the government in late-stage divestiture proposals. This supercharged the so-called "litigating the fix" problem,[19] creating legal precedent that muddied the waters around the question of whether the government should litigate the original (i.e. proposed) merger, or the restructured (i.e. post-divestiture) merger.[20]

IV. THE EMPIRICAL RECORD ON MERGER CONTROL

Some of the best evidence of the success of antitrust "reform" comes from merger enforcement. The DOJ and FTC annual reports to Congress under the Hart Scott Rodino Act (1976) contain data for calculating various rates of enforcement, from early-stage reviews to late-stage investigations, including abandonments, challenges, settlements, and injunctions.[21] Figure 1 shows administration-over-administration changes in these rates of enforcement from 1993-2024. There is a noticeable decline (i.e. negative changes below the horizontal axis) in all rates from Clinton to Bush II. This signals the Chicago School's influence on conservative Republican administrations. In contrast, there is a sharp upswing across all metrics from Bush II to Obama, evidence of invigorated center-left enforcement in the Post-Chicago period.

15 "More Changes to Merger Review at the FTC – Parties Should Expect a 'More Rigorous' Second Request Process," *Crowell & Moring*, Sep. 29, 2021, https://www.crowell.com/en/insights/client-alerts/more-changes-to-merger-review-at-the-ftc-parties-should-expect-a-more-rigorous-second-request-process.

16 *In the Matter of John Muir Health/Tenet Healthcare Co.*, Federal Trade Commission, December 21, 2023, https://www.ftc.gov/legal-library/browse/cases-proceedings/2310054-john-muir-healthtenet-healthcare-co-matter. See also In the Matter of RWJ Barnabas Health/Saint Peter's Healthcare System, Federal Trade Commission, June 23, 2022, https://www.ftc.gov/legal-library/browse/cases-proceedings/2010145-rwj-barnabas-healthsaint-peters-healthcare-system-matter. See also In the Matter of HCA Healthcare/Steward Health Care System, Federal Trade Commission, June 22, 2022, https://www.ftc.gov/legal-library/browse/cases-proceedings/2210003-hca-healthcarest-eward-health-care-system-matter.

17 "Statement Regarding the Termination of Amazon's Proposed Acquisition of iRobot," *Federal Trade Commission*, January 31, 2024, https://www.ftc.gov/news-events/news/press-releases/2024/01/statement-regarding-termination-amazons-proposed-acquisition-irobot. See also, Diana L. Moss, "The Demise of iRobot: How Antitrust Enforcers Missed the Elephant in the Room," *Progressive Policy Inst.*, December 16, 2025, https://www.progressivepolicy.org/the-demise-of-irobot-how-antitrust-enforcers-missed-the-elephant-in-the-room/.

18 "Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit," *Federal Trade Commission*, April 4, 2022, https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

19 See Hugh Hollman, Elaine Johnston & Nicholas Putz, "Parties are More Willing Than Ever to 'Litigate the Fix' in the United States," Global Competition Review (October 25, 2023), https://globalcompetitionreview.com/guide/the-guide-merger-remedies-archived/fifth-edition/article/parties-are-more-willing-ever-litigate-the-fix-in-the-united-states.

20 See also, In the Matter of Illumina, Inc. and Grail, Inc., *Federal Trade Commission*, August 15, 2024, https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter. See also *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 2022 U.S. Dist. LEXIS 170934, 2022 WL 4365867, https://www.justice.gov/d9/2023-08/415418.pdf.

21 U.S. Dep't. of Justice and Fed. Trade Commn., *Merger Guidelines* (2023) and Fed. Trade Comm'n., Premerger Notification: Reporting and Waiting Period Requirements: Proposed Rule, Fed. Register 88 FR 42178 (Jun. 29, 2023), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements. Enforcement "rates" are calculated as a percentage of cleared transactions. Enforcement statistics expressed as absolute numbers, as opposed to rates, are misleading because of cyclical merger activity. See, e.g. Diana L. Moss, "Taking Stock of Merger Enforcement Under the Biden Administration," *Progressive Policy Inst.*, Mar. 2024, https://www.progressivepolicy.org/wp-content/uploads/2024/09/PPI_Merger-Enforcement_V3.pdf.

Figure 1

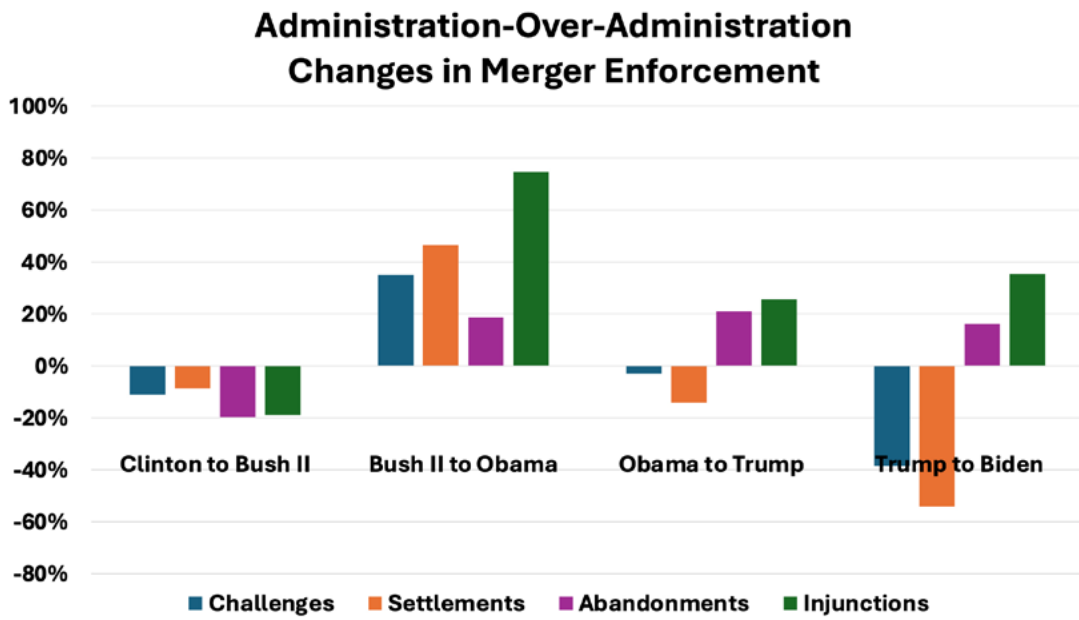
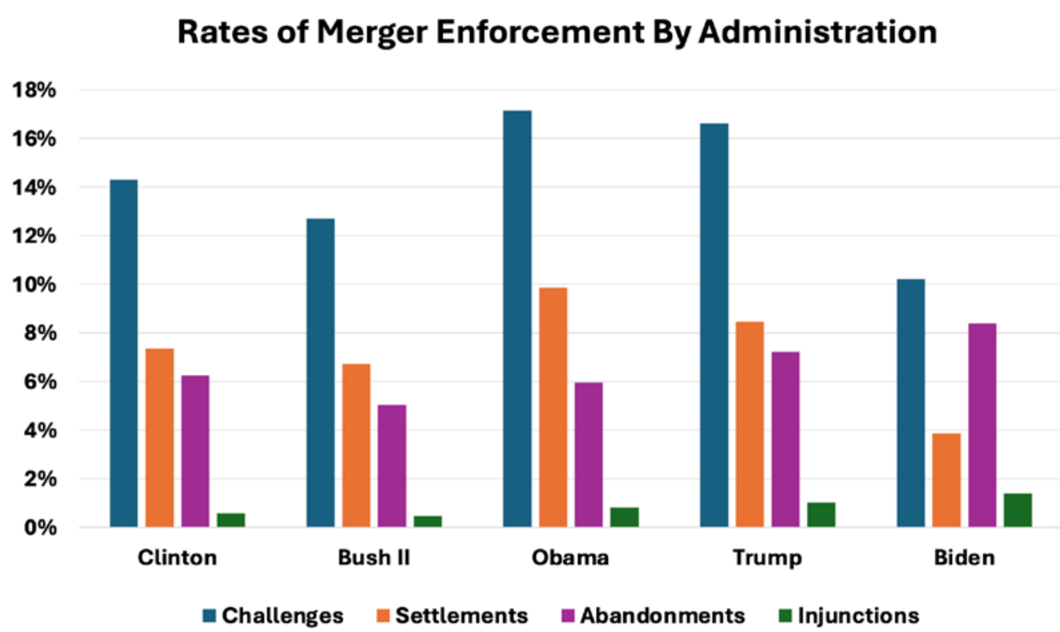


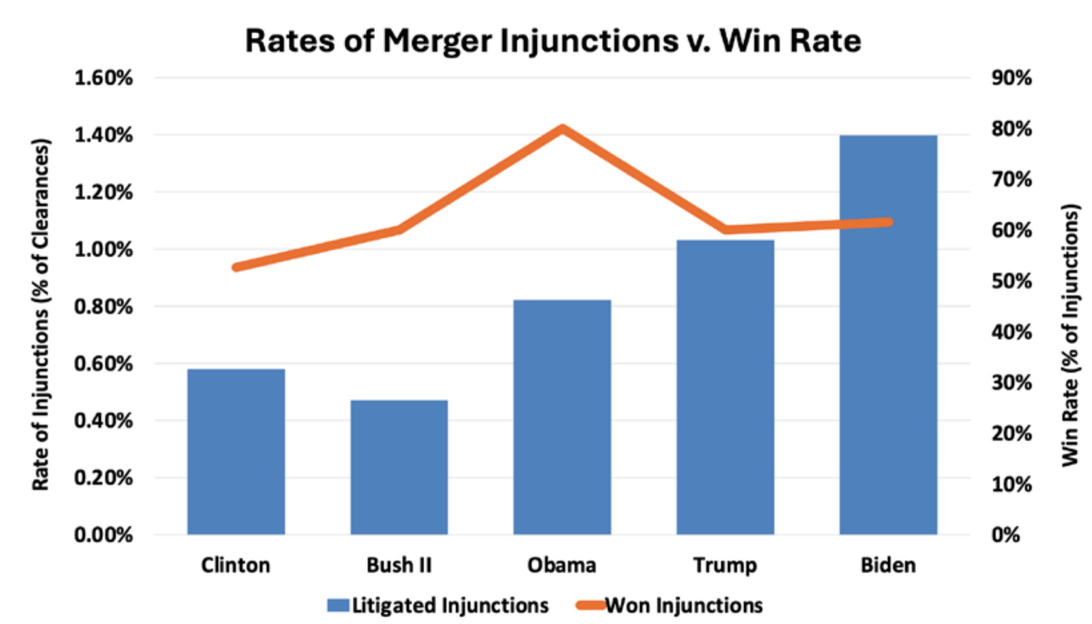
Figure 2 presents the data on rates of enforcement for each of the five administrations, as opposed to administration-over-administration changes. The lowest rate of challenges under the Biden administration is clear in the highest rate of abandoned deals. In other words, there is no need for the government to file a complaint challenging a transaction if it succeeds in pressuring the parties to abandon it early on. Likewise, the "no settlement" policy is reflected in the lowest rate of settlements.

Figure 2



Historical merger enforcement data supports the idea that merger control under Biden temporarily discouraged proposals for anticompetitive mergers. However, the long-term effect is quite different. Figure 3 shows the rate of merger injunctions, along with the government's "win rate," or percentage of cases where it successfully blocked a merger in federal court. The rate of injunctions increases steadily from the Bush II administration. The win rate increases from Clinton to Obama, falls sharply from Obama to Trump 1.0, and remains at a depressed level through Biden. The Obama enforcers have the highest win rate, at 80 percent, but the Biden win rate is only 63 percent, or about average, and on par with the Bush II and Trump 1.0 administrations.

Figure 3



The practical implication of this analysis is important. The Biden enforcers achieved a record rate of injunctions over the last 30 years, but won just over half of them. The Obama enforcers had a lower rate of injunctions but won the vast majority of them. The high loss rate sustained by the Biden enforcers — now codified in antitrust caselaw — has two possible implications. Companies could be emboldened to pursue future deals similar to those that the Biden enforcers attempted unsuccessfully to block. Future enforcers may also think twice about challenging cases on similar theories of harm, even if they have stronger facts and evidence.

There is also a high opportunity cost of focusing antitrust enforcement resources on specific sectors. The Anti-Monopoly enforcers' heavy focus on digital technology contrasts with steadily mounting concern over high concentration and prices in consumer-facing sectors like food, healthcare, and transportation. Reportable mergers in these sectors increased about 30 percent year-over-year from 2009 and 2024.[22] Given the Biden enforcer's focus on forcing abandonments, it makes sense to look at the difference between the rate of abandonments in consumer-facing sectors and the average across *all* sectors.[23]

This difference is, on balance, negative — meaning that the Biden enforcers were forcing parties to abandon mergers in key consumer-facing sectors at a lower rate than the average across all sectors. For example, the Biden enforcers' rate of abandonments was -8 percent for food processing, retail grocery, and gas stations, -6 percent for insurance, and -3 percent for ambulatory care. The rate of abandonments for hospital mergers was about 2 percent higher than average. The evidence suggests, therefore, that the Biden enforcers were pursuing enforcement less aggressively in consumer-facing sectors, supporting the concern that resources were diverted to other (e.g. digital) sectors.

V. POST-BIDEN LEGISLATIVE REFORM

Since 2025, Anti-Monopoly advocates have shifted focus to legislative reform. There are three bills in Congress that would implement sweeping, sector-by-sector, changes to antitrust law: the American Innovation and Choice Online Act (AICOA) (S.2992),[24] Break Up Big Medicine Act (S.3822),[25] and the Family Grocery and Farmer Relief Act (S.4007).[26] The AICOA bill focuses on digital technology and the other two on healthcare

22 Based on annual change in number of reportable transactions under the Hart Scott Rodino Act (1976). Data sourced from Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Fed. Trade Comm'n, Table X, https://www.ftc.gov/policy/reports/annual-competition-reports.

23 *Id.* Data sourced for NAICs codes 621, 622, 524, 447, 445, 311. See, e.g. Diana L. Moss, Can Antitrust Be Doing More to Protect Consumers?, Progressive Policy Inst., Dec. 2024, https://www.progressivepolicy.org/wp-content/uploads/2024/12/PPI-Antitrust-Consumers.pdf.

24 S.2992 - American Innovation and Choice Online Act, Mar. 2, 2022, https://www.congress.gov/bill/117th-congress/senate-bill/2992.

25 S.3822 - Break Up Big Medicine Act, February 10, 2026, https://www.congress.gov/bill/119th-congress/senate-bill/3822/text.

26 S.4007 - Family Grocery and Farmer Relief Act, March 5, 2026, https://www.congress.gov/bill/119th-congress/senate-bill/4007/text.

and meatpacking. They have limited bipartisan, or only Democratic, support. The healthcare and meatpacking bills reflect the Anti-Monopoly, post-Biden pivot from an outsized emphasis on digital competition issues to consumer-facing sectors where center-left advocates and enforcers have focused resources for decades.

These sector-specific legislative proposals are pitched as strengthening antitrust and consumer-protection policy by reducing concentration, preventing dominant firms from engaging in conduct that limits competition, and unwinding vertical integration. However, they mandate government-imposed market restructuring, arbitrary thresholds for liability, and breakups as a one-size-fits all remedy. As a result, they risk discouraging smaller players from expanding, the loss of consumer welfare, and destabilizing markets and supply chains through massive, hasty, divestments of critical assets to potentially unsuitable buyers. Missing from the bills are crucial details, among others, on how new antitrust laws would interact with violations under the Sherman and Clayton Acts.

To be clear, the conduct that Anti-Monopoly-backed antitrust bills seek to rein in is reachable under existing U.S. law. Moreover, there less extreme and risky approaches to antitrust reform. For example, strengthening, clarifying, and modernizing the U.S. antitrust laws would, among other things, codify the full scope of the consumer welfare standard to include price and non-price dimensions of competition; set a higher bar for efficiencies defenses; lower burdens on plaintiffs; and incorporate learning on failed remedies. Pragmatic, consistent, and effective center-left antitrust enforcement provides a better roadmap for promoting competition, protecting consumers, and supporting innovation and economic growth.

VI. CONCLUSION

While the Biden antitrust enforcement record shows some success in temporarily slowing consolidation involving overtly harmful mergers, it prominently reveals the downsides and high opportunity costs resulting from the ideological swings that divert antitrust enforcement from a more pragmatic, consistent, and effective course. As Americans face the worst cost-of-living crisis since the 1970s, the imperative to refocus antitrust policy to ensure it works in the best interests of competition and consumers has never been higher.

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