Antitrust Abandonment

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This Article identifies the problem of "antitrust abandonment": a pattern of long-term, unexplained disuse of antitrust-like enforcement powers held by industry regulators. Much of antitrust scholarship focuses on the primary federal enforcers, the Federal Trade Commission (FTC) and the Department of Justice (DOJ). This Article looks instead at several other *federal agencies that hold statutory antitrust powers in specific industries, some exclusively. It finds a striking pattern in which these regulators rarely use their antitrust enforcement authority.*

The Article critically evaluates the track record of antitrust-like enforcement by three industry regulators—in ocean shipping, rail, and meatpacking—using primary research, historical accounts of agency (in)action over time, and the perceptions of scholars, policymakers, and the agencies themselves of their competition oversight. The Article finds an alarming result: these agencies have brought only a handful of antitrust claims, sometimes none at all, over the span of decades, and, in one case, over a century. The Article argues that this antitrust abandonment is a problem, because it leaves unintended gaps in competition enforcement across pockets of highly concentrated, economically important industries.

The Article then considers how to cure and prevent antitrust abandonment. It calls for an immediate shift in policymaker expectations, away from the recent push for regulators to use their long-dormant antitrust powers, and toward the empowerment of expert antitrust enforcers—the FTC and the DOJ—to act in abandoned spaces. Achieving this change will require Congress to repeal arcane legislative exceptions, as well as more subtle shifts in agency perceptions of the need for antitrust enforcement in regulated industries.

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> "[D]on't you think when the sinner confesses and resolves to do better he should be given a chance?"[1]

Introduction

Earl L. Butz made this heartfelt plea to the Senate Judiciary Subcommittee on Antitrust and Monopoly in 1957.[2] The "sinner" was the U.S. Department of Agriculture (USDA), a federal agency for which Butz was responsible as the Assistant Secretary. Congress had delegated its power to combat anticompetitive acts in the meatpacking industry to the USDA, through legislation called the Packers and Stockyards Act.[3]

The USDA's sin, which Butz readily admitted, was a spectacular failure to use this power. For thirty-six years—the entire period it had held such responsibility at the time—the USDA had never done much to enforce the competition provisions of the Act.[4] In response to this failure, the Senate Judiciary Committee voted to remove the USDA as enforcer and to return its powers to a dedicated antitrust agency, the Federal Trade Commission (FTC).[5] The FTC's competition mandate spanned much of the economy then, as it does now, and the FTC had held these enforcement powers prior to 1921, when Congress transferred primary enforcement responsibility to the USDA[6]—a mistake, in the Committee's view.[7]

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1. *Unfair Trade Practices in the Meat Industry: Hearings on S. 1356 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 85th Cong. 392 (1957) [hereinafter *Senate Subcommittee Hearings on Meat Industry*] (statement of Earl L. Butz, Assistant Secretary of Agriculture).

2. *Id*.

3. Packers and Stockyards Act, ch. 64, §§ 201-205, 42 Stat. 159, 160-63 (1921) (codified as amended at 7 U.S.C. §§ 181-231).

4. *See Senate Subcommittee Hearings on Meat Industry*, *supra* note 1, at 392 (statement of Sen. Arthur V. Watkins, Member, S. Comm. on the Judiciary) (lamenting that the U.S. Department of Agriculture (USDA) had "not ha[d] enough force to do the job in title II [of the Packers and Stockyards Act]" "for nearly 36 years"); *id.* (statement of Butz) (admitting that "[i]t is quite true for 26 years [title II] has not been adequately enforced," potentially accounting for what he viewed as an earlier period of action); S. REP. NO. 85-704, at 3 (1957) (observing similarly the dearth of USDA enforcement "[d]uring the 36 years in which the Packers and Stockyards Act has been in force").

5. *See* S. 1356, 85th Cong. (as reported by S. Comm. on the Judiciary, July 18, 1957); S. REP. NO. 85-704, at 1-2.

6. *See* Federal Trade Commission (FTC) Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 46); Wheeler-Lea Act, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111-112 (1938) (codified as amended at 15 U.S.C. § 45(a)) (excluding "persons, partnerships, or corporations subject to the Packers and Stockyards Act" from the FTC's jurisdiction).

7. *Cf. Meatpackers: Joint Hearings on H.R. 5282, H.R. 5283, H.R. 5454, H.R. 7038, H.R. 7319, H.R. 7764, and H.R. 7796 Before the Antitrust Subcomm. of the H. Comm. on the Judiciary and the Subcomm. on Com. & Fin. of the H. Comm. on Interstate & Foreign Com.*, 85th Cong. 173 (1957) [hereinafter *House Meatpacker Hearings (1957)*] (statement of Sen. Arthur V. Watkins) ("Experience clearly indicates that Congress made a mistake when it transferred authority to regulate trade practices of packers from the Federal Trade Commission . . . to the United States Department of Agriculture . . . .").

Somehow, though, the plea of Secretary Butz worked.[8] The USDA was given a second chance to enforce the powerful competition provisions in the Packers and Stockyards Act. Then a third. Then a fourth. The history of the Packers and Stockyards Act is rife with congressional forgiveness and further chances.[9] Still today, more than a century after the USDA obtained these powers, it has engaged in little enforcement against anticompetitive acts.[10]

This Article argues that the USDA is far from alone in its sins. For the first time in the antitrust literature, it identifies a pattern: industry regulators are failing to use their competition enforcement powers for lengthy periods of time, without clear justification.

The Article constructs three case studies of regulators that hold statutory, "antitrust-like" enforcement powers, in meatpacking, ocean shipping, and regulated rail. These agencies have the power to police anticompetitive acts, such as collusion among competitors and monopolization, which are classically subject to antitrust law due to their harmful effects on competition.[11] These powers are peculiar, though. Instead of existing in general antitrust legislation, they are found within industry-specific statutes. And instead of belonging to the agencies that ordinarily enforce antitrust law across much of the economy—the FTC and the U.S. Department of Justice, Antitrust Division (DOJ)—these powers are held by industry-specific regulators.

This Article critically evaluates each agency's track record of enforcing their antitrust-like provisions, using primary research into litigation and other enforcement action; historical accounts of agency (in)action over time; and the perceptions of scholars, policymakers, and the agencies themselves of the robustness of such competition enforcement. The results are alarming. Some of these agencies have never brought any cases, while others have brought only a small handful of actions over the span of decades or more of antitrust enforcement responsibility. These industry-specific antitrust provisions have gathered dust on a shelf, without any real explanation for this inaction.

The Article coins the term "antitrust abandonment" to describe this phenomenon of seemingly unjustified, long-term disuse by industry regulators of their antitrust-like enforcement powers.[12] It argues that antitrust

8. *See infra* notes 294-298 and accompanying text.

9. *See infra* Section II.C.

10. *Id*.

11. Antitrust law seeks to promote and restore competition. While other statutes could be included, the term "antitrust law" is often used at the federal level to refer to the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2018), the Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-27 (2018), and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2018), as it is here.

12. The term draws inspiration from the abandonment of unused railroad tracks. Rail abandonment is defined as "'a permanent or indefinite cessation of rail service' which terminates the railroad's public service obligation," Gibbons v. United States, 660 F.2d 1227, 1234 (7th Cir.

abandonment creates real risks of harm to competition, because it leaves unintended gaps in enforcement oversight.[13] Neither antitrust law nor regulation is being applied in these economically important and concentrated areas of industry where antitrust abandonment is occurring. The risks from abandonment are particularly acute where general antitrust law is barred by statutory exemptions, as in regulated rail and ocean shipping. In these spaces, the FTC and the DOJ are statutorily precluded from acting, while the industry regulators that hold the power to act have abandoned their obligation to do so.

Antitrust abandonment is not just a theoretical issue—it has important implications for current competition policy. Scholars,[14] antitrust agency leadership,[15] and even President Biden[16] have sounded the alarm over unprecedented corporate concentration in the very same industries where this Article demonstrates antitrust abandonment is happening. For example, the meatpacking industry, where the USDA holds antitrust-like enforcement power, is more concentrated than ever before. Just four companies control the supply chain in each area, holding an estimated 81% of the national market for wholesale beef, 64% for hog processing, and 53%

1981) (quoting Interstate Com. Comm. v. Balt. & Annapolis R.R. Co., 398 F. Supp. 454, 461 (D. Md. 1975)), not unlike the long-term disuse of powers seen by the regulators examined here. Abandonment involves a relinquishment of the rail lines and related property interests, as distinguished from mere discontinuance with the prospect of later reactivation, *see* Nat'l Ass'n of Reversionary Prop. Owners v. STB, 158 F.3d 135, 137 n.1 (D.C. Cir. 1998) (distinguishing an abandoned railroad from one that is "discontinued"), and requires approval from the Surface Transportation Board (STB), one of the agencies examined in this Article, 49 U.S.C. § 10903(a) (2018) (requiring an application to STB to "abandon any part of its railroad lines"); *see infra* Section II.B.

13. *See infra* Part III.

14. *See e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 14-22 (2018) (describing increasing size and concentration of corporations in several areas of U.S. commerce); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 960-61 (2018) (lamenting that "excessive concentration and undue market power now look to be not an isolated issue but rather a systemic feature of America's political economy" and noting the poultry industry as an example); Hiba Hafiz & Nathan Miller, *Big Ag's Monopsony Problem: How Market Dominance Harms U.S. Workers and Consumers*, WASH. CTR. FOR EQUITABLE GROWTH (Feb. 18, 2021), https://equitablegrowth.org/competitive-edge-big-ags-monopsony-problem-how-market-dominance-harms-u-s-workers-and-consumers [https://perma.cc/Y7C7-X3AW] ("Agricultural markets are among the most highly concentrated in the United States. The markets for beef, pork, and poultry, grain, seeds, and pesticides are dominated by four firms."); JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 14-17 (2019) (observing increases in market power in the U.S. economy); JONATHAN TEPPER WITH DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION 17 (2018) (describing increasing industry concentration across the U.S. economy).

15. *See, e.g.*, Lina M. Khan, Comment on Advance Notice of Proposed Rulemaking Regarding the Use of Poultry Grower Ranking Systems in Contract Poultry Production 2 (Sept. 1, 2022) [hereinafter Khan Comment], https://www.ftc.gov/system/files/ftc_gov/pdf/Comment%20of%20Lina%20M.%20Khan%20on%20USDA%20ANPR%20re%20Poultry%20Growing%20Tournament%20Systems.pdf [https://perma.cc/9C5U-VBFN] (emphasizing "the severe degree of concentration in local markets for poultry grower services").

16. *See* Exec. Order No. 14,036, 3 C.F.R. 609 (2022).

for broiler chicken processing.[17] Scholars argue that such concentration gives these companies the power to restrict competition, raise prices, and control supply in ways that harm consumers, farmers, and labor.[18] These conditions should attract close antitrust scrutiny, yet this Article finds the opposite—these industry regulators are not using their antitrust-like powers.

In response to these competition concerns, policymakers and scholars have pushed industry regulators to activate, and to begin using their antitrust-like enforcement powers.[19] Such pressure is part of a broader move-

17. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092, 16094 tbl.1 (Mar. 6, 2024) (to be codified at 9 C.F.R. pt. 201). Broilers are chickens raised for meat rather than for eggs. *See* Press Release, U.S. Dep't of Just., Senior Executives at Major Chicken Producers Indicted on Antitrust Charges (June 3, 2020), https://www.justice.gov/opa/pr/senior-executives-major-chicken-producers-indicted-antitrust-charges [https://perma.cc/9UY3-CG5K]. Broiler chickens account for an estimated 98% of all chicken meat sold in the United States. *See* David Yaffe-Bellany, *Why Chicken Producers Are Under Investigation for Price Fixing*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/business/chicken-price-fixing.html [https://perma.cc/JV34-HKQ6]. Several of these poultry companies stand accused of conspiring to fix prices and bids in violation of antitrust laws. *See* Press Release, U.S. Dep't of Just., *supra.* Private plaintiffs filed suits against broiler chicken processors even before the U.S. Department of Justice's (DOJ) action. *See, e.g.*, *In re* Broiler Chicken Antitrust Litigation, 290 F. Supp. 3d 772, 779 (N.D. Ill. 2017). The DOJ has also considered bringing similar suits against beef processors. Jacob Bunge & Brent Kendall, *Justice Department Issues Subpoenas to Beef-Processing Giants*, WALL ST. J. (June 5, 2020, 11:42 AM ET) https://www.wsj.com/Articles/justice-department-issues-subpoenas-to-beef-processing-giants-11591371745 [https://perma.cc/KTA7-A36V].

18. Consider as an example of the alleged labor effects, for at least the past twenty years, DOJ claims the top poultry processors have employed more than ninety percent of all processing-plant workers and now accuses those companies of colluding to fix wages during that entire period. Complaint at 5, United States v. Cargill Meat Sols. Corp., No. 22-CV-01821 (D. Md. July 25, 2022) [hereinafter *Cargill* Complaint], https://www.justice.gov/media/1238931/dl [https://perma.cc/TL9Y-RN4Y]. The same companies are criticized for the use of opaque contracting practices that leave farmers with little choice or power in whom they contract with, creating opportunities for unfair conduct and the exclusion of competition. *See* Hafiz & Miller, *supra* note 14 (lamenting that concentrated buyer power and vertical integration in poultry, pork, and beef processing leaves farmers subject to such contractual abuses); Michael Kades, *Protecting Livestock Producers and Chicken Growers: Recommendations for Reinvigorating Enforcement of the Packers and Stockyards Act*, WASH. CTR. FOR EQUITABLE GROWTH 9-10 (May 5, 2022), https://equitablegrowth.org/wp-content/uploads/2023/04/050522-packers-stockyards-report.pdf [https://perma.cc/VV67-CUK6] (summarizing concerns over anticompetitive contracting practices in meat markets); Peter C. Carstensen, *Comments for the United States Departments of Agriculture and Justice Workshops on Competition Issues in Agriculture* 9-11 (Univ. of Wis. L. Sch. Legal Stud. Rsch. Paper, Paper No. 1103, 2010), https://ssrn.com/abstract=1537191 [https://perma.cc/2PCK-GWRV] (expressing concern over anticompetitive contracting practices in beef and pork processing).

19. *See, e.g.*, J. WYATT FORE & KATHLEEN BRADISH, AM. ANTITRUST INST., COMPETITION ENFORCEMENT, PRIVATE ACTIONS AND THE SHIPPING ACT *passim* (2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/05/AAI-Shipping-Paper-Summary_05.02.03.pdf [https://perma.cc/F6JF-DRTY] (outlining how to make Shipping Act "enforcement more common and effective"); Hafiz & Miller, *supra* note 14 (calling for a commitment from the U.S. Agriculture Secretary-nominee to enforce the Packers and Stockyards Act aggressively).

ment underway in antitrust law that seeks to expand its scope and function.[20] It has led to specific policy initiatives, such as President Biden's sweeping Executive Order on Promoting Competition in the American Economy (Executive Order on Competition), which proclaimed a "whole-of-government" approach to restoring competition in the U.S. economy.[21] The Order expresses a commendable, overarching policy of "enforc[ing] the antitrust laws."[22] It calls on the specific agencies examined here, among others, to bring that policy to life, analogizing their statutory powers to antitrust law.[23]

But as commendable as that goal is, this Article demonstrates that several of the same regulators being pressed to use their antitrust-like enforcement powers have never done so to any real extent. It is unlikely these agencies will suddenly start to act like antitrust enforcers—at least without a serious build-up of capacity and funding, along with cultural change in the approach to competition harms. None of this seems forthcoming.

This Article shares the enthusiasm for more robust and comprehensive competition enforcement across the economy, but questions whether the existing approach will achieve that goal. Instead of pushing for these specific industry regulators to use their antitrust-like powers, it argues that policy and law are better off paving the way for DOJ and FTC action.[24] Change should seek to empower these antitrust expert enforcers to do what they do best—enforce—in collaboration with specialized industry regulators. To achieve this change, it argues Congress must repeal ancient,

20. Jonathan B. Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST L.J. 705, 705 (2022) (noting the emergence of this "neo-Brandeisian" movement); A. Douglas Melamed, *Maybe We Have All Been Wrong About Antitrust Law*, 11 J. ANTITRUST ENF'T 230, 230 (2023) (observing the push for U.S. antitrust law reform). For paradigmatic examples of literature and policymaking in this movement, see generally Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 790 (2017) (outlining potential reforms to antitrust law to prevent the "dominance" of online platform markets); WU, *supra* note 14, at 17 (calling for "the recovery of one principle: that in enacting and repeatedly fortifying the antitrust laws the United States made a critical, indeed Constitutional choice in industrial and national policy"); MAJORITY STAFF OF THE SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: REPORT AND RECOMMENDATIONS 392-406 (Comm. Print 2020) (calling for an array of antitrust law reforms).

21. Exec. Order No. 14,036 § 2, 3 C.F.R. 609, 611-12 (2022).

22. *Id.* § 1, 3 C.F.R. at 610.

23. Specifically, the Order observes that "in addition to the traditional antitrust laws, the Congress has also enacted industry-specific fair competition and anti-monopolization laws that often provide additional protections." *Id.* § 2(c), 3 C.F.R. at 611. The Order cites several examples, including the three laws examined in this Article: the Packers and Stockyards Act, 7 U.S.C. §§ 181-231 (2018); the Shipping Act of 1984, 46 U.S.C. § 40101-41309 (2018); and the ICC Termination Act of 1995, 49 U.S.C. §§ 1301-1326, 10101-16106 (2018), which created the STB and granted it the powers held by its precursor, the Interstate Commerce Commission (ICC). Exec. Order No. 14,036 § 2(c), 3 C.F.R. 609, 611-12 (2022). The Order then indicates that the agencies that administer "such or similar authorities" include the three agencies examined in the case studies here: the USDA, the STB, and the Federal Maritime Commission (FMC). *Id.* § 2(e), 3 C.F.R. at 612. Later, the Order assigns each agency specific further responsibilities that focus much more on rulemaking. *Id.* § 5, 3 C.F.R. at 614-23.

24. *See infra* Part IV.

ill-conceived legislative exceptions that keep antitrust enforcement power exclusively with the regulators that have abandoned it.[25] Such change will also require a shift in agency perspective, to view antitrust as an important, overlapping complement to industry regulation rather than an optional, narrow alternative.

Part I of this Article introduces the basic theories of interaction between general antitrust law and industry-specific regulation of competition. Both are important tools of U.S. competition policy, but sometimes antitrust law and regulation are cast as substitutes, and other times as overlapping complements.

Part II presents three case studies on industry regulators that hold statutory, antitrust-like enforcement powers: the Federal Maritime Commission (FMC) in ocean shipping, the Surface Transportation Board (STB) in regulated rail, and the USDA in meatpacking. These regulators were selected because they hold such powers, and because they reflect a mix of models for agency power delegation: independent agencies,[26] executive-branch agencies,[27] agencies with exclusive power over pockets of antitrust enforcement,[28] and agencies that share such power.[29] This diversity makes the similar end result all the more striking: each has abandoned its antitrust enforcement powers.

The Article critically evaluates each agency's track record of enforcement using a range of primary and secondary research to trace how often, and in what ways, each regulator has invoked its antitrust-like powers. The results are dire. To varying degrees, the three agencies have each failed to use their antitrust-like powers for decades, or, in one case, for more than a century.[30]

Part III argues that antitrust abandonment is a problem because it creates unintended risks of harm to competition. Abandonment leaves gaps between antitrust and industry regulation within which there is no or little competition oversight. These gaps invite anticompetitive conduct, because each of the industries studied displays risk factors for such abuses of power: all are highly concentrated, have a history of anticompetitive activity, and are the subject of current scholarly and policymaker suspicion that anticompetitive conduct is occurring. These characteristics point to the need for close antitrust scrutiny, not the abandonment now occurring.

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25. *See infra* Part IV.

26. The FMC and the STB are independent agencies. *See infra* Sections II.A, II.B.

27. The USDA is an executive-branch agency, under the direction of the Secretary of Agriculture. *See infra* Section II.C.

28. The FMC has exclusive power to enforce antitrust-like law over certain ocean-shipping agreements; the STB has exclusive power to enforce antitrust-like law over regulated rail traffic. General antitrust law is excluded from these areas of commerce. *See infra* Sections II.A.1, II.B.2, II.B.3.

29. The DOJ and the USDA share the authority to police anticompetitive conduct in the meatpacking industry. *See infra* Section II.C.

30. *See infra* Part II.

Part IV offers an in-depth look at how to close the abandonment gap and avoid it in future. It argues that doing so will require a significant shift in policymakers' expectations, away from the view that these industry regulators will begin to use their abandoned enforcement powers—which has long been unreasonable—and toward the empowerment of expert antitrust enforcers, the DOJ and the FTC, to act in abandoned spaces. This change will require at least two actions: the repeal of arcane legislative exceptions to general antitrust law in certain industries, and a more nuanced shift in agency perspectives toward shared responsibility for enforcement. Finally, Part IV looks ahead at how antitrust abandonment should inform future institutional design. It argues that abandonment commends shared enforcement responsibility models, and the continued application of antitrust law alongside any new competition regulation.

This Article contributes to the literature in two main ways. Existing literature is sparse on the antitrust-like powers of each of these regulatory agencies.[31] Where it exists, the work tends to analyze a single industry or a single statute,[32] with the exception of some industry-wide assessments in transportation.[33] This Article expands the breadth of this thinking with analysis that spans beyond individual agencies and statutes. In doing so, it

31. On shipping, see generally FORE & BRADISH, *supra* note 19, at 4-6, which discusses the relationship between the general antitrust laws and the Shipping Act; Chris Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 VAND. J. TRANSNAT'L L. 779, 795-802 (2006), which analyzes competition exemptions for shipping; and Edward Mansfield, *The Federal Maritime Commission*, *in* THE POLITICS OF REGULATION 42, 42-74 (James Q. Wilson ed., 1980), which discusses the FMC's regulation of the shipping industry. On meatpacking, see generally Peter C. Carstensen, *The Packers and Stockyards Act: A History of Failure to Date*, CPI ANTITRUST J., Apr. 2010 (2), https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf [https://perma.cc/4TT9-9Z6R], which critiques the antitrust exceptions in the Packers and Stockyards Act; Kades, *supra* note 18, at 10-11; Carstensen, *supra* note 18, at 9-14; Hafiz & Miller, *supra* note 14; Herbert Hovenkamp, Does the Packers and Stockyards Act Require Antitrust Harm? (Jan. 10, 2011) (unpublished manuscript), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2862&context=faculty_scholarship [https://perma.cc/4NPM-A93L]; John D. Shively & Jeffrey S. Roberts, *Competition Under the Packers and Stockyards Act: What Now?*, 15 DRAKE J. AGRIC. L. 419 (2010); Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91 (2003); and Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449 (1999). On rail, see generally John E. Kwoka, Jr. & Lawrence J. White, *Manifest Destiny? The Union Pacific and Southern Pacific Railroad Merger (1996)*, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 27 (John E. Kwoka, Jr. & Lawrence J. White eds., Oxford Univ. Press, 4th ed. 2004); and Richard L. Schmalensee & Wesley W. Wilson, *Modernizing U.S. Freight Rail Regulation*, 49 REV. INDUS. ORG. 133 (2016). There is also a broader literature on the regulation of each of these industries that is not specific to antitrust. *See generally, e.g.*, THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY (1983).

32. *See* sources cited *supra* note 31.

33. *See, e.g.*, Peter C. Carstensen, *Replacing Antitrust Exemptions for Transportation Industries: The Potential for a "Robust Business Review Clearance,"* 89 OR. L. REV. 1059, 1064-69 (2011) (analyzing antitrust exemptions across several transportation contexts); Bruce B. Wilson, *Railroads, Airlines, and the Antitrust Laws in the Post-Regulatory World: Common Concerns and Shared Lessons*, 60 ANTITRUST L.J. 711, 714 (1991). There is also a broader literature on deregulation across industry contexts. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998); SECTION OF ANTITRUST L., AM. BAR ASS'N, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007).

demonstrates for the first time the pattern of antitrust abandonment across several regulators that hold antitrust-like powers but do not use them, and in some cases never have. This disuse is a shared, recurring, and longstanding problem. It exists despite distinct congressional rationales for the economic regulation of each industry,[34] and despite the variety of agency characteristics represented in the Article's case studies. This breadth suggests that there are no industry-specific economic or institutional conditions that explain away the phenomenon of antitrust abandonment. It is not idiosyncratic to a particular industry or law; rather, it is a shared and recurring issue among these regulators with antitrust-like powers.

Second, the Article adds to the literature by providing insight on institutional roles. Antitrust scholarship has long been "rich in substantive concepts and lean in the study of institutions."[35] Attention is more often spent on statutes and their judicial interpretation,[36] and less often on the agencies that enforce those laws. This is true of the topics examined here.[37]

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34. In shipping, Congress assumed collusive agreements were necessary to avoid perpetual overcapacity and rate wars, yet made clear that they should be supervised for excesses. The House Committee on the Merchant Marine and Fisheries explained, in the "Alexander Report" (named for the committee's then-Chairman, Joshua W. Alexander), that "[t]o permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and . . . they must be recognized." H.R. DOC. NO. 63-805, at 417-18 (1914); *see also id.* at 416 (explaining that certain benefits—such as "economy in the cost of service" and "greater regularity and frequency of service, stability and uniformity of rates"—could "be secured only by permitting" the "trade to cooperate through some form of rate and pooling arrangement under Government supervision and control"). In rail, the modern era of regulation was thought necessary to bring about financial stability, and adequate competition, in the industry after a number of bankruptcies in the 1970s. See *infra* Section II.B.1; *see also* 49 U.S.C. § 10101 (2018) (describing several goals of federal rail transportation regulation, such as "to foster sound economic conditions in transportation" and "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates"). In meatpacking, the regulatory regime was imposed to prevent unfair practices by powerful stockyards and packers against farmers. *See* Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91, 92-94 (2003).

35. William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1021 (2012) (book review). The greatest exception to this leanness is Kovacic's own leading work on the subject of antitrust institutions, particularly enforcement agencies. *See, e.g.*, D. Daniel Sokol, Christine Wilson & Joseph Nord, *Grading the Professor: Evaluating Bill Kovacic's Contributions to Antitrust Engineering*, *in* 1 WILLIAM E. KOVACIC AN ANTITRUST TRIBUTE LIBER AMICORUM 47-70 (Nicolas Charbit, Elisa Ramundo, Anna Chehtova & Abigail Slater eds., 2012) (summarizing Kovacic's contributions on the role and design of institutions in antitrust law); William E. Kovacic, *The Federal Trade Commission At 100: Into Our 2nd Century; The Continuing Pursuit of Better Practices*, FED. TRADE COMM'N (Jan. 2009), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-100-our-second-century/ftc100rpt.pdf [https://perma.cc/W7YX-627M]; William E. Kovacic, *Remark, Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009).

36. *See, e.g.*, sources cited *supra* note 31.

37. There is some existing literature on shared antitrust and regulatory power, but it tends to be about merger review, a particular subtopic of antitrust law. This Article examines a different area of antitrust doctrine—conduct—where there are also shared agency powers that, at least until quite recently, have seen little attention. On shared agency power over merger review see, for example, Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 445 (2020) (analyzing shared Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation (FDIC), and DOJ oversight of bank mergers); Garry A. Gabison,

While this Article shares the enthusiasm of prior doctrinal work for achieving a more resilient antitrust enforcement apparatus, it adds the often-underexamined institutional perspective. The interaction between antitrust and industry regulation is not just a problem of statutes or judicial interpretation, but of how enforcement powers and roles are allocated among institutions. The design of such institutional roles, examined here, is integral to achieving competition oversight across the U.S. economy.

Since the Article relies on a number of case studies, by nature it is not an exhaustive assessment of all possible agencies that may hold antitrust-like enforcement powers. The recent Executive Order on Competition identifies no fewer than ten additional agencies or executive departments[38] that administer "industry-specific fair competition and anti-monopolization laws," beyond generally applicable antitrust laws.[39] Each could be a candidate for further study to determine whether the agency truly holds antitrust-like enforcement powers,[40] and, if so, whether it uses them. Given

Dual Enforcement of Electric Utility Mergers and Acquisitions, 17 J. BUS. & SEC. L. 11, 12 (2017) (analyzing shared Federal Energy Regulatory Commission (FERC), FTC, and DOJ oversight of utility mergers and acquisitions); Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, 45 REV. INDUS. ORG. 295, 296 (2014) (analyzing shared Federal Communications Commission (FCC), FTC, and DOJ oversight of communication company mergers); Curtis M. Grimm, *Merger Analysis in the Post-Staggers Railroad Industry*, *in* COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES 84, 88 (Peter C. Carstensen & Susan Beth Farmer eds., 2008) (examining the effects of railroad mergers, and comparing STB and DOJ evaluations); Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29 *passim* (comparing differing roles in shared DOJ and FCC oversight of telecommunications mergers); Salvatore Massa, *Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific*, 24 TRANSP. L.J. 413, 441-42 (1997) (reviewing the STB's approach to railway merger review and concluding that courts may be better suited to make sound evaluations).

38. Exec. Order No. 14,036 § 2(e), 3 C.F.R. 609, 612 (2022) (listing—in addition to the agencies examined here and the FTC—the Department of the Treasury, the Department of Health and Human Services, the Department of Transportation (DOT), the Federal Reserve System, the Securities and Exchange Commission (SEC), the FDIC, the FCC, the Commodity Futures Trading Commission, FERC, and the Consumer Financial Protection Bureau (CFPB)).

39. In addition to the laws examined in this Article, the Executive Order also identifies the following laws as such: the Federal Alcohol Administration Act, 27 U.S.C. §§ 201-219a (2018); the Bank Merger Act, 12 U.S.C. § 1828(c) (2018); the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of the U.S. Code); the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); the Fairness to Contact Lens Consumers Act, 15 U.S.C. §§ 7601-7610 (2018); and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code). Exec. Order No. 14,036 § 2(c), 3 C.F.R. 609, 611-12 (2022). This seems to omit the empowering legislation for some of the agencies that the Order also references as having authority over competition, *see id.* § 2(e), 3 C.F.R at 612, such as the Federal Power Act, 16 U.S.C. §§ 791a-828c (2018), which empowers FERC.

40. Some of these agencies, like the CFPB, have powers more akin to consumer protection or public-interest powers, which may relate to competition but are not synonymous with it. *See Building the CFPB: A Progress Report*, CONSUMER FIN. PROT. BUREAU 8 (July 18, 2011), https://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf [https://perma.cc/QAS4-DFZ2] (recounting the establishment of the CPFB in 2010 to achieve more effective and consolidated consumer financial protection). Others, such as the DOT and

this case-study methodology, the Article does not contend that every industry regulator now or in the future will abandon its antitrust-like powers. At the same time, it demonstrates that antitrust abandonment is a recurring phenomenon across multiple agencies. The pattern should cause policymakers to rethink their expectations that these regulators will act like enforcers, and to reconsider granting antitrust-like powers in the future, particularly on an exclusive basis.

Finally, the Article does not seek to uncover the reasons why these regulators have not used their antitrust-like powers. Those reasons are likely myriad and complex, and more in the domain of a rich body of administrative law literature theorizing why agencies fail to act.[41] This literature is not limited to competition powers and offers several intertwined reasons why a regulator may not be effective, such as agency capture, shifting political control, cultural limitations or legacies, and constraints on resources or information.[42] The goal of this Article is not to pinpoint an explanation of why there is such inaction, but to reflect on its pattern of existence, and explore the significance of that pattern to current and future competition policy.

I. Non-Antitrust Agencies with Antitrust-Like Powers

Antitrust law seeks to preserve and restore competition. Such competition is thought to benefit consumers by encouraging companies to charge lower prices, offer higher-quality products, and engage in more innovation.

Antitrust is general law that applies across the economy unless Congress or the courts say otherwise. Three major federal antitrust statutes are commonly referred to as "antitrust law": the Sherman Antitrust Act of

FERC, have powers more analogous to those held by the agencies studied here. *See, e.g.*, 16 U.S.C. § 824(b) (2018) (empowering FERC to regulate mergers or consolidations of public utilities); *infra* note 331 (discussing the DOT's merger review powers).

41. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3, 17-18 (1971) (theorizing that "regulation is acquired by the industry and is designed and operated primarily for its benefit," and using ICC's "pro-railroad policies" as an example of the "rational theory of political behavior"); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335 (1974) (contrasting public-interest theory with capture theory); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976) (formalizing Stigler's classic theories of economic regulation); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y. 203, 204 (2006) (reviewing more recent theoretical and empirical literature on regulatory capture); ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 68-82 (2d ed. 2012) (summarizing the commonly articulated explanations for regulatory failures in the literature). This work is not specific to antitrust law, but rather it offers a more general perspective on potential causes of regulatory or agency failures. Antitrust abandonment could be cast as some specific manifestation of one or more of these theories, though such an argument has not yet been articulated.

42. *See* sources cited *supra* note 41.

1890,[43] the Clayton Antitrust Act of 1914,[44] and the Federal Trade Commission (FTC) Act.[45] Each law is framed in very broad terms to apply to "commerce"[46] that is interstate, or foreign but with the United States, and contain little else to narrow this scope.[47] Courts have maintained this statutory breadth in their comprehensive application of antitrust law, finding "commerce" to include almost any exchange of goods or services for money.[48] The Supreme Court has confirmed this span, describing the Sherman Act as "a comprehensive charter of economic liberty."[49]

The broad applicability of antitrust law means its primary federal enforcers—the FTC and the DOJ—have correspondingly broad mandates and powers. Unless specifically excepted by statute or judicial doctrine, these agencies have jurisdiction to police anticompetitive conduct. The DOJ and the FTC have taken up the mantle of this power to promote competition, enforcing across the economy. The agencies' recent litigation addresses anticompetitive conduct in a range of industries, from social networking[50] and video gaming[51] to asphalt[52] and pharmaceutical drugs.[53] Each agency has developed specific industry expertise, some of which is

43. 15 U.S.C. §§ 1-7 (2018).

44. *Id.* §§ 12-27.

45. *Id.* §§ 41-58. While other statutes could be added to this list, most would identify these three as what is generally meant in reference to federal "antitrust law."

46. *Id.* § 1 (applying to actions "in restraint of trade or commerce among the several States, or with foreign nations"); *id.* §§ 14, 18 (prohibiting various acts when committed by persons "engaged in commerce"); *id.* § 45(a)(1) (condemning "[u]nfair methods of competition in or affecting commerce").

47. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975) ("Congress intended to strike as broadly as it could in § 1 of the Sherman Act . . . ."); United States v. S.-E. Underwriters Ass'n., 322 U.S. 533, 553 (1944) (quipping that "[l]anguage more comprehensive" than that in sections 1 and 2 of the Sherman Act "is difficult to conceive"). The Sherman Act leaves the term "commerce" undefined. *See* 15 U.S.C. §§ 1-2 (2018). The Clayton Act and FTC Act add only the geographic clarification that the acts apply to commerce among the states or with foreign nations. *Id.* §§ 12(a), 44.

48. *See, e.g.*, *Goldfarb*, 421 U.S. at 787 (construing "commerce" under section 1 of the Sherman Act broadly to include the sale of services). Though idiosyncratic and hard to defend logically, one of the few exceptions to this breadth is the longstanding interpretation of the term "commerce" not to include professional baseball. *See* Flood v. Kuhn, 407 U.S. 258, 284-85 (1972); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 209 (1922).

49. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); *see also* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.").

50. FTC v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022).

51. Complaint, United States v. Activision Blizzard, Inc., No. 23-CV-00895 (D.D.C. Apr. 3, 2023), https://www.justice.gov/atr/case-document/file/1577846/dl?inline [https://perma.cc/3MUG-4YVF]; Complaint, Microsoft Corp., No. 9412 (F.T.C. Dec. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf [https://perma.cc/8ZTS-N6D7].

52. Information, United States v. F. Allied Constr. Co., No. 23-CR-20381 (E.D. Mich. June 30, 2023), https://www.justice.gov/atr/file/1304251/dl [https://perma.cc/9YL2-54WM].

53. FTC. v. Vyera Pharms., LLC, 479 F. Supp. 3d 31 (S.D.N.Y. 2020).

based on statutory divisions of labor, but much of which is a function of shared agency practice in dividing work along certain sectoral lines for administrative efficiency.[54]

Antitrust law is not, however, the only legal tool that the government uses to achieve competition. Industry regulation also plays an essential role in U.S. competition policy, seeking to promote competitive markets alongside antitrust law. While industry regulators often have mandates that span beyond competition,[55] their work and power can overlap in part with general antitrust laws to encourage competition in U.S. markets. Federal industry regulators promote and maintain competitive markets in many specific sectors of the economy, notably in securities, telecommunications, healthcare, electric power, transportation, and, of course, agriculture, where this Article began.[56] The Federal Communications Commission (FCC), for example, exercises its significant public-interest powers to oversee mandatory interconnection among telecommunications networks, enforcing a regime that requires incumbent local telephone companies to allow new entrants to interoperate with parts of their networks.[57] This interoperability mandate can promote competition by enabling entrants to offer services in telecommunications markets from which they might otherwise have been excluded, either by the high cost and complexity of building networks or by the conduct of incumbent firms.

This Article focuses on industry regulators that possess a specific type of statutory power: the power to enforce antitrust-like law. This is used as a term of art in this Article to mean the power to prevent conduct that is classically the subject of antitrust prohibitions because of its anticompetitive effects.

These antitrust-like powers are intriguing for the very reason that they exist in the hands of what might be referred to as "non-antitrust" agencies to distinguish them from the DOJ and the FTC. These powers are not contained within the general antitrust laws— the Sherman, Clayton, and FTC Acts—but rather are scattered across various industry-specific legislation. These statutes confer antitrust-like powers on industry regulators in several essential areas of the economy, such as transportation and food processing. In essence, Congress has granted each industry regulator a slice of

54. While their respective jurisdictions are broad, there are certain areas in which only one or the other antitrust agency has statutory jurisdiction. For example, the DOJ has jurisdiction to review "transactions involving banking, savings and loan institutions, and certain common carriers, such as airlines and telecommunications," whereas "the FTC Act specifically limits FTC's authority involving these industries." U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105790, DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT 6-7 (2023).

55. Industry-regulator mandates often extend beyond the competition focus here to other social welfare goals such as equal access or maintaining rate stability. *See, e.g.*, *infra* Section II.B.1 (discussing the goal of rail industry regulation).

56. *See, e.g.*, sources cited *supra* notes 38-39.

57. *See* 47 U.S.C. § 251 (2018).

the antitrust enforcement pie. The industry regulator, instead of or in addition to the usual antitrust agencies, has responsibility for policing certain anticompetitive conduct within portions of its respective industry. Under these statutory authorities, "[i]n effect, the [industry regulator] becomes a limited-jurisdiction enforcer of antitrust principles."[58]

Despite their locations in other statutes, these provisions look quite similar to the main prohibitions in the general antitrust laws. The statutory provisions grant industry regulators the power to stop anticompetitive conduct, either by issuing orders themselves or by seeking remedies in court, much like the DOJ would under general antitrust law. Depending on the agency, this can include the power to prevent collusive conduct such as cartel agreements or other unreasonable restraints of trade,[59] or to prevent unilateral misconduct involving monopolization or abuses of dominance.[60] In some instances, the statute itself frames the misconduct in terms of anticompetitive effects.[61] In others, the agency has interpreted its public-interest powers narrowly to cover only conduct that has anticompetitive effects, making these powers antitrust-like.[62]

As interpreted, then, none of these antitrust-like provisions task the regulator with action in the "public interest" or similarly malleable powers.[63] Such public-interest standards are legion in the U.S. Code and generally encompass many interests beyond competition, though competition may be considered, or even statutorily enumerated, as a relevant factor.[64] The language in the antitrust-like provisions examined here, by contrast,

58. Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922, 1926 (2018) (first alteration in original) (quoting Kearney & Merrill, *supra* note 33, at 1361).

59. *See infra* Section II.A (describing the FMC's power to police anticompetitive agreements among ocean carriers); *infra* Section II.C (describing the USDA's power to prevent anticompetitive and unfair conduct, including conspiracies or agreements to engage in such acts, or to fix territories, sales, or prices).

60. *See infra* Sections II.B.2.a, II.B.3 (describing the STB's power to order competitive access to railroad infrastructure and to prevent railroads from charging unreasonable rates); *infra* Section II.C (describing the USDA's power to prevent anticompetitive and unfair conduct, including any acts with the purpose, tendency, or effect of restraining commerce, manipulating pricing, or creating a monopoly).

61. *See infra* Section II.A.1 (describing the relevance of competitive effects to antitrust-like violations of the Shipping Act).

62. *See infra* Section II.B.2 (describing the STB's rules narrowing its statutory public-interest standard to an assessment based only on competition).

63. For an in-depth discussion of public-interest powers, see Jodi L. Short, *In Search of the Public Interes*t, 40 YALE J. ON REGUL. 759, 765, 780-824 (2023) (tallying "more than 1,200 public interest standards in the U.S. Code and legions more in state statutory law"—including more than 100 public-interest powers exercised by the FCC alone—and assessing how some such powers are being exercised).

64. Several of the regulators examined here also hold public-interest powers under different provisions of their enabling statutes, or may be said more colloquially to be acting in the public interest in their decisions, but the statutory standard governing the exercise of the antitrust-like powers examined here is not a public-interest standard. The STB, for example, reviews mergers under a public-interest standard that expressly includes as one of five factors "whether the proposed transaction would have an adverse effect on competition among rail carriers." 49 U.S.C. § 11324(b)(5) (2018). Note for clarity that this is the merger review power of the STB, not the conduct powers examined in depth later in this Article.

does not grant express or implied powers to the agency to weigh or balance competition relative to other interests.[65] Instead these clauses home in specifically on the effects of firms' conduct on competition and, at times, require the agency to take action if competition is at risk.[66] Although these industry-specific provisions are splintered off from general antitrust law, they nonetheless look very similar to it, and are thus referred to here as "antitrust-like."

A major way these antitrust-like provisions vary is whether or not they overlap with antitrust law. Some apply alongside general antitrust law. Others are exclusive to the industry regulator, and bar the application of general antitrust law and its enforcers.

These differing statutory schemes reflect broader variation in the theories of how antitrust and regulation interact or should interact. In some industries, courts and scholars cast antitrust and regulation as overlapping complements.[67] This view enables both to apply, at least up to the point at which antitrust conflicts with regulation.[68] One example is the USDA's meatpacking regime where this Article began: general antitrust law and the Packers and Stockyards Act both apply to bar anticompetitive conduct in meatpacking.[69] Another example is telecommunications regulation, where the Telecommunications Act of 1996[70] regulates many aspects of tel-

65. While at one time the FMC held a public-interest power over carrier agreements, this was eliminated in amendments to the Shipping Act in 1984. *See infra* note 86.

66. See, for example, the mandatory action by the USDA provided for by the Packers and Stockyards Act. 7 U.S.C. § 193(a) (2018) ("Whenever the Secretary has reason to believe that any packer or swine contractor has violated or is violating any provision of this subchapter, he shall cause a complaint in writing to be served upon the packer or swine contractor, stating his charges in that respect, and requiring the packer or swine contractor to attend and testify at a hearing . . . .").

67. *See, e.g.*, Shelanski, *supra* note 58, at 1942-43 (discussing a shift in Supreme Court doctrine from treating antitrust and regulation as complements to treating them as substitutes, particularly in securities); Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 708 (2009) (arguing that both antitrust and regulation have a role in ensuring competitive markets).

68. Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963) (encouraging courts to reconcile antitrust and regulation when possible).

69. *See infra* Section II.C.

70. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

ecommunications competition but expressly states that the regime overlaps with antitrust law.[71] Scholars favoring this view argue that overlap between antitrust and regulation enables legal systems to guard against gaps between the two where anticompetitive conduct can take place.[72]

In other industries, though, antitrust and regulation are viewed more as substitutes. For example, judicial doctrine has largely excluded antitrust law from applying to conduct that is subject to securities regulation.[73] The Supreme Court found that securities regulation largely obviates the need for antitrust law to apply to regulated conduct, on the assumption that antitrust scrutiny is likely to provide only a small added benefit to the Securities and Exchange Commission's (SEC) in-depth regulation of securities markets, and that antitrust action may even interfere with the SEC's role.[74] In other industries the exclusion of antitrust is a statutory, rather than a judicial, construct. This includes ocean shipping and regulated rail, as discussed in this Article.[75] Congress created express, statutory exemptions that remove certain regulated conduct from the purview of general antitrust law and its enforcers.[76] These regimes reflect the view famously espoused by economist Alfred E. Kahn, and shared by then-Judge Stephen Breyer, that "antitrust laws are not just another form of regulation but an alternative to it."[77]

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71. The Act makes this overlap clear by including an express antitrust savings clause providing that nothing in the legislation "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152 note (2018) (Applicability of Consent Decrees and Other Law); *see* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 406 (2004) (finding that the Telecommunications Act's antitrust savings clause bars any finding of implied antitrust immunity for conduct under that Act).

72. *See, e.g.*, Shelanski, *supra* note 58, at 1944-59 (arguing that antitrust law should be robustly applied in periods of deregulation to prevent the narrowing of regulation from causing gaps in competition enforcement); Dogan & Lemley, *supra* note 67, at 729 (arguing that antitrust should be viewed as an important backstop to regulation because antitrust acts to limit "regulatory gaming," in which private actors use regulation itself to engage in practices that exclude competition).

73. *See* Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 267-68 (2007) (declining to apply antitrust scrutiny to conduct already regulated by securities law).

74. *Id.*

75. *See infra* Sections II.A, II.B.

76. There are at least twenty statutory exemptions or modifications that exempt federal antitrust law in some way, though not all involve regulation that steps into the space where antitrust law is excluded. *See* SECTION OF ANTITRUST L., AM. BAR ASS'N, *supra* note 33, at 404 app. A (enumerating statutory exemptions from antitrust law).

77. Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CALIF. L. REV. 1059, 1059 (1987) ("I agree thoroughly with Judge Breyer that the antitrust laws are not just another form of regulation but an alternative to it—indeed, its very opposite."); *see also* ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, xxiii (1988) ("[S]ociety's choices are always between or among imperfect systems, but . . . wherever it seems likely to be effective, even very imperfect competition is preferable to regulation."); Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1007 (1987) (describing antitrust as "an *alternative* to regulation and, where feasible, a better alternative," though referencing price regulation specifically); Shelanski, *supra* note 58, at 1952 (linking Kahn's and Breyer's work, with the caveat that this comparative preference was being expressed specifically for rate regulation as compared to antitrust law).

II. Case Studies in Antitrust Abandonment

This Part critically examines the track record of three regulatory agencies with statutory, antitrust-like powers. These case studies demonstrate recurring instances of antitrust abandonment across several industries and types of regulatory regimes.

These agencies were selected for two main reasons. First, each has antitrust-like enforcement powers, meaning the power to prevent conduct that is classically the subject of antitrust prohibitions because of its anticompetitive effects. Depending on the agency, this includes the power to prevent collusive conduct such as cartel agreements or other unreasonable restraints of trade,[78] or to prevent unilateral misconduct involving monopolization or abuses of dominance.[79] Second, these agencies reflect several different types of federal agencies within the modern regulatory state: some are independent,[80] some are executive-branch,[81] some have exclusive power to enforce antitrust-like law in industry segments,[82] and others share enforcement power with the DOJ.[83] This breadth suggests that no specific set of agency characteristics wholly explains away the problem of antitrust abandonment.

Each case study explains the specific, antitrust-like powers held by the industry regulator, and why those powers are similar to antitrust law. The case studies then examine the agency's track record of using those powers. The research engages in a firsthand examination of the record of complaints and other agency actions where available from public sources and legal databases. This is combined with historical accounts of agency action over time, the perceptions of scholars and policymakers, and assessments from the agencies themselves of the robustness of competition oversight.

The research shows dramatic and longstanding disuse by these regulators of their antitrust-like powers. The enforcement records for these provisions are abysmal, with little to no action over extensive periods of time. The analysis considers possible explanations for this apparent inaction—such as a lack of anticompetitive conduct, or a lack of transparency where the enforcement is internal to the agency—but finds that underenforcement is often a more compelling conclusion. While these results are based on case studies, and thus limited to the agencies examined here, together they suggest a persistent pattern of antitrust abandonment across multiple regulators.

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78. *See infra* Section II.A (describing the FMC's power to police anticompetitive agreements among ocean carriers); *infra* Section II.C (describing the USDA's powers to prevent anticompetitive and unfair conduct by meatpackers, swine contractors, and live-poultry dealers, including conspiracies or agreements to engage in such acts, or to fix territories, sales, or prices).

79. *See infra* Sections II.B.2.a, II.B.3, II.C.

80. *See infra* Sections II.A, II.B.

81. *See infra* Section II.C.

82. *See infra* Sections II.A, II.B.

83. *See infra* Section II.C.

A. Antitrust Abandonment in Ocean Shipping

The FMC offers one of the most egregious examples of antitrust abandonment. This Section explains the FMC's antitrust-like powers, tracks the history of their disuse, and then argues this disuse is primarily explained by underenforcement over time.

1. The FMC Has the Exclusive Power to Challenge Anticompetitive Agreements in Ocean Shipping

The Shipping Act grants the FMC, an independent federal agency, responsibility for the regulation of ocean-borne transportation between the United States and foreign countries.[84] Since 1916, the Agency and its precursors have exercised an array of oversight of the industry and have established rules and regulations for such shipping. This includes a complex set of provisions that, in effect, give the FMC antitrust-like authority over anticompetitive agreements among ocean common carriers. The FMC's statutory power is exclusive, displacing general antitrust law and its enforcers to leave the FMC with the sole power to police such agreements.

The Shipping Act requires that specified types of agreements be filed with the FMC.[85] The agreements that must be filed are listed in the Act and include those between ocean carriers on prices; allocation of markets; shipping volumes; information and facilities sharing; and "exclusive, preferential, or cooperative" arrangements; as well as other agreements to "control, regulate, or prevent competition" in international ocean transportation.[86]

As this description suggests to antitrust readers, many of these agreements would otherwise constitute classic violations of antitrust law. Price-

84. Power under the Shipping Act was initially granted to the FMC's precursor agency, the Shipping Board within the Department of Commerce. The Shipping Board later became the redundantly named Shipping Board Bureau, then the U.S. Maritime Commission, the Federal Maritime Board and, finally, the Federal Maritime Commission. *See* Mansfield, *supra* note 31, at 46, 69.

85. *See* 46 U.S.C. §§ 40301-40302 (2018) (requiring that all agreements by or among ocean common carriers or marine terminal operators for the specified activities be filed with the Commission, including agreements to fix rates or conditions of service; pooling cargo revenue; allocating ports or sailings; limiting the volume or character of cargo or passengers to be carried; engaging in exclusive or preferential arrangements; or controlling or prevent competition).

86. *See id.* § 40301. This listing of the types of agreements to which the Act applies was a legislative response to confusion as to its application arising from *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968). The Court found that the FMC could not approve ocean common carrier agreements unless it determined that they were "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." *Id.* at 243 (internal quotation marks omitted). Carriers were concerned that this standard for approvals could empower the FMC to subject conference agreements to antitrust-like scrutiny, and secured a legislative amendment making clear which agreements were antitrust exempt. *See* Bureau of Econ., *An Analysis of the Maritime Industry and the Effects of the 1984 Shipping Act*, FED. TRADE COMM'N 9 & n.16 (Nov. 1989), https://www.ftc.gov/sites/default/files/documents/reports/analysis-maritime-industry-and-1984-shipping-act/198911maritime.pdf [https://perma.cc/U5GY-5Y5R].

fixing and market-allocation agreements among horizontal competitors are the most egregious violations of section 1 of the Sherman Act.[87]

The Shipping Act, however, exempts these agreements from antitrust law provided they are filed with the FMC.[88] Since its passage in 1916, the Shipping Act has included this antitrust exemption for ocean common carrier agreements.[89] Antitrust immunity is obtained automatically forty-five days after the effective filing of an agreement.[90]

In effect, then, the Shipping Act legalizes what are otherwise egregious antitrust violations, such as horizontal price-fixing and market-allocation cartels.[91] It also shields other agreements that may or may not violate antitrust law depending on their effects on competition, such as information-sharing and joint operational agreements among competitors.[92]

While commonly referred to as an "exemption," it is perhaps more accurate to say that the Shipping Act creates an antitrust substitute scheme. This is due to another important provision, § 41307 of the consolidated Shipping Act. This section grants the FMC the power to challenge in court any ocean-carrier agreements that turn out to have "unreasonable" anticompetitive effects.[93] Once an agreement is filed, this provision empowers the FMC to pursue an injunction in federal court against any agreement that is "likely, by a reduction in competition," to result in either "an unreasonable reduction in transportation service," or "an unreasonable increase in transportation cost."[94]

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87. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972). "[B]ecause of their pernicious effect on competition and lack of any redeeming virtue," such agreements "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

88. 46 U.S.C. § 40302 (2018) (setting out the filing requirement and statutory exceptions). Operation under a listed agreement that is *not* filed with the FMC is itself a violation of the Shipping Act. *Id.*

89. Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728, 734 (codified as amended at 46 U.S.C. §§ 40102(2), 40307).

90. *Id.* § 40304(c). The Act provides that the agreement must meet certain technical and content requirements before coming into effect, but none are particularly difficult to meet. *Id.* § 40304(b) (requiring agreements to comply with certain provisions in the Act); *id.* § 40303 (setting out certain required content in agreements).

91. *Id.* § 40307(a)(1) (granting immunity from antitrust law for agreements filed).

92. *Id.*

93. *Id.* § 41307(b)(1). This FMC power to seek a judicial remedy for anticompetitive agreements was introduced in 1984, when the process for filing these agreements changed. Shipping Act of 1984, Pub. L. No. 98-237, §§ 6(g), (h), 11(c), 98 Stat. 67, 72-73, 80 (codified as amended at 46 U.S.C. § 41307(b)). Before the 1984 amendments, there was no need for such a provision because the FMC itself (then the Board) had full authority to reject such agreements as anticompetitive at any time. Agreements were not effective—or immune from antitrust law—until approved by the FMC. *See infra* 111-114.

94. *Id.* This section also provides for the FMC to challenge agreements that "substantially lessen competition" in the purchasing of covered services, which is defined to involve port services. *See id*. §§ 41307(b)(1), 40102(5). The FMC also has the supporting powers to investigate and hold

This provision in the Shipping Act echoes antitrust law in its prohibition on agreements that are "unreasonable" restraints on trade in their effects on competition. The Supreme Court reads section 1 of the Sherman Act similarly to prohibit "unreasonable" restraints of trade, and the assumed or actual effects on competition of an agreement are the touchstone for determining that reasonableness.[95] The Shipping Act thus shares an important goal with antitrust law: protecting the public from the effects of agreements that unduly restrict competition.[96]

These various Shipping Act sections combine to create an antitrust-like scheme specific to ocean shipping. Agreements filed with the FMC are exempt from antitrust law. The FMC, in turn, holds the exclusive right to subject those ocean-carrier agreements to antitrust-like enforcement under which it can challenge agreements with unreasonable effects on competition. By virtue of the exclusion of antitrust law, both expert antitrust agencies—the DOJ and the FTC—are blocked from overseeing these ocean-shipping agreements. Only the FMC has authority to intervene if the anticompetitive effects become unreasonable.

An important caveat on this exclusion, though, is that the FMC's Shipping Act authority extends only to ocean common carriers, meaning shippers that are available for hire to the general public for shipping, on routes between the U.S. and other countries.[97] This means the Agency does not have authority over private carriers that are owned and operated by the

hearings regarding any potential violations of § 41307, as well as to issue certain reparations. *See id.* §§ 41302-41305 (empowering FMC to investigate potential violations of the Act of its own volition, to hold hearings, and to require reparations).

95. Section 1 of the Sherman Act prohibits "contract[s]," "combination[s]" and "conspirac[ies], in restraint of trade." 15 U.S.C. § 1 (2018). To this provision, courts have added that only "unreasonable" restraints are prohibited. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) ("[T]he standard of reason which had been applied at the common law . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) ("While § 1 could be interpreted to proscribe all contracts, the Court has never 'taken a literal approach to [its] language.' Rather, the Court has repeated time and again that § 1 'outlaw[s] only unreasonable restraints.'" (alterations in original) (citations omitted) (first quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); and then quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997))). It seems, however, that the interpretation of "unreasonable" restraints under the Shipping Act would have to be distinct in some way from the Sherman Act, since the Shipping Act condones price-fixing and other types of agreements that are per se "unreasonable" under Sherman Act section 1 jurisprudence. *See* cases cited *supra* note 87.

96. Letter from Renata B. Hesse, Acting Assistant Att'y Gen., Dep't of Just., to Sec'y, Fed. Mar. Comm'n 2 (Sept. 19, 2016), https://www.justice.gov/atr/file/909131/download [https://perma.cc/K9Y5-LB35] (noting that FMC's power "parallels the goal of the antitrust laws: to protect the public from a reduction in competition caused by agreements that unreasonably increase market power, that is, the power to increase price or reduce output").

97. 46 U.S.C. § 40102(7) (2018) (defining "common carrier" as those holding themselves out to the public as "provid[ing] transportation by water for passengers or cargo between the United States and a foreign country for compensation," with certain exclusions). The Act also applies to certain other marine operators, such as ports. *Id.* § 40301(b) (applying to agreements between marine terminal operators and carriers).

company shipping the cargo,[98] over non-ocean shipping (which is often domestic), or over agreements the Shipping Act does not require to be filed.[99] This other maritime commerce remains subject to general antitrust law.[100] Antitrust enforcers are free to pursue such conduct where it violates antitrust law, and have recently done so.[101]

2. No FMC Antitrust-Like Enforcement Has Occurred—Ever

The FMC has now held this modern power to challenge anticompetitive ocean-shipping agreements for forty years.[102] The FMC's ability to seek a judicial remedy against anticompetitive agreements was introduced into the Act in 1984.

Since that time, the FMC has never once brought a case against the powerful ocean-shipping carriers that dominate shipping markets. A Westlaw search of all decisions citing this provision produces just one complaint brought by the FMC in 2008—and it was against ports, not ocean carriers.[103] There are no reported FMC enforcement actions under § 41307 against any ocean carriers.

On its face, then, the Shipping Act tasks the FMC with a powerful and exclusive slice of the antitrust function: policing agreements among ocean carriers that go too far and create unreasonably anticompetitive effects. In practice, the Agency has never used this power.

3. The FMC's Inaction Is Best Explained as Underenforcement

The important next question is why the FMC has not used these antitrust-like powers. Are there reasonable explanations for the agency's lack

98. Bureau of Econ., *supra* note 86, at 3 n.2.

99. There is a complex set of rules that subject certain other agreements to antitrust law rather than granting immunity under the Shipping Act, several of which are based on past cases disputing the scope of such immunity. Such agreements include those that the Shipping Act does not require to be filed, 46 U.S.C. § 40307(a)(3)(B) (2018); domestic transport agreements among entities that the FMC does not regulate, *id*. § 40307(b)(1); agreements on inland "through" rates paid to domestic carriers in the United States, *id*. § 40307(b)(2); loyalty contracts that lower rates if all or a fixed portion of a shipper's cargo is committed to a carrier, *id*. § 40307(b)(4); and certain agreements among common carriers regarding marine terminal operations, *id.* § 40307(b)(3).

100. So too are shipping mergers and acquisitions, *id.* § 40301(c), though these are not the subject of the analysis here, and agreements involving foreign-to-foreign ocean transportation that meet a threshold for effects on U.S. commerce, *id.* § 40307(a)(4) (exempting foreign agreements without a "direct, substantial, and reasonably foreseeable effect on the commerce of the United States" from general antitrust law); Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950, 954 (9th Cir. 1991) (affirming FMC finding that it lacks jurisdiction over entirely foreign shipping).

101. *See infra* text accompanying notes 438-442 (discussing DOJ ocean-shipping and related enforcement).

102. *See supra* note 93.

103. FMC v. City of Los Angeles, 607 F. Supp. 2d 192 (D.D.C. 2009). The FMC brought an unsuccessful challenge under § 41307(b)(1) to enjoin agreements between trucking programs at ports in Southern California. *Id.* at 193-94.

of challenges against anticompetitive ocean-carrier agreements? This Section considers the potential explanations for the inaction: that agreements are not being filed with the FMC, that the FMC is addressing anticompetitive conduct by non-public means rather than via litigation, that there are no anticompetitive acts occurring among ocean carriers, or that there is misconduct but the FMC is underenforcing these provisions. This Section finds that the last—underenforcement—seems by far the most likely explanation for the lack of Shipping Act antitrust cases.

The simplest reason for a lack of challenges would be that carriers are not filing agreements with the FMC. This is certainly not the case. While the number of agreements has fluctuated significantly over time, in some years the FMC has received nearly 50,000 agreements.[104] More recently, the FMC has had fewer agreements filed, but the existing number on file still remains in the hundreds. As most recently reported in fiscal year 2022, the FMC received sixty-six new agreements, bringing the number of agreements on file to 353.[105] Most of these agreements are between common carriers, many of whom are competitors in ocean shipping.[106] While this is not to imply that every one of these agreements is anticompetitive, these numbers show that plenty of agreements could be subject to the FMC's antitrust attention.

104. *41st Annual Report for Fiscal Year 2002*, FED. MAR. COMM'N 132 (Mar. 31, 2003), https://www.fmc.gov/wp-content/uploads/2018/09/Annual_Report_FY_2002.pdf [https://perma.cc/2YT3-4Z5P] (reporting 48,154 new service contracts in fiscal year 2002).

105. *61st Annual Report for Fiscal Year 2022*, FED. MAR. COMM'N 18 (Mar. 31, 2023), https://www.fmc.gov/wp-content/uploads/2023/04/61stAnnualReport.pdf [https://perma.cc/2SAS-MCDW]. This dramatic variation in the number of agreements filed in various years relates to the deregulation of shipping competition from the late 1990s onward, which made more rate and service competition and agreements possible. In particular, amendments to the Shipping Act in 1998 allowed, for the first time, independent service contracts to be negotiated between ocean shippers and their customers. Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, § 104(a)(3), 112 Stat. 1902, 1904-05 (codified as amended at 46 U.S.C. § 40303(a)). Before the 1998 amendments, shipping conferences—groups of shipping carriers that formally agree to adhere to the same terms of service, including price, *see* 46 U.S.C. § 40102(8) (2018)—had long controlled rates and other forms of competition through collusive agreements, *see The Impact of the Ocean Shipping Reform Act of 1998*, FED. MAR. COMM'N 2, 16 (Sept. 2001), https://www.fmc.gov/wp-content/uploads/2019/04/OSRA_Study.pdf [https://perma.cc/EU6S-7LTR]. The 1998 amendments prohibited such conferences from forbidding their members to negotiate shipping contracts independently. § 104(a)(3), 112 Stat. at 1904-05 (codified as amended at 46 U.S.C. § 40303(a)). Individually negotiated contracts then quickly became popular; and because they, like conference tariffs, were required to be filed with the FMC, the number of filed agreements skyrocketed in the years after the 1998 amendments. *The Impact of the Ocean Shipping Reform Act of 1998*, *supra*, at 2, 17-18. But rather than entirely eliminating agreements among ocean carriers, the 1998 amendments simply changed those agreements' nature: Instead of fixing rates, ocean carriers began to reach agreements on capacity, information sharing, and operations. *Id.* at 3, 24-27. Ocean carriers also began to agree on "voluntary" guidelines for the terms of independent agreements as a way to manage price less directly. *Id.* at 27-29; *see also* § 104(a)(3), 112 Stat. at 1904-05 (codified as amended at 46 U.S.C. § 40303(a)(2)) ("An [ocean-carrier] agreement may provide authority to adopt voluntary guidelines relating to the terms and procedures of . . . agreement members' [independent] service contracts if the guidelines explicitly state the right of members of the agreement not to follow the guidelines.").

106. *See 61st Annual Report for Fiscal Year 2022*, *supra* note 105, at 18.

A second possible explanation for the lack of § 41307 challenges is that the FMC carries out its competition oversight internally, rather than in the courts. This explanation of internal supervision does not seem well supported, though a lack of transparency around the FMC's actions makes it difficult to assess. The FMC's annual reporting on the use of this authority emphasizes "monitoring" of filed agreements, and reports on the number of agreements, but offers little further detail.[107] The Agency's annual reports do not indicate the number of investigations, any agreement modifications, or other similar actions that have occurred.[108] The FMC briefly refers to its use of "traditional antitrust law principles and economic models to evaluate the potential competitive impacts" of these agreements, but it does not specify which principles or how they are applied.[109] There are no guidelines on how the Agency analyzes agreements, or the effects that FMC action may be having on anticompetitive terms in carrier agreements. This makes it difficult to determine whether the Agency is, in fact, engaging in accurate antitrust analysis—or any analysis at all.[110] Any such monitoring has never identified an agreement or conduct that merited a § 41307 challenge, which suggests that the monitoring may not be particularly effective. In short, if the FMC is working internally with common carriers to modify and resolve competition concerns in filed agreements to avoid judicial challenges, such activity is not apparent.

Prior to 1984, the FMC had the power to reject anticompetitive agreements without recourse to the courts,[111] so the explanation of internal action may have been more plausible then. This changed in 1984, when Congress, largely in response to the FMC's lengthy delays in approving agreements, eliminated the FMC's power to reject at filing, and instead implemented the current system under which antitrust immunity goes into effect automatically "on the 45th day after filing."[112] Since these changes, at filing, the FMC is empowered only to check for technical compliance

107. *See, e.g.*, *id.* at 17.

108. For example, the Shipping Act empowers the Agency to ask parties for more information in its review of agreements, but in recent reporting it is unclear whether or to what extent the FMC exercises this power. 46 U.S.C. § 40304(d) (2018).

109. *See 61st Annual Report for Fiscal Year 2022*, *supra* note 105, at 17.

110. Drawing on this concern, J. Wyatt Fore and Kathleen Bradish call for greater transparency in the antitrust analysis conducted by the FMC. *See* FORE & BRADISH, *supra* note 19, at 6, 15 ("There is almost no public information about the standards used by the FMC when evaluating the competitive effect of a filed agreement. Some [FMC] commentary has indirectly referenced the use of common economic tools like the Herfindahl-Hirschman Index (HHI). However, there appear to be no guidelines or other public comment on the subject.").

111. *See* Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728, 733-34 (amended 1984).

112. Shipping Act of 1984, Pub. L. No. 98-237, § 6(c), 98 Stat. 67, 72 (codified as amended at 46 U.S.C. § 40304(c)). This immunity applies unless the FMC seeks to prevent this or later challenges the agreement under 46 U.S.C. § 41307(b)(1) (2018). *See* § 6(b), (c), 98 Stat. at 72 (codified as amended at 46 U.S.C.§ 40304(b), (c)).

with the specific content requirements of the Act.[113] Then, if the Agency thinks the agreement is anticompetitive, it must file in federal court to challenge the agreement.[114] It has not done so. The internal policing story became much less plausible with this switch to a judicial-only route to challenging an agreement in 1984.

Finally, the FMC has neither carrot nor stick to press ocean carriers into modifying anticompetitive agreements. Agencies like the DOJ and the FTC have a track record of enforcement that makes their threats of litigation credible, and this history often prompts parties to modify or agree to conditions on their transactions or conduct to avoid enforcement action.[115] For the FMC, though, the complete lack of challenges to agreements suggests that there is no real threat of enforcement for carriers engaged in anticompetitive conduct. Nor can the FMC offer the carrot of a grant or withdrawal of antitrust immunity to create incentives for the carriers to change their agreements, because the Shipping Act grants antitrust immunity automatically after filing. While the internal Agency actions are opaque, all of this suggests that non-public FMC competition oversight of carrier agreements is likely minimal or ineffective.

A third potential explanation for the FMC's lack of cases is that the filed common carrier agreements are not, and never have been, anticompetitive. This has long been the FMC's primary explanation and defense for its scant record of enforcement, and it is perhaps born of the FMC's identity as an institution. The FMC's precursor agency was created in response to a 1914 House document[116]—commonly called the Alexander Report[117]—which found that free competition among ocean carriers would lead to ruinous overcapacity on ships and the eventual collapse of the industry.[118] The Alexander Report observed that the members of shipping conferences were engaged in flagrant violations of the Sherman Act, such

113. 46 U.S.C. § 40304(b) (2018) (allowing the FMC to reject agreements that do not meet the requirements of the Act as set out in its regulations pursuant to § 40302—none of which have been issued—and § 40303, which requires certain content in agreements, such as a purpose statement and a withdrawal mechanism for carriers, and prohibits certain other content such as terms that disallow independent service agreements); *see id.* §§ 40302-40303.

114. *See id.* § 41307(b)(1) (providing for civil action). In conjunction with this change to automatic immunity, the 1984 amendments also introduced this FMC power to challenge an approved agreement in court if it later proved anticompetitive. *See* §§ 6(g), (h), 11(c), 98 Stat. at 72-73, 80 (codified as amended at 46 U.S.C. § 41307(b)); *see also* Bureau of Econ., *supra* note 86, at 10 (describing the changes introduced by the 1984 statutory amendments to the process for challenging agreements).

115. *See* Douglas H. Ginsburg & Joshua D. Wright, Antitrust Settlements: The Culture of Consent, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE LIBER AMICORUM 177-190 (Nicolas Charbit, Elisa Ramundo, Anna Chehtova & Abigail Slater eds., 2012) (observing the high rates of settlements in government enforcement actions over time).

116. H.R. DOC. NO. 63-805 (1914).

117. *See supra* note 34.

118. *See* H.R. DOC. NO. 63-805, at 416. Interestingly for the discussion here, Congress commissioned the Alexander Report because, from the late 1890s onward, steamship carriers had been operating price-fixing cartels in open violation of (what was then) new legislation, the Sherman Act. *See* Mansfield, *supra* note 31, at 43.

as predatory practices, tying, and exclusive dealing.[119] Yet it recommended against restoring open competition among shipping carriers.[120] The Report found that the special economics of ocean shipping made horizontal collusion necessary to avoid ruinous rate wars and chronic overcapacity, which would otherwise lead to unprofitable operations and industry collapse.[121]

This founding identity of the FMC is at odds with competition and seems not to have changed much over time. From the Alexander Report onward, the historical record suggests that the FMC has been unconcerned with competition and has at times even used its powers to prevent it. From the early 1960s until 1984, the FMC had the power to reject common carrier agreements outright.[122] Yet one FMC analyst gave this alarming description of the Agency's reviews of filed agreements:

> I joined in '61. At the time all we looked for was grammar and punctuation. Those of us conversant with the problem thought there ought to be some justification [for anticompetitive agreements]. Something sophisticated like a pooling agreement would come in and we'd say, "What do you want it for?" The carriers would say, "None of your f——ing business."[123]

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119. *See* Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 488 (1958) (summarizing the anticompetitive conduct uncovered by the Alexander Report, which was "designed to give the conferences monopolies upon particular trades by forestalling outside competition and driving out all outsiders attempting to compete").

120. *See* H.R. DOC. NO. 63-805, at 416 ("These advantages . . . can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control."). While this rationale was emphasized, a secondary rationale for the antitrust exemptions was identified as international competitiveness. At the time the Shipping Act was passed, several other countries afforded antitrust exemptions to their ocean carriers. Congress thought that, without an equivalent antitrust exemption, U.S. carriers would be unfairly disadvantaged in efforts to compete with these international carriers. *See Free Market Antitrust Immunity Reform (FAIR) Act of 1999: Hearing on H.R. 3138 Before the H. Comm. on the Judiciary*, 106th Cong. 22 (2000) [hereinafter *Hearing on Shipping Act Reforms (2000)*] (statement of John Nannes, Deputy Assistant Att'y Gen., Department of Justice).

121. *See* H.R. DOC. NO. 63-805, at 416-418 (finding that the restoration of unrestricted competition among ocean carriers would be contrary to the public interest because restraints on competition are necessary for a functional industry); *see also* ADVISORY COMM'N ON CONFS. IN OCEAN SHIPPING, REPORT TO THE PRESIDENT AND THE CONGRESS 67 (1992), https://babel.hathitrust.org/cgi/pt?id=uc1.31210024859256&seq=1 [https://perma.cc/BFB8-2ZFX] ("Congress believed that the distinctive features of the international ocean liner industry made it unsuited to the unregulated, free-market competition that governs most other parts of the American economy."). Though not an economic theory recognized at the time of the 1916 Shipping Act, the logic related to what would later be called the "empty core" theory. This theory posits that some industries have certain special cost or technology problems that make it impossible for competition to produce a stable price equilibrium over time: instead, there is inevitably too much capacity or not enough. *See* SECTION OF ANTITRUST L., AM. BAR ASS'N, *supra* note 33, at 178-81 (discussing theory of empty core in shipping and its challenges); John S. Wiley, *Antitrust and Core Theory*, 54 U. CHI. L. REV 556, 585 n.100 (1987) (describing empty-core theory and opining that ocean shipping "seems to fit" the theory "neatly"); *see also* LESTER TELSER, ECONOMIC THEORY AND THE CORE (1978) (originating the theory of the empty core). More recent scholarship is skeptical that shipping constitutes such an empty-core industry, and even that such industries exist at all. *See, e.g.*, Sagers, *supra* note 31, at 807-08.

122. *See supra* text accompanying notes 111-112.

123. Mansfield, *supra* note 31, at 56.

When the FMC did use its powers, at times it actively *blocked* competition. In *Federal Maritime Board v. Isbrandtsen Co.*, the FMC's precursor agency endorsed an agreement that enabled seventeen ocean-carrier conference members to act collectively to exclude the sole remaining independent competitor on certain shipping routes.[124] The rate system approved by the Agency permitted discriminatory conference pricing for customers that agreed to exclusivity with the conference, in a scheme that specifically sought to drive out the last maverick, independent carrier.[125] *Isbrandtsen* reveals an FMC that was not just passively permissive of anticompetitive conduct but that actively endorsed anticompetitive acts using its rate-approval powers.

Years later, in 1980, little seemed to have changed in the FMC's reviews of agreements—except perhaps the severity of the language used to describe this perfunctory check. At the time, Edward Mansfield interviewed FMC reviewers who characterized the agreement-review process as "more show than substance."[126] One attorney referred to it as "a pure paper-shuffling operation."[127] During congressional scrutiny in the late 1990s, the FMC maintained the position that there could be no competition issues in ocean shipping because of widespread overcapacity, which made it almost impossible to charge supracompetitive prices for shipping services.[128]

Today, while no longer emphasizing the overcapacity explanation, the FMC still reaches similar conclusions on competition. In a 2022 special report ordered by Congress,[129] the FMC found that competition was vigorous among ocean carriers and their three major shipping alliances.[130]

124. *Isbrandtsen*, 356 U.S. at 484, 486.

125. *See id*. at 483 (explaining that the scheme allowed any party agreeing to use conference carriers only to receive a significant discount, below the otherwise applicable rates charged by conference carriers).

126. *See* Mansfield, *supra* note 31, at 58.

127. *Id*. (noting further that in inquiring about the impact on competition, "the only justification [needed] is that the parties want the agreement").

128. *See* ADVISORY COMM'N ON CONFS. IN OCEAN SHIPPING, *supra* note 121, at 25 (noting that the FMC "believes" it has not "had to bring" any such cases because "the overcapacity which plagues the market has made it unlikely that any agreement could cause the unreasonable rise of rates").

129. *See* Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, § 18(b)(1)(A), 136 Stat. 1272, 1281-82 (requiring the FMC to seek public comment on "whether congestion of the carriage of goods has created . . . a substantial, adverse effect on the competitiveness and reliability of the international ocean transportation supply system").

130. *See Fact Finding Investigation 29, Final Report, Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. § 41102(c)*, FED. MAR. COMM'N 6 (May 31, 2022) [hereinafter *Fact Finding Investigation 29*], https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf [https://perma.cc/XDE7-QEH6] (describing an analysis using "established antitrust analytical tools" that found that "the current market for ocean liner services in the Trans-Pacific trade is *not* concentrated and [that] the Trans-Atlantic trade is only *minimally* concentrated").

This longstanding FMC narrative is difficult to square with the perspectives of Congress, scholars, and the DOJ on competition in ocean shipping. The DOJ has long pushed the FMC to investigate anticompetitive agreements among carriers, including during the eras above. In fact, by the late 1970s, the DOJ was the primary author of "protest" filings, through which third parties could force the FMC to hold hearings on potentially anticompetitive agreements.[131] An administrative law judge at the FMC lamented this intervention, complaining that "the Justice Department has taken it upon itself to protest every agreement that's filed. [They] would like to see us abolished."[132]

The DOJ and scholars argue that the original excess-capacity rationale for the antitrust exemption in shipping is proved unsound by modern economic theory, and by the experience of the industry itself as it became increasingly deregulated.[133] As DOJ leadership testified before the House Judiciary Committee, the overcapacity defense for ocean-shipping agreements amounts to an argument that inefficient carriers need collusive agreements to protect themselves from competition—to impose higher prices on buyers so they can cover the capital costs that the carriers are too poorly operated to recover.[134] Such protection of inefficient actors is at odds with modern antitrust law, which promotes economic efficiency, and encourages the protection of overall competitive processes rather than individual actors. The Alexander Report feared that open competition would see "the elimination of the weak and the survival of the strong,"[135] but modern economics and antitrust view precisely such weeding out of inefficient competitors as a benefit of fair competition.[136]

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131. *See* Mansfield, *supra* note 31, at 60 (observing a 1977 DOJ estimate of "fourteen or fifteen" protests and a total of twenty-eight docketed agreements for the year). The FMC is required to hold a hearing on "any formally protested agreement that is a per se violation of the antitrust laws." *Id.* at 61; *see* Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 583 (D.C. Cir. 1969).

132. *See* Mansfield, *supra* note 31, at 61.

133. *See Hearings on Shipping Act Reforms (2000)*, *supra* note 120, at 22 (statement of Nannes) ("Supporters of the antitrust exemption for ocean carriers have been reciting essentially the same rationales from the beginning. Whatever may have been the force of those rationales at the time the exemption was first enacted in 1916, they have become increasingly dubious in the years since, and, when they are floated in the current economic and legal environment, they quickly take on water and begin to list.").

134. *Id*. at 19 (refuting the economic justifications for the Shipping Act antitrust exemption and arguing that "simply because competitors desire to collude in order to maximize their joint profits does not mean that it is good public policy to allow them to do so"); *see also* ADVISORY COMM'N ON CONFS. IN OCEAN SHIPPING, *supra* note 121, at 68 (describing the economic theory behind the Shipping Act, but finding that "rather than being a problem to be avoided, rate wars may be an essential part of a free market mechanism that ultimately solves the problems of surplus capacity and ensures the long-term health of the industry" as market forces eventually eliminate overcapacity through the exit of inefficient operators, and rates stabilize); Letter from Renata B. Hesse to Sec'y, *supra* note 96, at 296 ("The ocean shipping industry exhibits no extraordinary characteristics that warrant departure from competition policy.").

135. H.R. Doc. No. 63-805, at 416 (1914).

136. *See, e.g.*, Sagers, *supra* note 31, at 808-09.

Scholars and practitioners also criticize this overcapacity justification as circular.[137] Ocean-shipping overcapacity may well be caused by the same Shipping Act carrier agreements that this rationale is invoked to defend: Once price competition was removed from the industry by lawful, collusive agreements, ocean carriers were left to compete solely on the basis of other, non-price factors—primarily, increased shipping frequency and quality.[138] This meant running more ships, which led to the very excess capacity invoked by the industry and the FMC to justify the need for those price-fixing agreements.[139]

In a reflection of this modern economic understanding, there have been numerous efforts to repeal the antitrust exception in the Shipping Act.[140] This includes a bill pending as of this writing that would repeal the antitrust exception in part.[141] So far none have succeeded, making this ocean-shipping exemption the oldest surviving statutory exemption from antitrust law.[142]

During its lengthy history, there have been at least four major amendments to the Shipping Act—in 1984, 1998, 2018, and 2022.[143] Each has moved the ocean-shipping industry closer to open competition in certain ways. For example, the 1998 amendments introduced greater price competition by making it much easier for shippers to reach independent service

137. *See id.* at 804-05 ("While the [shipping] industry surely has suffered overcapacity, there are competing explanations for this phenomenon. . . . [T]here is reason to believe that the carriers themselves have deliberately contributed to capacity problems through the inefficient service competition typical of regulated or price-stabilized industries."); *Hearing on Shipping Act Reforms (2000)*, *supra* note 120, at 19 (statement of Nannes) ("[E]conomists have often found that a regulated cartel yields the worst of both worlds—high prices and low profitability, as companies over-invest in capacity, and lose the incentive to innovate and operate efficiently.").

138. *See* Sagers, *supra* note 31, at 804-05; *Hearing on Shipping Act Reforms (2000)*, *supra* note 120, at 19 (statement of Nannes).

139. *See* Sagers, *supra* note 31, at 804-05; *Hearing on Shipping Act Reforms (2000)*, *supra* note 120, at 19 (statement of Nannes).

140. *See, e.g.*, Ocean Shipping Antitrust Enforcement Act of 2023, H.R. 1696, 118th Cong. § 3 (2023) (repealing 46 U.S.C. § 40307 (2018), which grants the antitrust exception, but preserving the exception for certain other agreements); Press Release, White House, Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping (Feb. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping [https://perma.cc/36LV-8QD5] ("[The President] is calling on Congress to address the immunity of alliance agreements from antitrust scrutiny under current law."); Free Market Antitrust Immunity Reform (FAIR) Act of 2001, H.R. 1253, 107th Cong. (2001) (proposing the elimination of the antitrust exemption for ocean-shipping agreements, except those among marine terminal operators); Free Market Antitrust Immunity Reform Act of 1999, H.R. 3138, 106th Cong. (1999) (same).

141. H.R. 1696.

142. Organisation for Econ. Co-operation & Dev. [OECD], *Contribution from the United States on Competition Issues in Liner Shipping*, at 2, DAF/COMP/WP2/WD(2015)13 (May 26, 2015), https://one.oecd.org/document/DAF/COMP/WP2/WD(2015)13/en/pdf [https://perma.cc/JQW5-FQRT].

143. Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67; Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, §§ 101-118, 112 Stat. 1902, 1902-14; Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-282, §§ 701-714, 132 Stat. 4192, 4293-99; Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272.

agreements with carriers and to keep the terms of those agreements confidential.[144] Despite this movement toward competition, the FMC does not seem to place much more emphasis on competition than it did when ocean shipping was firmly and fully regulated and within the iron grip of large conferences of ocean carriers.[145]

In sum, the lack of Shipping Act challenges to anticompetitive carrier agreements seems best explained by underenforcement. Over forty years and thousands of agreements, in the face of expert criticism and changing economics, law, and industry conditions, the FMC has never challenged an ocean-carrier agreement as anticompetitive. In the face of this history, it is hard to find the FMC's antitrust inaction justified.

B. Antitrust Abandonment in Rail

While it provides a vivid example, ocean shipping is far from the only industry to suffer from antitrust abandonment. The railway industry provides another problematic case study of a regulator making little use of its antitrust-like powers.

The Surface Transportation Board is an independent federal agency that holds a wide array of powers over regulated rail carriers,[146] including several powers to affect competition in regulated rail.[147] This Section examines two of the STB's greatest powers to prevent anticompetitive conduct: its power to grant rail-line access to competitors, and its power to

144. *See supra* note 105.

145. *See id.* on shipping conferences.

146. *See* 49 U.S.C. § 10501(b) (2018) (granting the STB "exclusive" jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of" rail tracks or facilities); *id.* § 10102(5) (defining a rail carrier as "a person providing common carrier railroad transportation for compensation"). The STB became an independent agency with the passage of the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, §§ 3(b), 4, 129 Stat. 2228, 2229-30 (codified as amended at 49 U.S.C. § 1301(a), (b)).

147. In addition to the powers discussed in the following Section, the STB has the power to affect competition in several other ways. It can impose common carriage obligations that, in essence, require regulated railroads to supply service to all shippers on nondiscriminatory terms. *See* 49 U.S.C § 11101 (2018) (requiring a rail carrier to provide service in accordance with common carrier terms of service and empowering the Agency to create such rules). It can also approve agreements among railroads to split earnings or traffic. *See id.* § 11322(a) (forbidding a rail carrier providing transportation subject to the STB's jurisdiction to "agree or combine" with another rail carrier "to pool or divide traffic or services or any part of their earnings" without the STB's approval, and providing that the STB may approve the agreement or combination if it "will be in the interest of better service to the public or of economy of operation[] and will not unreasonably restrain competition"); *id.* § 10706 (permitting certain rate agreements among rail carriers subject to the STB's approval). While such agreements among competitors may seem relevant to the discussion here, the Staggers Act vastly narrowed the types of such agreements that are permitted, and there are "very few" such agreements now in place. *See An Examination of S. 772, the Railroad Antitrust Enforcement Act: Hearing on S. 772 Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rts. of the S. Comm. on the Judiciary*, 110th Cong. 133-34 (2007) [hereinafter *Railroad Antitrust Enforcement Senate Subcommittee Hearing*] (prepared statement of Charles D. Nottingham, Chairman, Surface Transportation Board) (observing that "[i]n practice, there are very few section 10706 agreements in place today," and describing just three such agreements).

determine when dominant firms are charging unreasonable rates.[148] This Section finds that in the nearly thirty-year history of the STB as an agency,[149] these powers have rarely or, in some cases, never been exercised.

1. A Short History of U.S. Rail Regulation, Competition, and Antitrust Exemptions

The U.S. rail industry has been highly regulated for much of its long history, from the passage of the Interstate Commerce Act in 1887 onward.[150] This regulatory past is rich and meandering and has been detailed in great depth elsewhere.[151] For the discussion here, the relevant history is that antitrust law continued to apply alongside rail regulation until the 1940s. The DOJ actively enforced antitrust law in rail while it had the power to do so,[152] indicating some history of anticompetitive conduct in the industry.

This changed in 1948 with the passage of the Reed-Bulwinkle Act, which created a new exemption that removed certain regulated rail conduct from antitrust scrutiny.[153] Rail carriers had long set collective rates through "rate bureaus" under the auspices of the Interstate Commerce Commission (ICC)—in effect, engaging in lawful price-fixing not unlike that seen in shipping.[154] The DOJ upset this applecart in the 1940s when it supported challenges to these rate bureaus as antitrust law violations.[155]

148. 49 U.S.C. §§ 10701, 10704, 10707 (2018).

149. The STB was established in 1995, replacing the ICC in the process. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended at scattered sections of 49 U.S.C.). Prior to the STB's creation, the ICC held many similar powers over rail regulation, and this history is drawn on here at times. *See id.*; *see also* SECTION OF ANTITRUST L., AM. BAR ASS'N, *supra* note 33, at 193 (noting federal oversight of rail by the ICC since it was established in 1887). The ICC was established in part in response to complaints by shippers that railroads were setting their rates in an anticompetitive manner, and it was given the power to oversee those rates and ensure that they were not discriminatory. *Id.*

150. R.J. Corman R.R. Co. v. Palmore, 999 F.2d 149, 151 (6th Cir. 1993) (noting that the railroad industry has been "subject to comprehensive federal regulation for nearly a century" (quoting United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 687 (1982))).

151. *See generally* 3 LAURITS R. CHRISTENSEN ASSOCS., INC., A STUDY OF COMPETITION IN THE U.S. FREIGHT RAILROAD INDUSTRY AND ANALYSIS OF PROPOSALS THAT MIGHT ENHANCE COMPETITION: POLICY ANALYSIS AND FUTURE DIRECTIONS FOR RESEARCH app. 20A (rev. 2009), https://www.stb.gov/wp-content/uploads/files/docs/competitionStudy/Volume%203.pdf [https://perma.cc/8MTJ-VRHW] (overviewing the history of railroad legislation and regulation); KEELER, *supra* note 31 (giving a broad overview of railroad regulation); SECTION OF ANTITRUST L., AM. BAR ASS'N, *supra* note 33 (examining antitrust exemptions in rail); Kwoka & White, *supra* note 31 (offering a detailed account of the STB's role in a high-controversy rail merger).

152. *See infra* notes 155-156 and accompanying text.

153. Reed-Bulwinkle Act, ch 491, 62 Stat. 472 (1948) (repealed 1980). Instead of directly regulating rates, the new scheme enabled the ICC to approve the creation of "rate bureaus," composed of railroad companies that were, in turn, free to set their own rates and immunized from antitrust law when they did so. *Id.*

154. *See* KEELER, *supra* note 31, at 101; *supra* Section II.A.1.

155. *See* Georgia v. Pa. R.R. Co., 324 U.S. 439, 489 (1945) (Stone, C.J., dissenting) (noting the DOJ's amicus support for Georgia in the litigation).

Congress responded with the Reed-Bulwinkle Act, which sought to resolve the tension this antitrust challenge created with the regulation of railroads. A Senate report explained this moment, and views on rail competition at the time:

> The confusion, uncertainties and inconsistencies became matters of national concern as a result of a series of actions commenced by the Department of Justice beginning in 1941 which questioned the cooperative activities of the railroads carried on through rate bureaus. Congress was faced with the duty of harmonizing and reconciling the policy of the antitrust laws as applicable to common carriers with the national transportation policy . . . . A large measure of cooperation and collective action by and among common carriers is necessary if the national transportation [policy] is to be effectuated and the public is to receive the kind of transportation service to which it is entitled and if the rates are to be reasonable and nondiscriminatory.[156]

After the Act was passed, the DOJ continued to press some antitrust enforcement around the edges of this exception,[157] but as the passage above reflects, the dominant policy in rail was not one of competition.

The modern era of rail (de)regulation, which is the focus of this Section, was ushered in during the late 1970s when a flurry of legislation first introduced competition in rail services.[158] At the time, the rail industry was in dire straits, with numerous bankruptcies, widespread financial distress, and deterioration of facilities.[159] This decline was attributed to over-regulation that allowed inefficient railways to remain in operation,[160] and Congress cast the solution as the introduction of competition in rail for the first time.[161] This legislative reform reflected a duality of goals that persist in rail policy today, and which can create tension. On one hand the legislation had protectionist aims—it sought to restore financial stability and viability

156. S. REP. NO. 94-499, at 14-15 (1975).

157. *See* Wilson, *supra* note 33, at 71-12 (describing the continued application of antitrust law to rail in certain cases brought by the DOJ).

158. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 11, 45, and 49 U.S.C.).

159. *See, e.g.*, 3 LAURITS R. CHRISTENSEN ASSOCS., INC., *supra* note 151, app. 20A, at 20A-12 (describing the financial instability and bankruptcies plaguing the rail industry at the time of the 1970s legislative changes).

160. Statement on Signing S. 1946 Into Law, 3 PUB. PAPERS 2229, 2230-31 (Oct. 14, 1980) ("We have seen a number of major railroad bankruptcies and the continuing expenditure of billions of Federal dollars to keep railroads running. Service and equipment have deteriorated. A key reason for this state of affairs has been overregulation by the Federal Government.").

161. *Id.* at 2229 ("By stripping away needless and costly regulation in favor of marketplace forces wherever possible, this act will help assure a strong and healthy future for our Nation's railroads and the men and women who work for them.").

to the industry[162]—but at the same time, these laws articulated clearly the need for increased competition in rail as a way to achieve this stability.[163]

These reforms, most notably the Staggers Rail Act of 1980,[164] introduced three major changes that enabled competition for the first time in rail. As mentioned above, rate bureaus had long engaged in lawful price-fixing in rail.[165] The Staggers Act greatly limited their ability to engage in such collusion.[166] The Act also gave the regulator, then the ICC, the power to exempt from regulation *altogether* the rail transport of certain types of goods, on the condition that regulation was not necessary to prevent the abuse of market power.[167] The regulator soon granted such exemptions for several classes of traffic.[168] Finally, the Act allowed railroad companies to set their own rates via private contracts with shippers, provided that the rates charged by railways with market dominance were not "unreasonable."[169]

These changes in effect split rail traffic into two categories: (1) traffic for which rates were set by the market, either because it was carried under private contracts or exempted from regulation (but still subject to the regulator's power to re-regulate and limit unreasonable rates), and (2) the traffic that remained subject to regulated ("tariff") rates. The former is referred to here as "unregulated" rail traffic, and the latter "regulated" rail traffic, though this oversimplifies the dichotomy somewhat because the

162. *See, e.g.*, Railway Revitalization and Regulatory Reform Act of 1976 § 101 (codified as amended at 45 U.S.C. § 801) (expressing both the policy goals of restoring financial stability to the rail industry and fostering competition among rail carriers and other modes of transportation to promote more adequate and efficient transportation services).

163. Staggers Rail Act of 1980 § 101(a) (codified as amended at 49 U.S.C. § 10101) (describing federal rail transportation policy as including several competition-oriented goals, including "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," but also other more stability-oriented goals such as "to foster sound economic conditions in transportation" and "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital").

164. 94 Stat. 1895.

165. KEELER, *supra* note 31, at 101 ("[The Act] phases out the right, contained in the Reed-Bulwinkle Act of 1948, of railroads to collude through rate bureaus and it allows collective rate making only for carriers setting joint interline rates." (citation omitted)).

166. *See* Staggers Rail Act of 1980 § 219(a) (codified as amended at 49 U.S.C. § 10706). Only carriers that were providing joint services in conjunction with each other were still permitted to set a single rate for shippers. *Id.* § 217 (codified as amended at 49 U.S.C. § 10705).

167. *Id.* § 213 (codified as amended at 49 U.S.C. § 10502).

168. *See* 3 LAURITS R. CHRISTENSEN ASSOCS., INC., *supra* note 151, app. 20A, at 20A-20 to -22 (describing exemptions). To complicate things further, some classes of agricultural traffic and intermodal traffic were exempted by the STB entirely through its regulations. *Id.* at 20A-22.

169. Staggers Rail Act of 1980 § 208(a) (codified as amended at 49 U.S.C. § 10709) (allowing private contracts); *id.* § 201(a) (codified as amended at 49 U.S.C. § 10701(d)(1)) (setting conditions for reasonableness if a rail carrier has market dominance). The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, enabled railroads for the first time to enter into private contracts with shippers at negotiated rates, rather than being bound by regulator-set common carriage or rate-bureau rates. *Id.* § 202 (codified as amended at 49 U.S.C. § 10709(c)). These contracts were exempt from most rail regulation. *Id.*

Agency could decide to re-regulate traffic that it previously exempted if necessary to prevent abuses of market power.

These categories remain important to understanding the STB's powers today. The antitrust exemption introduced in 1948 persists, but it applies only to regulated rail traffic. For that traffic only, the STB is the surrogate antitrust enforcer and the only agency with the power to prevent anticompetitive conduct. Since the deregulatory changes of the late 1970s, the proportion of rail traffic that is regulated has declined dramatically, as more and more is carried under private contracts.[170] For this deregulated rail traffic, antitrust law applies. This makes the antitrust abandonment story here a less egregious one than for the other case studies, because as more traffic moves under private contracts, it becomes subject to antitrust law scrutiny.

2. The STB Has the Sole Power to Order Competitor Access to Regulated Rail

The STB has multiple different powers to create competition by ordering a railway to grant a competitor access to its rail lines.[171] One such power is to order "reciprocal switching," in which the host railway must transport the competitor's cars over its tracks up to an interchange point with that competitor's railway[172]—in simpler terms, an order for mandatory carriage. Such orders can be used to create rivalry on routes where before there was none. For example, the STB could use such an order to end the anticompetitive abuse of a monopoly over a section of rail by granting a competitor access, and thus the new ability to offer services.[173] This

170. Schmalensee & Wilson, *supra* note 31, at 136 & tbl.1 (estimating the regulated ("tariff") traffic as composing just over six percent of rail shipments as of 2013).

171. While reciprocal switching has received the most attention, and is analyzed here, the STB can also require that the host railroad allow another rail company to carry its own cars on the host's tracks, achieving a similar result of moving goods from point A to point B through mandatory access. *See* 49 U.S.C. § 11102(a) (2018) (granting the STB power to order access to rail terminals and nearby rails); *id.* § 10705(a) (empowering the STB to order "through routes," where multiple carriers quote one rate to a shipper and each carries the traffic in part, and establishing the criteria for issuing through-route orders, including greater efficiency). Each of these sections also empowers the STB to set rates to compensate for this mandated access or carriage. The STB also has distinct powers to impose common carriage obligations on regulated railroads, which could similarly be used to require carriage of a rival's freight. *See id.* § 11101.

172. *Id.* § 11102(c) ("The [STB] may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."). The term "host railway" is adopted here for convenience in referring to the owner of the railroad track and related facilities.

173. *See* BEN GOLDMAN, CONG. RSCH. SERV., R47013, THE SURFACE TRANSPORTATION BOARD (STB): BACKGROUND AND CURRENT ISSUES 6 (2022) [hereinafter STB: BACKGROUND AND CURRENT ISSUES], https://crsreports.congress.gov/product/pdf/R/R47013 [https://perma.cc/43V5-CXRV]. The term "bottleneck" is also used to describe scenarios in which such orders could enable competition; in particular, it refers to situations where a shipper seeks to transport goods but has only one realistic alternative for such transportation for

could be particularly valuable to "captive" shippers, which have access only to a single railroad and no economically viable alternative to transport goods.

The legislation permits the STB to order such reciprocal switching in two situations: where it would be "practicable and in the public interest," or where it is "necessary to provide competitive rail service."[174] The first part of this disjunctive test gives the STB the power to account for interests other than competition in choosing to grant orders for carriage or access on a route.

However, the STB's precursor agency, the Interstate Commerce Commission, chose to make these powers even more antitrust-like in nature.[175] It passed regulations that, in effect, eliminated the public-interest branch by declaring that the Agency would only grant such an order if it determined that it would remedy anticompetitive conduct. The regulations provide for the possibility of a reciprocal switching order only when "necessary to remedy or prevent an act that is contrary to the competition policies [of the Staggers Act]"[176] or "otherwise anticompetitive."[177] The regulation self-narrows the Agency's discretion from the broader public-interest standard provided in the statute to only situations with anticompetitive effects. The D.C. Circuit confirmed that this self-narrowing was not unreasonable and thus was within the Agency's statutory powers to impose.[178] The regulations have continued in effect under the STB.

This STB power over reciprocal switching most stretches the definition of "antitrust-like" in this Article. Mandated access is typically more the domain of regulation.[179] Antitrust courts are often hesitant to order access to essential facilities,[180] though they have done so from time to time—

some portion of the route. For example, there might be access to only one railroad at the origin or destination. *See* Schmalensee & Wilson, *supra* note 31, at 153 (describing a bottleneck scenario and the STB's powers to order reciprocal switching).

174. 49 U.S.C § 11102(c) (2018).

175. The ICC held enforcement and regulatory power under the Staggers Act from its passage in 1980 until the mid-1990s when the STB was established as its successor agency. *See supra* note 149.

176. *See* 49 C.F.R. § 1144.2(a)(1) (2023) (specifying the STB's rules for prescription of competitive access remedies that involve through routes or reciprocal switching, in reference to the Staggers Act's "competition" policies, which are set out at 49 U.S.C. § 10101 (2018)). These regulations were issued when the ICC had authority but continued in relevant effect after the STB became the relevant agency in 1995.

177. *See id.*

178. *See* Midtec Paper Corp. v. United States, 857 F.2d 1487, 1500 (D.C. Cir. 1998) (confirming that the ICC was within its statutory authority in adopting its competitive access regulation, which narrowed its own discretion to issue orders for such access by requiring anticompetitive effects); Balt. Gas & Elec. Co. v. United States, 817 F.2d 108, 115 (D.C. Cir. 1987) (similarly upholding the ICC's decision to prescribe competitive access only to remedy or prevent acts with anticompetitive effects).

179. Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1195 (1999) (finding that antitrust law has a long history of mandatory-access orders but arguing that such remedies "fit" more "comfortably" within regulation than within antitrust law).

180. *Id.* at 1248.

including in notable, historic cases in rail.[181] However, the STB's competitive access provisions are included here because of the intense emphasis of the Agency itself on competition, as adopted in its regulations. These self-imposed limits suggest that the STB's analysis on the need for such orders would be antitrust-like, focused on competitive effects in determining whether to order access. Further, the Agency's reading of its own powers could be even stronger than antitrust law itself when it comes to combatting anticompetitive acts. As framed by the regulations, the prohibited acts need only violate the "competition *policies*" of the Staggers Act or be "otherwise anticompetitive."[182] This reference to policy could reach a broader array of conduct than that required to demonstrate a violation of antitrust law. The STB can order such a remedy whenever it concludes that there are anticompetitive acts occurring,[183] giving it more power than antitrust agencies, which often have to litigate to seek such a remedy.

a. The STB Has Never Used Its Power to Order Competitor Access to Railways

Unfortunately, the STB has not used its powers to grant competitive access. In 2023, the STB Chair candidly described this disuse: "[N]o reciprocal switching orders have been issued since before 1985, and none have even been sought since 1989."[184] A 2022 report by the Congressional Research Service considered reciprocal switching orders and found that "few . . . have been filed since 1985 and none have ever been granted."[185] The difference in these two tallies may depend on whether the precursor agency, the ICC, is also considered, or only the STB. In the STB's lifetime as an agency, no complainant has ever successfully convinced it to issue

181. *See* United States v. Terminal R.R. Ass'n, 224 U.S. 383, 410-13 (1912) (granting a mandatory-access remedy for antitrust claims in the rail industry). For cases involving mandatory competitor access to physical infrastructure other than rail, see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973), which required an electric utility company to allow municipal systems to access its transmission services; and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 587 (1985), which held unlawful a skiing facility's refusal to deal with another nearby skiing facility to offer a package skiing pass.

182. 49 C.F.R. § 1144.2(a)(1) (2023) (emphasis added).

183. *See, e.g.*, 49 U.S.C. § 11102(c)(1) (2018) ("The [STB] may require rail carriers to enter into reciprocal switching agreements . . . .").

184. Press Release, Surface Transp. Bd., Statement from STB Chairman Martin J. Oberman Regarding Final Rule for Reciprocal Switching 1 (Apr. 30, 2024) [hereinafter STB Press Release on Final Rule for Reciprocal Switching], https://www.stb.gov/wp-content/uploads/Chairmans-Statement-re-EP-711-Final-Rule_117b40.pdf [https://perma.cc/K8BT-AWCU].

185. CONG. RSCH. SERV., THE SURFACE TRANSPORTATION BOARD (STB): BACKGROUND AND CURRENT ISSUES *supra* note 173, at 7. The difference between these accounts may be attributable to whether the record of STB's precursor agency, ICC, are included or not. An earlier report is gentler in its description of these powers as "seldom-exercised." Comm. for a Study of Freight Rail Transp. & Reg. & Transp. Rsch. Bd., *Modernizing Freight Rail Regulation*, NAT'L ACADS. SCIS., ENG'G & MED. 3 (2015), https://nap.nationalacademies.org/download/21759 [https://perma.cc/8WHP-DK4Q].

such an order against anticompetitive conduct.[186] The STB's antitrust-like powers have existed only on paper.[187]

b. The STB Has Long Frustrated Competitive Access Orders

No rail customer has ever filed a request for a reciprocal access order with the STB. Such a filing is required for the STB to issue an order. So, is the Agency blameless for this disuse?

One factor that may explain the absence of filings is the decline over time in regulated rail traffic for which the STB can issue such orders, leaving fewer customers to seek them. But this is far from a full explanation.

The reason for the lack of orders comes from the Agency itself in an important sense. As the STB itself has recently recognized,[188] for decades the Agency's rules and decisions have created such a high bar to obtain a reciprocal switching order that shippers find it futile to seek one. The ICC began this tradition, but the STB allowed this legacy of frustration to continue. As explained above, the Agency self-narrowed its discretion to issue access orders with a regulation requiring negative effects on competition. In the leading case, the ICC made clear that this requirement for competitive effects would be applied in a manner that set a high bar, and the D.C. Circuit confirmed the agency's power to do this.[189] Shippers have long known that this makes it pointless to seek such an order, and in a nonvirtuous cycle, do not apply for them. This leaves the STB with no occasion to issue orders. The Agency's self-limiting conduct has, in short, led to its antitrust abandonment.

For at least a decade or more, this lack of applications and orders has not been well explained by a lack of need. Since 2010, the STB itself has implicitly recognized that its own administrative burdens and barriers block demand for reciprocal switching orders.[190] The Agency made efforts to change its process to make switching orders more available, but these moved at a slow pace.[191] By 2015, a report from the National Academy of

186. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-94, FREIGHT RAILROADS: INDUSTRY HEALTH HAS IMPROVED, BUT CONCERNS ABOUT COMPETITION AND CAPACITY SHOULD BE ADDRESSED 42 (2006), https://www.gao.gov/assets/gao-07-94.pdf [https://perma.cc/V5UL-X93A] ("To date, STB has found that all complaints have failed to prove that the owning railroad has engaged in anticompetitive behavior.").

187. From the STB's establishment in 1995 to the time of writing in 2024.

188. *See* STB Press Release on Final Rule for Reciprocal Switching, *supra* note 184.

189. *See* Midtec Paper Corp. v. United States, 857 F.2d 1487, 1500 (D.C. Cir. 1998) (confirming the ICC acted within its authority in adopting its competitive access regulation, which narrowed its own discretion to issue orders for such access by requiring anticompetitive effects).

190. *See* Press Release, Surface Transp. Bd., STB Issues Proposed Rule Regarding Reciprocal Switching for Inadequate Service (September 7, 2023) [hereinafter STB Press Release on Proposed Rule for Reciprocal Switching], https://www.stb.gov/wp-content/uploads/PR-23-16.pdf [https://perma.cc/4YCC-PJ2S] (noting history of efforts by the STB to make such orders more available, dating back to 2010).

191. *Id.*

Sciences encouraged Congress to allow the STB to use its reciprocal switching orders to remedy unreasonable rail rates.[192]

Shortly thereafter, the Agency's own rulemaking documents became more frank in their acknowledgement of "the history of recurring service problems that continue to plague the industry."[193] The STB acknowledged a wide range of complaints from various stakeholders of "inconsistent and unreliable rail service," ineffective customer assistance, and little recourse for captive shippers to address these issues.[194] In 2023, the Chair of the STB once again described the state of rail service as often "inadequate and deteriorating," and admitted that "many of the ills of the national freight rail network stem from a lack of competition in the industry and the fact that many rail customers are captive to one Class I railroad."[195] This suggests competition-driven switching problems exist, despite the STB's lack of applications and orders for reciprocal switching that could improve such competition.

These long-simmering problems seem to have come to a head recently, for in April 2024 the STB adopted a new rule once again intended to make reciprocal switching orders more easily and cheaply available.[196] The rule sets out three service-quality criteria for rail-carrier service,[197] implying that if those service standards are not met, the STB would now be willing to order reciprocal switching. However, the Agency itself frames the new rule as an exercise in incrementalism, rejecting the notion of any "sweeping reform" for "an industry which doesn't always adapt well to rapid change."[198] This is not the first time the STB has engaged in reform efforts to try to overcome its history of making these orders unavailable.[199]

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192. *See* Comm. for a Study of Freight Rail Transp. & Reg. & Transp. Rsch. Bd., *supra* note 185, at 8.

193. *See* Reciprocal Switching for Inadequate Service, 88 Fed. Reg. 63897, 63899 (proposed Sept. 18, 2023) (to be codified at 49 C.F.R. pt. 1145) (describing industry service-quality issues dating back to at least 2016).

194. *See* Urgent Issues in Freight Rail Service, 87 Fed. Reg. 22009, 22009 (Apr. 13, 2022) (describing a broad range of stakeholders' complaining of inconsistent and unreliable rail service, including limited car supply, unfilled car orders, delays, missed switches, and ineffective customer assistance); STB Press Release on Proposed Rule for Reciprocal Switching, *supra* note 190 ("In the past several years, and particularly since 2021, it has become clear that many rail customers nationwide have suffered from inadequate and deteriorating rail service.").

195. *See* STB Press Release on Proposed Rule for Reciprocal Switching, *supra* note 190.

196. *See* Reciprocal Switching for Inadequate Service, 89 Fed. Reg. 38646, 38648 (May 7, 2024) (to be codified at 49 C.F.R. pt. 1145). The rule would use switching as a remedy for poor-quality service, imposing reciprocal switching agreements when service fails to meet certain objective performance standards defined in the rule. *See id*. at 38646; STB Press Release on Final Rule for Reciprocal Switching, *supra* note 184 (describing the new rule as increasing "the ease and speed of bringing and obtaining a switching order from the Board").

197. Reciprocal Switching for Inadequate Service, 89 Fed. Reg. at 38707.

198. *See* STB Press Release on Final Rule for Reciprocal Switching, *supra* note 184.

199. *See* STB Press Release on Proposed Rule for Reciprocal Switching, *supra* note 190, at 3 ("Since at least 2010, the Board has been considering various ideas to reform the current reciprocal switching regulations so that captive shippers, in particular, would have a practical and realistic opportunity to obtain a reciprocal switching order when warranted. Unfortunately, until now, the Board has not developed such a reform.").

The new rule was not yet in effect as of this writing, making it too early to assess whether it will change the STB's longstanding disuse of its switching powers.

3. The STB Has the Sole Power to Prevent Dominant Railways from Charging Unreasonable Rates

The STB holds another important statutory power over competition: the authority to prevent a railway with market dominance from charging unreasonable rates for rail service.[200] This power applies only to railways that are dominant, and only to regulated rail traffic,[201] though, as explained above, the STB can choose to re-regulate traffic to prevent the abuse of market power by a dominant firm.[202]

The STB has the power to assess whether a rate is reasonable only in response to a complaint.[203] Once a complaint is filed—usually by a shipper—the STB employs a complex combination of quantitative and qualitative assessments to determine whether the rate is reasonable.[204] First, the Staggers Act deems that a rail carrier is not dominant if its rates fall below a certain statutorily prescribed ratio of variable costs.[205] If the STB finds that the rates are below this ratio then its inquiry ends. In effect, this provides a safe harbor below which the STB has no power to review the reasonableness of a rate.[206] The impact of this determination has led to a number of different, complex approaches to calculating this rate ratio.[207]

If the rates are above this ratio, then the STB continues with further qualitative assessment of whether the rail carrier has market dominance.[208]

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200. *See* 49 U.S.C. § 10707 (2018).

201. For an explanation of the distinction between regulated rail traffic and traffic subject to contract rates, see *supra* Section II.B.1.

202. *See* 49 U.S.C. § 10502(a) (2018).

203. *See id.* § 10704(b). Rail shippers may challenge the reasonableness of a rail carrier's common carrier rate by filing a formal complaint with the STB. *See id.* §§ 10701(d), 10702, 10704(b); 49 C.F.R. pt. 1111 (2023).

204. *See* 49 U.S.C. § 10707 (2018).

205. *See id.* § 10707(d)(1)(A) (providing that the STB shall "find" a railway not dominant if the rate complained of is less than 180% of variable costs of providing that rail service).

206. *See id.* § 10707(b) ("A finding by the [STB] that the rail carrier does not have market dominance is determinative in a proceeding under this part related to that rate or transportation unless changed or set aside by the [STB] or set aside by a court of competent jurisdiction."); *see also* Burlington N. R.R. Co. v. Interstate Com. Comm'n, 679 F.2d 934, 941 (D.C. Cir. 1982) (noting that the above-referenced section "withdraws from the ICC jurisdiction to inspect for maximum reasonableness rates that fall below the specified threshold").

207. Rate Reform Task Force, *Report to the Surface Transportation Board*, SURFACE TRANSP. BD. 52-54 (Apr. 25, 2019), https://www.stb.gov/wp-content/uploads/Rate-Reform-Task-Force-Report-April-2019.pdf [https://perma.cc/BCU9-9GFG] (discussing the various approaches to calculating this rate ratio).

208. *See* 49 U.S.C. § 10707(b) (2018); 49 C.F.R. § 1111.12 (2023) (describing the STB's analysis of dominance); Market Dominance Streamlined Approach, 85 Fed. Reg. 47675, 47675 (Aug. 6, 2020) (codified at 49 C.F.R. pts. 1011, 1111) (summarizing the analytical steps taken in STB rate reviews).

Such dominance is statutorily defined as "an absence of effective competition from other rail carriers or modes of transportation for the [traffic] to which a rate applies."[209] In making this determination, the STB considers whether feasible alternative modes of transportation could competitively constrain the rates subject to review.[210] Finally, if the rail carrier is found dominant, the STB determines whether the rate at issue is unreasonable, taking into account all of this analysis, and factors such as high fixed costs.[211] If it is unreasonable, then the Agency is empowered to set a reasonable rate.[212]

These statutory powers enable the STB to prevent dominant railways from charging supracompetitive rates for services—or at least any rates the Agency finds "unreasonable." In this sense these powers function somewhat like antitrust law. Both can be used to prevent dominant firms from charging prices above what would be expected in a competitive market.[213]

a. The STB Has Not Found a Dominant Railroad's Rates Unreasonable Since 2011 and Has Long Frustrated Rate Complaints

Despite these powers, the STB has not found a rail rate to be unreasonable since 2011.[214] The Agency has not even adjudicated any rate complaints since 2019, though it appears one was filed and pending as of 2023.[215] What accounts for this sparse use of STB rate review powers?

The superficial explanation is that the STB can only act in response to rate complaints, and few such complaints are filed. Unlike the other agencies discussed in this Article, the STB is not itself responsible for bringing complaints—rate complaints are filed by third parties, usually by shippers using the subject railroads. Over the last decade, only seven rate reviews have been filed with the STB.[216] In fact, over the Agency's nearly thirty-year history, only fifty-two rate reviews have ever been filed.[217] Part of the explanation for this fairly low number of complaints may be the declining

209. 49 U.S.C. § 10707(a) (2018).

210. Market Dominance Streamlined Approach, 85 Fed. Reg. at 47678 (describing the STB's analysis of dominance).

211. *See* 49 U.S.C. § 10707(c) (2018).

212. STB: BACKGROUND AND CURRENT ISSUES, *supra* note 173, at 4-5 (discussing cost measures that have been used to set such rates, including various measures of hypothetical competitor rates and benchmarks).

213. Antitrust tends to consider price levels as evidence of potential anticompetitive conduct, rather than directly assessing or controlling the reasonableness of a given price.

214. *See Quarterly Status Report of Rate Complaint Cases Before the STB – 3rd Quarter 2024*, SURFACE TRANSP. BD. 2, https://www.stb.gov/wp-content/uploads/Report-on-Rate-Case-Review-Metrics-Third-Quarter-September-30-2024.pdf [https://perma.cc/4H95-H9VE] (listing every rate review in the STB's history from 1996 to the present with the case result, and no adjudicated cases after 2019).

215. *See id.*

216. *See id.*

217. *See id.*

proportion of rail traffic over which the STB exercises its competition powers, though the Agency can choose to re-regulate some traffic.[218] Competition optimists might further posit that few complaints are filed because there are few dominant railways, or that dominant railways are not charging unreasonable rates.

A more pessimistic, but much more common, explanation is that the STB has made rate reviews so complex, expensive, and slow that shippers find little point in filing complaints.[219] The STB has long faced criticism from scholars[220] and congressional-oversight entities for creating a rate review process that is onerous, difficult, and costly.[221] As the description above suggests, the rate review process is multi-step and highly involved. The complainant bears the burden of demonstrating both dominance and the unreasonableness of the rate to substantiate its complaint.[222] This demands proof of the negative proposition that competition is not an effective constraint on rates,[223] which can often require evidence on theoretical rates from a "hypothetical, completely new railroad,"[224] and elaborate cost calculations.[225] As far back as 2006 the Government Accountability Office observed that "there is widespread agreement that STB's standard rate relief process is inaccessible to most shippers and does not provide for expeditious handling and resolution of complaints. The process remains expensive, time consuming, and complex."[226]

A decade and a half later, little seems to have changed. This complexity persists despite certain congressionally mandated efforts by the Agency

218. *See supra* notes 167-170 and accompanying text.

219. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 186, at 41 (noting that shippers reported that "only large-volume shippers, such as coal shippers . . . have the money to be able to afford the STB rate relief process").

220. Schmalensee & Wilson, *supra* note 31, at 146-47 (tracing the history of complexity in rate reviews by the STB and precursor agencies, including reference to scholarly critiques, and describing the commonly used cost test for rate reviews as "quite complicated and expensive" as well as "unreliable" in contexts outside of coal shipping where it was originally developed).

221. *See* STB: BACKGROUND AND CURRENT ISSUES, *supra* note 173, at 4-5 (2022); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 186, at 39.

222. Total Petrochemicals & Refin. USA, Inc. v. CSX Transp., Inc., No. NOR 42121, 2013 WL 2367766, at *19 (S.T.B. May 31, 2013).

223. Market Dominance Streamlined Approach, 85 Fed. Reg. 47675, 47676 (Aug. 6, 2020) (codified at 49 C.F.R. pts. 1011, 1111) (observing "[t]he time and cost associated with an evidentiary process that 'requires the complainant to prove a negative proposition on opening—that intermodal and intramodal competition are not effective constraints on rail rates'" (quoting Market Dominance Streamlined Approach, 84 Fed. Reg. 48882, 48883 (proposed Sept. 17, 2019))).

224. *See* STB: BACKGROUND AND CURRENT ISSUES, *supra* note 173, at 4-5.

225. *Id.*

226. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 186, at 41. When Congress created the STB, it directed the newly formed Agency to develop more accessible ways of resolving rate disputes. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 810 (codified as amended at 49 U.S.C. § 10701(d)(3)). The Agency did so in 1997, but the simplified processes had not been used by complainants as of the GAO report in 2006. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 186, at 4 (noting that the simplified process "has not been used").

to simplify the process,[227] none of which have seen much adoption by complainants.[228] The STB itself observed in 2019 that "the market dominance inquiry has often become a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants," particularly for smaller complainants.[229] A 2022 Congressional Research Service report concluded similarly that proving a rate complaint is "very detailed, requires extensive documentation . . . and frequently results in prolonged litigation."[230]

During the period in which these criticisms were levied, the process for proving a rate complaint has grown more and more expensive. As of 2006, shippers estimated that a rate review costs approximately three to five million dollars for the complainant alone.[231] As of 2019 the cost estimates had grown as high as ten million dollars.[232]

In sum, the STB's rate review processes have never been anything but difficult and expensive. This combination of cost and complexity provides the most likely, or at least the most common, explanation for the infrequency of rate review filings. Combined with the long odds of success—the STB has not found a rate unreasonable in the last thirteen years—it is understandable why the rate review process has not seen much use.

Perhaps, then, it is not fair to describe the STB's rate review power as "abandoned" so much as "stymied." Though the Agency itself is not tasked with bringing complaints, it has still managed to deprive these antitrust-like provisions of their effect by creating and perpetuating serious process and cost challenges that eliminate the potential utility of these rate reviews. The result is functionally similar to abandonment. The legislation leaves regulated rail traffic shielded from antitrust scrutiny yet not subject to much, if any, alternative competition oversight. Dominant railways are left largely free to charge above-market rates with impunity.

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227. STB: BACKGROUND AND CURRENT ISSUES, *supra* note 173, at 5 (observing that the simplified rate review processes "have been revised several times since their creation").

228. In 2020, the STB again engaged in a rulemaking and again implemented a simplified process for proving market dominance, setting out factors that, if shown, would constitute prima facie proof that the subject of the complaint was dominant in the relevant market. Market Dominance Streamlined Approach, 85 Fed. Reg. at 47678. The STB's reporting as of 2023 implies that this most recent simplified process has yet to be used in an adjudicated case. *Quarterly Status Report of Rate Complaint Cases Before the STB – 4th Quarter 2023*, SURFACE TRANSP. BD. 3, https://www.stb.gov/wp-content/uploads/Report-on-Rate-Case-Review-Metrics-Fourth-Quarter-December-31-2023.pdf [https://perma.cc/5WCM-A9Y4] (listing no adjudicated cases after 2019).

229. Market Dominance Streamlined Approach, 85 Fed. Reg. at 47675.

230. STB: BACKGROUND AND CURRENT ISSUES, *supra* note 173, at 4-5 (explaining that the rate review process essentially requires shippers to "design a hypothetical, completely new railroad . . . and calculate the rates that railroad would charge given the costs associated with operating the route (including other hypothetical revenue-generating traffic it would carry)").

231. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 186, at 41 (providing estimates from shippers of a rate review case). The STB estimated such costs as even higher around this time. Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (SUB-No. 1), 2007 WL 2493509, at *3 (S.T.B. Sept. 5, 2007) (noting that shippers' litigation costs in recent cases "have approached $5 million").

232. Rate Reform Task Force, *supra* note 207, at 6.

C. Antitrust Abandonment in Meatpacking

The meatpacking industry, where this Article began, provides another compelling case study of a regulator that has abandoned its antitrust enforcement powers. For decades at a time, the U.S. Department of Agriculture has failed to police anticompetitive conduct by meatpackers and stockyards. This is despite its significant powers to do so under the Packers and Stockyards Act—powers that reach even further than general antitrust law.[233]

Section 202 of the Packers and Stockyards Act grants the USDA authority to prevent anticompetitive and unfair conduct by meatpackers,[234] swine contractors, and live-poultry dealers.[235] The provisions of section 202 were modeled on antecedent antitrust laws and share a similar purpose of combatting anticompetitive practices.[236] From the earliest decisions in 1922, the Supreme Court recognized this similarity; much like antitrust law, the "chief evil" targeted by the Act was monopoly power among packers and stockyards, and the threat that such power would enable them unduly and arbitrarily to underpay farmers, and to increase prices to consumers.[237]

This shared origin is most evident in the language of subsections 202(c) through (g), which are the focus of the discussion here given their antitrust-like prohibitions.[238] Subsections (c) through (e) echo antitrust law

233. Swift Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962) (explaining that the Packers and Stockyards Act was intended to be "broader in scope" than antitrust law).

234. Packers and Stockyards Act § 201, 7 U.S.C. § 191 (2018) (defining the term "packer" as any person engaged in the business of buying livestock for slaughter, manufacturing or preparing meats for sale or shipment, or marketing meats, poultry, or similar products).

235. *Id*. § 202, 7 U.S.C. § 192 (2018) (laying out prohibitions on anticompetitive conduct). There are similar sections governing unfair conduct of stockyards as well. See *id*. §§ 307, 312, 7 U.S.C. §§ 208, 213 (2018), which are akin to section 202 but applicable to stockyards rather than packers. This discussion focuses on the packer-related provisions, which have become the most relevant to modern competition.

236. Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1460 (8th Cir. 1995) (explaining that "the [Packers and Stockyards Act] has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition"); United States v. Perdue Farms, Inc., 680 F.2d 277, 280 (2d Cir. 1982) ("As originally enacted in 1921, the purpose of the Packers and Stockyards Act was to combat anticompetitive and unfair practices in the highly concentrated meatpacking industry."); Letter from Rohit Chopra, Comm'r, Fed. Trade Comm'n, to Sonny Perdue, Sec'y, U.S. Dep't of Agric. (Mar. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1569047/chopra_-_usda_proposed_rule_packers_and_stockyards.pdf [https://perma.cc/4G8B-SK78] (noting that the Packers and Stockyards Act "was modeled after provisions in the Federal Trade Commission Act and other antitrust laws").

237. Stafford v. Wallace, 258 U.S. 495, 514-15 (1922) ("The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards.").

238. This discussion focuses on these antitrust-like subsections, which relate expressly to competition, in contrast to other subsections of section 202 that appear to focus more on consumer protection or unfairness. *See* Packers and Stockyards Act, § 202(a), (b), 7 U.S.C. § 192(a), (b) (2018). This lens is not meant to imply that section 202 in its entirety is limited to policing anticompetitive conduct. *See id.* (prohibiting unfair practices without requiring a showing of anticompetitive effect); Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. 53886, 53886

in their prohibitions on various acts with the purpose, tendency, or effect of "restraining commerce" or "creating a monopoly."[239] Subsections 202(f) and (g) also bar conduct that is prohibited by antitrust law: conspiracies, combinations, or agreements to engage in such acts, or otherwise to divide territories, apportion sales, or fix prices.[240]

However, the language of subsections 202(c) through (g) is even broader in scope than antitrust law in some respects.[241] Like section 1 of the Sherman Act,[242] the provisions bar "restraining commerce"; but unlike section 1, these Packers and Stockyards Act provisions can be unilaterally violated with no need for proof of an agreement or other collusion. The language of subsections 202(d) and (e) applies to a single firm that "manipulat[es] or control[s] price" or otherwise "restrain[s]" commerce, conduct ordinarily beyond the scope of the Sherman Act in the absence of monopolization.[243] This gives the USDA the power to prevent a wider range of anticompetitive conduct than the DOJ or the FTC in their enforcement of general antitrust laws.

Whenever the USDA has reason to believe these prohibitions on anticompetitive acts are violated by a packer or swine contractor, the Act *requires* the USDA to issue a complaint and hold a hearing.[244] If a violation is found, the USDA then has the power to impose administrative remedies such as cease and desist orders and civil monetary penalties.[245] Alternatively, the USDA may refer cases to the Attorney General, who is then required by the Act to bring an enforcement action.[246] For live poultry only, there is no administrative pathway for USDA enforcement as there is for packers and swine contractors. Instead, the Agency must report live-

(proposed June 28, 2024) (to be codified at 9 C.F.R. pt. 201) (proposing a rule to "define unfair practices as conduct that harms market participants and conduct that harms the market").

239. Packers and Stockyards Act § 202(c)-(e), 7 U.S.C. § 192(c)-(e) (2018).

240. *Id*. § 202(f), 7 U.S.C. § 192(f) (2018) (prohibiting conspiracies to divide territories, apportion sales, or fix prices); *id*. § 202(g), 7 U.S.C. § 192(g) (2018) (prohibiting conspiracies to engage in the conduct prohibited in subsections 202(a) through (e)).

241. Swift Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962) ("The legislative history showed Congress understood the sections of the [Packers and Stockyards Act] under consideration were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, sec. 5 of the Federal Trade Commission Act, and sec. 3 of the Interstate Commerce Act." (citation omitted)).

242. 15 U.S.C. § 1 (2018).

243. Packers and Stockyards Act § 202(d), (e), 7 U.S.C. § 192(d), (e) (2018).

244. *Id.* § 203(a), 7 U.S.C. § 193(a) (2018) ("Whenever the Secretary has reason to believe that any packer or swine contractor has violated or is violating any provision of this subchapter, he shall cause a complaint in writing to be served upon the packer or swine contractor, stating his charges in that respect, and requiring the packer or swine contractor to attend and testify at a hearing . . . .").

245. *Id.* § 203(b), 7 U.S.C. § 193(b) (2018) (providing remedial power for violations by packers); *id.* § 312(b), 7 U.S.C. § 213(b) (2018) (providing remedial power for violations by stockyards).

246. *Id*. § 404, 7 U.S.C. § 224 (2018) ("The Secretary may report any violation of this Act to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts . . . .").

poultry violations to the Attorney General, who then has the sole authority to pursue remedies in federal court.[247]

In these various respects, the DOJ and the USDA share enforcement authority for anticompetitive conduct under the Packers and Stockyards Act. The Act, however, expressly excludes the FTC from jurisdiction over "any matter" over which the Act grants authority to the USDA.[248] With narrow exceptions,[249] this removes the FTC from antitrust enforcement in wholesale agricultural markets, though the Agency continues to exercise authority over the retail sale of meat.

Responsibility for policing anticompetitive acts is also shared with the DOJ in another sense: general antitrust law continues to apply to conduct under the Packers and Stockyards Act.[250] Unlike shipping or rail, the Packers and Stockyards Act does not contain any wholesale exemptions from antitrust law. Some conduct can thus be unlawful both in antitrust and under subsections 202(c) through (g) of the Packers and Stockyards Act.

Finally, the USDA also has consumer protection–like powers under subsections 202(a) and (b) of the Packers and Stockyards Act. These subsections are at times swept up into antitrust debates over USDA action, but these provisions resonate more in consumer protection law.[251] The USDA has taken the position, though contested, that these provisions do not require anticompetitive effects for a violation.[252] This interpretation is

247. *Id*.

248. *Id.* § 406(b), 7 U.S.C. § 227(b) (2018) (limiting the FTC's jurisdiction with certain minor exceptions).

249. *Id.* (providing for certain exceptions such as the Secretary of Agriculture's requesting that the FTC "make investigations and report in any case").

250. Though this general antitrust law is enforced only by the DOJ, not the FTC, given the statutory exclusion noted above.

251. The fairness-focused language in subsections 202(a) and (b) of the Packers and Stockyards Act echoes the non-competition-focused language in section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2018), which outlaws "unfair or deceptive practices in or affecting commerce." *See* Hovenkamp, *supra* note 31, at 3 (observing that under section 202, "subsections (a) and (b) appear to be tort-like provisions that are concerned with unfair practices and discrimination, but not with restraint of trade or monopoly as such").

252. *See* Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. 53886, 53886 (proposed June 28, 2024) (to be codified at 9 C.F.R. pt. 201) (taking the position that competitive effects need not be proved for a subsection 202(a) violation, but acknowledging that some courts have required proof of harm to competition for subsection (a) violations, while others have expressly rejected such a requirement); Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566 (Dec. 20, 2016) (promulgating an interim final rule reflecting the "longstanding position of the Secretary of Agriculture that a violation of section 202(a) or (b) can be proven without evidence of competitive injury or the likelihood of competitive injury"). *But see* Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594, 48597-98 (Oct. 18, 2017) (withdrawing the 2016 rule on competitive injury and summarizing several appellate court decisions in various circuits that have required or suggested that harm to competition is necessary for subsection 202(a) and (b) claims). Such competitive effects are required for antitrust law violations, though in some instances those effects are presumed. A. DOUGLAS MELAMED, RANDAL C. PICKER, PHILIP J. WEISER & DIANE P. WOOD, ANTITRUST LAW AND TRADE REGULATION: CASES AND MATERIALS 119 (7th ed. 2018) (describing the per se standard, which applies to "[c]ertain practices [that] pose such a serious threat to competition . . . that they can be condemned out-of-hand without an elaborate inquiry into . . . the actual effect of the practice").

consistent with the statutory text, though some appellate courts have disagreed, requiring that effects on competition be shown.[253] Subsection 202(a) echoes language in section 5 of the FTC Act, barring packers from engaging in "unfair, unjustly discriminatory, or deceptive" practices.[254] Subsection 202(b) prevents packers from conferring "undue or unreasonable prejudice or disadvantage" on a particular person or locality.[255]

If accurate, this means subsections 202(a) and (b) do not meet the main criterion used in this Article for being "antitrust-like," because competitive effects are not required for a violation. Reasonable minds differ on this exclusion, but expanding to subsections 202(a) and (b) would not significantly change the results of the research in this Article. There remain few instances of enforcement of these two subsections, though very recently the USDA and the DOJ have each brought some cases under them.[256] The USDA also has a pending rulemaking that would define the conduct prohibited under subsection 202(a).[257] This could signal an intent to bring future cases, but similar rulemaking efforts have been ongoing, and frustrated, since 2010 with no notable enforcement to date.[258]

1. Eras of Disuse: The USDA's Antitrust-Like Enforcement Powers

Before the Packers and Stockyards Act was passed, both the FTC and the DOJ were actively enforcing antitrust law in meat processing. The Act's exclusion of the FTC from enforcement power was ironic in this regard. It was the FTC that published a series of reports from 1918 to 1919

253. *E.g.*, Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 362 (5th Cir. 2009) (finding that "an anti-competitive effect is necessary" to prove a violation of subsection 202(a) of the Packers and Stockyards Act).

254. Packers and Stockyards Act § 202(a), 7 U.S.C. § 192(a) (2018); *see also* Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (2018) ("[U]nfair or deceptive acts or practices in or affecting commerce[] are hereby declared unlawful.").

255. Packers and Stockyards Act § 202(b), 7 U.S.C. § 192(b) (2018).

256. For example, the research for this Article found there were four USDA complaints under subsection 202(a) and none under subsection (b) within the last seven years. *See infra* note 274.

257. Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. at 53886. The USDA has also issued two other recent rules on fairness in meatpacking. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092, 16112 (Mar. 6, 2024) (to be codified at 9 C.F.R. pt. 201) (finalizing a rule combatting practices that discriminate on the basis of a protected ground in commercial interactions in meatpacking); Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. 83210, 83224 (Nov. 28, 2023) (to be codified at 9 C.F.R. pt. 201) (requiring new disclosures to improve the transparency of contractual dealings in poultry tournament system).

258. Budgetary constraints and changes in administration have stymied past rulemaking efforts. The USDA began rulemaking under subsections 202(a) and (b) in 2010 but did not promulgate the proposed regulation until 2016. The rule was then promptly withdrawn in 2017 after a change in administration. *See* Scope of Section 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566, 92567 (Dec. 20, 2016) (reflecting the commencement of the rulemaking in 2010 and the rule's ultimate promulgation in 2016); Scope of Section 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594, 48594 (Oct. 18, 2017) (withdrawing the 2016 rule on competitive injury).

that brought congressional attention to a variety of anticompetitive practices in the meat-processing industry,[259] and this led to the passage of the Act. In these reports, the FTC concluded that the "Big Five" meatpacking firms "had complete control of the trade from the producer to the consumer, [and] had eliminated competition."[260] However, much like the shipping industry, Congress's decision to grant the USDA enforcement power under the Packers and Stockyards Act was driven by perceptions that the industry was economically complex[261] and significant enough to merit special agency attention and competition rules distinct from antitrust law.[262]

For a few years after the Packers and Stockyards Act was passed, the USDA briefly pursued active enforcement of the prohibitions against unfair or anticompetitive acts. Between 1922 and 1928, the USDA "brought quite a few actions."[263]

Unfortunately, the nearly 100 years since tell a different story. The USDA has often left its antitrust-like powers unused. While the record is

259. FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY, SUMMARY AND PART I: EXTENT AND GROWTH OF POWER OF THE FIVE PACKERS IN MEAT AND OTHER INDUSTRIES (1919) [hereinafter FTC REPORT PART I]; *see* FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY, PART II: EVIDENCE OF COMBINATION AMONG PACKERS (1918); FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY, PART III: METHODS OF THE FIVE PACKERS IN CONTROLLING THE MEAT-PACKING INDUSTRY (1919); FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY, PART IV: THE FIVE LARGER PACKERS IN PRODUCE AND GROCERY FOODS (1919).

260. Stafford v. Wallace, 258 U.S. 495, 500 (1922) (summarizing the FTC's findings); FTC REPORT PART I, *supra* note 259, at 24 (reporting that the meatpackers had "attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands"). The reports identified detailed evidence that the firms were engaging in anticompetitive conduct to "[m]anipulate live-stock markets; [r]estrict interstate and international supplies of foods; [c]ontrol the prices of dressed meats and other foods; . . . [c]rush effective competition; [s]ecure special privileges from railroads, stockyard companies, and municipalities; and [p]rofiteer." FTC REPORT PART I, supra note 259, at 32-33. Before the passage of the Packers and Stockyards Act, the reports also led to a consent decree that prevented packers from pursuing combinations to monopolize the purchase and control the price of livestock and the sale and distribution of meat products. S. DOC. NO. 68-219, at 1 (1925) (explaining that the FTC report "had great influence . . . on the Attorney General of the United States in the drawing of the terms of the said decree"); *see also* 61 CONG. REC. 1866 (1921) (statement of Rep. Edward Voigt) (same).

261. In debates over the Packers and Stockyards Act, representatives expressed that an agency tasked with antitrust oversight must be able to "acquire the technical knowledge as to the operation of the industry necessary to enable that agency to act in a practical and sound manner." 61 CONG. REC. 1887 (1921) (statement of Rep. Sydney Anderson). There was also some logic that the administration of the Act by the USDA would be efficient since the Agency already possessed authority over food inspection and certain other animal regulatory matters. *Id.* at 1878 (statement of Rep. Charles McLaughlin).

262. *Stafford*, 258 U.S. at 524-25 (explaining that the Act "treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East" and "assumes that they conduct a business affected by a public use of a national character and subject to national regulation").

263. *House Meatpacker Hearings (1957)*, *supra* note 7, at 173 (statement of Watkins) (quoting a USDA employee's testimony that "[i]n the early years of the administration of the act . . . [the USDA] brought quite a few actions").

less complete than for the other agencies examined in this Article, it reflects decades in which it is clear the USDA has engaged in little to no antitrust-like enforcement.

From the late 1930s through to 1957, the USDA did not issue any antitrust-like orders.[264] This two decades of disuse came to the policy forefront in the late 1950s, attracting the attention of the Senate Judiciary Committee. The Committee found "neglect and inaction in enforcement" dating back to the inceptions of the Agency's antitrust-like powers.[265] Despite the brief flurry of early enforcement, the Committee found that the total number of actions related to monopolistic practices over time was small—from the conception of the USDA's power under the Act through to 1938, the USDA had only issued eight cease and desist orders against packers for monopolistic or unfair trade practices, and two were rescinded.[266] Further, the Committee noted that the scope of this enforcement was narrow, involving only certain subtypes of packers and stockyards.[267] This dissatisfactory record in the Committee's view was then exacerbated by the USDA's long period of inaction from the 1930s onward.[268]

Since this 1957 Senate Committee report, the research for this Article did not reveal any pre-existing statistics that track the USDA's enforcement of subsections 202(c) through (g). This lack of transparency is itself an issue, one that makes assessing the USDA's action—or inaction—on antitrust-like enforcement more difficult.

However, the Article gathers several primary sources, which when considered together offer a sense of the USDA's antitrust-like enforcement activity.[269] First, the USDA publishes the administrative orders for recent years in all of its Packers and Stockyards Act actions. This includes but is not limited to any recent UDSA orders in cases involving the antitrust-like subsections, 202(c) through (g). Second, for cases prior to this period, while the orders are not made available from the USDA, there are

264. S. REP. NO. 85-704, at 7-8 (1957).

265. *Id.* at 3-4, 7-8.

266. *Id*. at 7 (noting that of the thirty-two total orders issued by the Agency, only eight dealt with such practices).

267. *Id.* at 7-8.

268. *Id.*

269. The USDA publishes its recent orders from 2017 onward in full-text format. *See infra* note 270. For actions before 2017, the published records lack adequate detail to determine which provisions of the Packers and Stockyards Act were involved in the complaint. This is because, while the style of cause is published in a journal for all decisions and orders issued in USDA adjudicatory proceedings (those issued by the USDA Office of Administrative Law Judges as well as Judicial Officers), the text of the decisions is only published if the action was resolved via an order rather than an adjudicatory proceeding, or appealed and heard by an administrative law judge. Without the decision text, it cannot be determined which section of the Packers and Stockyards Act was at issue in the action (for the pre-2017 subset of cases without proceedings or appeals). These cases are thus not able to be reflected in the analysis for this Article.

reported decisions for those cases (and only those cases) that were the subject of judicial or administrative appeals of the USDA's actions. Each of these sources was examined for this Article.

The record of recent USDA action is the most transparent: the USDA makes administrative decisions from 2017 onward available on its website.[270] To assess the recent enforcement track record for subsections 202(c) through (g), the research for this Article reviewed all such Packers and Stockyards Act administrative orders that the USDA had made available. These actions dated from 2017 to early 2024.[271] This should approximate the universe of Packers and Stockyards Act complaints by the USDA made during this time, since the data include all cases that ended in consent orders, default judgments, summary judgment, or, while rare, dismissals.[272] The USDA investigations, if any, that did not culminate in some form of decision would not be not reflected in the data reviewed.

There were no USDA complaints for the antitrust-like provisions of the Act reflected in these data. The website makes available 152 USDA actions from 2017 onward;[273] none alleged violations of any of the antitrust-like provisions, subsections 202(c) through (g). The reported cases in these recent years all involved other subsections of the Packers and Stockyards Act.[274] There is, in other words, no evidence of USDA enforcement of its antitrust-like provisions over the last seven years.

Appeals of USDA actions offer a second potential source of evidence on any USDA antitrust-like cases. The respondents to a USDA section 202

270. *See Packers and Stockyards Enforcement*, U.S. DEP'T. OF AGRIC., https://www.ams.usda.gov/services/enforcement/psd [https://perma.cc/SBW5-S8R4] (describing the dataset as "the most recent decisions issued under the Packers and Stockyards Act").

271. This review encompasses the decisions that were publicly available on the USDA's website, *id*., as of June 13, 2024, the end date for the review of the data for this Article. At that time, the date of the posted decisions ranged from February 8, 2017, at the earliest to March 13, 2024, at the latest, all of which are included in the discussion here.

272. *Packers and Stockyards Enforcement*, *supra* note 270. A distinction is not drawn here between these various case results, since the research question was simply whether the USDA brought a complaint, which it did in each.

273. This figure de-duplicates the posted decisions that involve multiple respondents, to identify the number of USDA complaints regardless of the number of respondents in each complaint. The USDA website instead lists the decisions by respondent. Since in some cases there are multiple respondents involved in a single decision, this means the decision is posted multiple times. See, for example, Miller, P&S Docket No. 23-J-0018 (U.S.D.A. Jan. 4, 2023), and Miller Livestock, Inc., P&S Docket No. 23-J-0016 (U.S.D.A. Jan. 4, 2023), which are counted as one decision only in the above tally.

274. Most of these complaints relate to failures to pay in full the purchase price of livestock, or other payment-related violations of the Act that appear unrelated to competition. This review found that there were four complaints against a total of seven respondents that alleged violations of a different subsection, 202(a), which is a consumer protection–like portion of this provision. One further complaint from 2022 mentioned subsection 202(a), but this appeared to be in error, as the terms of the order were unrelated to such a violation, and the provisions cited do not provide for the civil remedies for which they are referenced in the order. *See* Halal Packing Inc., P&S Docket No. 22-J-0015, 2022 WL 2192849, at *2 (U.S.D.A. May 25, 2022) (assessing a USDA civil penalty for failing to pay the purchase price of livestock when due).

complaint have the right to appeal to a circuit court.[275] When such appeals lead to a judicial decision, this provides another indication that the USDA has brought antitrust claims. While these data date back further than the USDA's own online publication of actions, they are incomplete in other ways since not all cases are appealed.

The research for this Article examined all reported decisions available on Westlaw that claimed a violation of subsections 202(c) through (g) of the Packers and Stockyards Act, for all time available.[276] These judicial decisions show that the USDA brought at least a couple of claims under these provisions in the late 1960s.[277] The last reported appeal of such a USDA claim was in 1980.[278] Since then, the only reported cases involve private parties—not appeals of USDA decisions.[279] While it is not clear what proportion of cases are appealed, this record reflects that the USDA must have brought at least a small handful of complaints alleging violations of section 202 in the period between the 1957 Senate report and the present. It also demonstrates that it has been more than forty years since the last such appeal.

Finally, appeals of USDA complaints may also be pursued through administrative proceedings rather than in federal court. The research for this Article reviewed reported decisions and orders issued in adjudicatory

275. Packers and Stockyards Act § 204(a), 7 U.S.C. § 194(a) (2018).

276. The research reviewed the citing references on Westlaw for subsections 202(c) through (g), up until June 23, 2024. This review was overinclusive in that it covered both decided cases on any claims brought under these subsections, as well as cases that cited these subsections for other reasons (such as reasoning by analogy) but did not involve claimed violations.

277. Armour & Co. v. United States, 402 F.2d 712, 713 (7th Cir. 1968) (alleging violations of subsections 202(a), (b), and (e), and dismissing subsection (e) claims); Ark. Valley Indus., Inc. v. Freeman, 415 F.2d 713, 713 (8th Cir. 1969) (alleging violations of subsection 202(g), as well as violations of subsections (a) and (b)). During this period, there was also a small number of USDA cases involving its consumer protection powers only—that is, subsections 202(a) and (b) rather than (c) through (g). Cent. Coast Meats, Inc. v. U.S. Dep't of Agric., 541 F.2d 1325, 1326 (9th Cir. 1976) (alleging violations of subsections 202(a) and 312(a) only, but discussing the distinction from subsections 202(c) and (d)); Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962); Wilson & Co. v. Benson, 286 F.2d 891, 891 (7th Cir. 1961).

278. De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329, 1331, 1335 (9th Cir. 1980) (alleging violations of subsections 202(a), (e), and (g), but finding no violation of (e) or (g)). The USDA was also listed as counsel, and so presumably contributing, in one other case in 1982 wherein the DOJ brought the complaint. United States v. Perdue Farms, Inc., 680 F.2d 277, 278 (2d Cir. 1982). As noted at the outset of this discussion, the research distinguishes the consumer protection–like provisions under subsections 202(a) and (b), but note that the USDA brought at least one consumer protection case after 1980 that involved those other subsections. *See* IBP, Inc., 57 Agric. Dec. 1353 (U.S.D.A. 1998).

279. These private claims all date from 2004 onward. See, for example, *Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1093-94 (N.D. Iowa 2004), and, more recently, *In re Pork Antitrust Litigation*, No. 18-1776, 2023 WL 6279354, at *9-10 (D. Minn. Sept. 26, 2023). The DOJ has brought claims recently, but under subsections 202(a) or (b) rather than (c) through (g). *See* Complaint, United States v. Koch Foods Inc., 23-CV-15813 (N.D. Ill. Nov. 9, 2023) [hereinafter *Koch Foods* Complaint], https://www.justice.gov/d9/2023-11/418031.pdf [https://perma.cc/C3YB-GWSJ] (alleging section 202(a) violations); *Cargill* Complaint, *supra* note 18 (alleging a section 202(a) violation).

proceedings conducted for the USDA. These reported decisions were examined back to 2013, the earliest year for which such reports are made available on the official website.[280] There were no decisions in which the USDA claimed a violation of subsections 202(c) through (g).[281]

Together, this research suggests that USDA complaints under its antitrust-like provisions are rare, and marked by decades of inactivity. There was minimal enforcement from the 1930s through 1957, occasional enforcement thereafter—though the record can be patchy due to transparency issues—and no claims in the last seven years. The USDA's use of its antitrust-like powers looks decidedly sparse, even if not abandoned to the same extent as other powers examined in this Article. As scholar Peter C. Carstensen frankly summarized, the USDA's antitrust-like "function was never pursued and remains another monument to Congressional misperception of legal and administrative reality."[282]

2. The USDA Has Likely Underenforced Its Antitrust-Like Provisions

Is the USDA's disuse of its antitrust-like powers justified? The history of the USDA's antitrust-like powers is long, stretching back more than 100 years. To be fair, meatpacking may well not have needed antitrust-like enforcement action during all of this history. A competition optimist might assume there were periods of more robust competition, and perhaps then antitrust enforcement was not needed at times. But the historical record points strongly to USDA underenforcement of section 202 during at least some of this time.

280. The Office of Administrative Law Judges publishes *Agriculture Decisions*, the official reporter publishing decisions and orders issued in adjudicatory proceedings conducted for the USDA under various statutes and regulations, including the Packers and Stockyards Act. Since 2013, *Agriculture Decisions* has been published exclusively online at Agriculture Decisions *Publication*, U.S. DEP'T AGRIC., https://www.usda.gov/oha/services/agriculture-decisions-publications [https://perma.cc/4GAZ-5FDJ].

281. While there were no claims under the antitrust-like provisions, this work identified appeals of two USDA-brought consumer protection cases under either subsection 202(a) or (b). First, in Tyson Farms, Inc., 72 Agric. Dec. 399 (U.S.D.A. 2013), the USDA alleged that chicken processor Tyson failed to pay its contract poultry growers in violation of sections 410 and 202 of the Packers and Stockyard Act. *Id.* at 399, 401. The USDA's section 202 claim did not identify a specific subsection but asserted that Tyson "committed an unfair and deceptive practice," which suggests a claim under subsection 202(a). *Id.* at 399. Second, in IBP, Inc., the tribunal held that a challenged contractual right of first refusal violated subsection 202(a) but not (b). IBP, Inc., 57 Agric. Dec. at 1353. For a discussion of how subsections 202(a) and (b) are more akin to consumer protection law than antitrust law and their exclusion from much of this discussion, see *supra* notes 251-255 and accompanying text.

282. Carstensen, *supra* note 31, at 2-3. Carstensen observes further that "[t]he Secretary of Agriculture was never given and still lacks the resources, staffing, and inclination to enforce antitrust type claims against the industry." *Id.* at 3.

Senator Arthur V. Watkins, reporting on the 1957 Senate inquiry, attributed the USDA's inaction in the prior thirty-six years to underenforcement.[283] He concluded that "it is unlikely that the small number of cease and desist orders—32 since 1921 [when the USDA first obtained this power]—is attributed to any other fact tha[n] noninterest and concern on the part of the USDA since the early 1930's."[284] He and the Senate Judiciary Committee's report drew this conclusion not just from the lack of issued orders,[285] but also from the lack of more basic USDA action to gather any data about packers' conduct that could inform its (non)enforcement decisions.[286] Worse, even when the USDA stumbled upon evidence of likely violations, the Senate inquiry found the Agency still was not taking enforcement action.[287]

During this period, companies were going as far as to weaponize the Packers and Stockyards Act to shield their anticompetitive conduct from the FTC's jurisdiction. The Act, as mentioned above, excludes the FTC from jurisdiction over "any matter" for which the Act grants authority to the USDA.[288] Grocery stores and other companies would acquire a meatpacking company then successfully claim that, as "packers," their entire business was outside of FTC authority.[289] This tactic was used to escape from FTC jurisdiction for conduct as far ranging as misleading advertising of consumer products[290]—leaving these "packers" subject to the sole scrutiny of the USDA, which was inactive on competition matters, and protecting them from the more enforcement-minded FTC.[291]

Given this USDA inaction (and subversion of FTC authority), Senator Watkins concluded, "[e]xperience clearly indicates that the Congress made a mistake when it transferred authority to regulate trade practice of

283. *See House Meatpacker Hearings (1957)*, *supra* note 7, at 172-74 (statement of Watkins).

284. *Id*. at 183.

285. *Id.* at 173; *see* S. REP. NO. 85-706, at 3-4 (1957) (asserting that the USDA's "failure to prevent discriminatory practices in the distribution of meat, meat products, and nonfood products over which it has jurisdiction stems largely from its lack of interest in problems not directly related to the livestock producer").

286. *House Meatpacker Hearings (1957)*, *supra* note 7, at 173 (statement of Watkins) (describing the USDA's "failure to acquire adequate economic data about packer activities and to use it for enforcement purposes," and further noting the USDA's failure to seek adequate appropriations and "maintain an adequate staff" to bring investigations and cases).

287. *Id*. at 182-83.

288. *See* Packers and Stockyards Act § 406(b)-(f), 7 U.S.C. § 227(b)-(f) (2018) (removing the power of the FTC over areas of USDA jurisdiction with certain minor exceptions).

289. *See, e.g.*, Food Fair Stores, Inc., 54 F.T.C. 392, 398-99 (1957) (dismissing complaint for lack of jurisdiction where retail grocery chain acquired a packing business and then claimed immunity from FTC jurisdiction for all of its business); Armour & Co., 52 F.T.C. 1028, 1032 (1956) (finding that the FTC has "no jurisdiction" over a business with packing operations that also engages in misleading advertising of margarine).

290. Armour & Co., 52 F.T.C. at 1028-32.

291. *See House Meatpacker Hearings (1957)*, *supra* note 7, at 194-96 (statement of Watkins).

packers from the Federal Trade Commission, a specialized agency handling antitrust matters, to" the USDA.[292] He noted that, on at least "four occasions since 1935, bills ha[d] been introduced to correct this mistake" by returning authority to the FTC in certain respects.[293] The Senate Judiciary Committee proposed once again to return enforcement of anticompetitive and unfair trade practice in meatpacking and poultry to the FTC,[294] but succeeded only in part. After the 1957 hearings, the FTC was given sole authority over certain finished products at retail, even if made by meatpackers.[295] The USDA retained its Packers and Stockyards Act authority over the earlier stages in the supply chain,[296] where the Agency had issued all but one of its prior orders.[297] In short, the USDA's plea for forgiveness of its underenforcement "sins"[298] was successful: the Agency retained much of its authority.

Over the last fifteen years or so, a common explanation for inaction on meatpacking competition is once again USDA underenforcement. Policymakers, scholars, and the Agency itself have confirmed with growing regularity that the USDA has long underused its Packers and Stockyards Act competition powers.[299] In 2010, the rumblings of concern over meatpacking competition began, with the first ever joint USDA and DOJ hearings on competition.[300] Then–Attorney General Eric Holder framed the issue as a question, asking whether there is "a lack of free and fair competition" in agricultural markets.[301] Scholars and farmers responded with a resounding yes, particularly focusing on enforcement failures and buyer power.[302]

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292. *Id*. at 173.

293. *Id*.

294. *Id*. at 172; S. REP. NO. 85-706, at 2 (1957).

295. *See* Act of Sept. 2, 1958, Pub. L. No. 85-909, sec. 1(2), § 406(b)(3), (d), 72 Stat. 1749, 1749-50 (codified as amended at 7 U.S.C. § 227(b)(3), (d)).

296. Sec. 1(1), (2), §§ 202, 406(c), 72 Stat. at 1749-50 (codified as amended at 7 U.S.C. §§ 192, 227(c)).

297. *House Meatpacker Hearings (1957)*, *supra* note 7, at 183-84 (statement of Watkins).

298. *Senate Subcommittee Hearings on Meat Industry*, *supra* note 1, at 392 (statement of Butz); *see supra* text accompanying notes 1-10.

299. *See, e.g.*, Organisation for Econ. Co-operation & Dev. [OECD], *Contribution from the United States on Interactions Between Competition Authorities and Sector Regulators*, at 4-5, DAF/COMP/GF/WD(2022)26 (Nov. 23, 2022), https://one.oecd.org/document/DAF/COMP/GF/WD(2022)26/en/pdf [https://perma.cc/KJ49-42V6] ("The Packers & Stockyards Act is a tool to protect the competitiveness and fairness of agricultural markets, but there have been concerns in Congress and the White House that it has been underenforced.").

300. *See* U.S. Dep't of Just. & U.S. Dep't of Agric., Public Workshops Exploring Competition Issues in Agriculture: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplace 56 (Mar. 12, 2010) [hereinafter Introductory Hearing] (statement of Eric Holder, Att'y Gen. of the United States), https://www.justice.gov/atr/media/1244666/dl [https://perma.cc/RV8F-2ZMX] (noting this was the first joint hearing between these agencies on competition issues in the agriculture industry).

301. *Id.* at 11.

302. *See, e.g.*, Carstensen, *supra* note 31, at 2-3; Timothy A. Wise & Sarah E. Trist, *Buyer Power in U.S. Hog Markets: A Critical Review of the Literature* (Glob. Dev. & Env't Inst., Working

Since then, there have been various renewals of attention to the USDA's competition and consumer protection powers, including rulemaking efforts after the 2010 joint hearings, again in 2016,[303] and most recently in 2021 through executive action.[304] Of late, the USDA itself has become frank about past underenforcement. In 2022, a USDA report found that section 202 has been "underutilized" and "underenforce[d] by past Administrations."[305] In this assessment, the Agency optimistically points to prior eras of greater enforcement, but musters only two cases in support.[306] While it is too early to judge the latest efforts to activate these antitrust-like powers, in the past none have had much effect in sparking USDA enforcement.

III. Understanding the Risks Antitrust Abandonment Creates for Competition

As these case studies show, several industry regulators have long disused their antitrust-like powers. This Part defines this pattern of "antitrust

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Paper No. 10-04, 2010), https://core.ac.uk/download/pdf/6397233.pdf [https://perma.cc/WB98-2922] (summarizing the literature and noting that "[r]esearchers have found well-documented evidence of market power on both the seller and the buyer sides of the [U.S. hog] market"); U.S. Dep't of Just. & U.S. Dep't of Agric., Public Workshops Exploring Competition in Agriculture: Poultry Workshop 215-17 (May 21, 2010) [hereinafter Poultry Hearing] (statement of Hilde Steffey, Farm Aid), https://www.justice.gov/atr/media/1244676/dl [https://perma.cc/4F9H-GAPS]; Poultry Hearing, *supra*, at 254-59 (statement of Mike Weaver, President, Contract Poultry Growers Association of the Virginias); Poultry Hearing, *supra*, at 260-62 (statement of John Ingrum); Poultry Hearing, *supra*, at 263-64 (statement of Robert Taylor, Professor, Auburn University); Poultry Hearing, *supra*, at 278-81 (statement of Cindy Johnson, Attorney); Introductory Hearing, *supra* note 300, at 130-31 (statement of Tim Ennis, National Farmers Organization); U.S. Dep't of Just. & U.S. Dep't of Agric., Public Workshops Exploring Competition Issues in Agriculture: Livestock Workshop 120-22 (Aug. 27, 2010) (statement of Chris Sanders), https://www.justice.gov/atr/media/1244701/dl [https://perma.cc/568N-8TA5].

303. *See, e.g.*, Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566, 92566-67 (Dec. 20, 2016) (reflecting that in 2010, the USDA and the DOJ held five joint public workshops on competition in agricultural industries, which led to proposed rules from the agencies that were never implemented). The 2016 rulemaking picked up on this 2010 attempt and itself issued a rule on anticompetitive conduct under subsections 202(a) and (b). *Id.* The rule was withdrawn by the Trump administration. Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594 (Oct. 18, 2017) (withdrawing the 2016 rule on competitive injury).

304. *See generally* Exec. Order No. 14,036, 3 C.F.R. 609 (2022) (announcing a government-wide initiative to enforce competition and calling on various federal agencies, including the USDA, to take part).

305. *Agricultural Competition: A Plan in Support of Fair and Competitive Markets*, U.S. DEP'T AGRIC. 17 (May 2022), https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf [https://perma.cc/9KTH-GM45]. The report explained, "[I]n recent decades, the strength of the Act has been undermined by a combination of regulatory narrowing and underenforcement by past Administrations, budget and administrative cuts (to the agency's policy development and enforcement capacities, and its critical enforcement partners in the Office of General Counsel), and judicial constraints." *Id.*

306. *Id.* at 17 & n.41 (explaining that "[f]or many decades, USDA enforcement helped ensure open markets for producers and competitive market entry for packers and poultry companies" and citing as examples *Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961), and *Swift & Co. v. United States*, 393 F.2d 247 (7th Cir. 1968)).

abandonment," then explains why it matters. It argues that abandonment leaves dangerous and unintended gaps in competition policy and enforcement, in areas of industries with several antitrust risk factors.

A. Defining Antitrust Abandonment

As these case studies show, the histories of shipping, rail, and meatpacking all share a similar antitrust problem. Congress placed the antitrust enforcement function in the hands of non-antitrust agencies. There, this important function has gone almost entirely unused. The regulator in each industry, over the span of decades or more, has taken little action to enforce the sectoral prohibitions against anticompetitive acts and practices. Competition-related enforcement has not been brought, at least not in any sustained way.

The provisions lying fallow in these statutes look much like the general antitrust laws that the DOJ and the FTC regularly enforce across the economy. In shipping, for example, the FMC can challenge agreements that are "likely, by a reduction in competition," to result in anticompetitive effects, in the form of reduced services or increased prices.[307] The Supreme Court observed the similarity of these provisions to antitrust law, noting that while Congress "decided to confer antitrust immunity," "antitrust concepts are intimately involved in the standards Congress chose" in its place for ocean shipping.[308] Each of these provisions sets the agency up to engage in antitrust-like enforcement, but the agency never really does. These regulators may be active in other areas of their mandate, which are not the subject of this Article, but their antitrust-like function stagnates without a clear justification.

There is little justification as to why such power is going unused, and it is often not simply because these industries are highly competitive even without intervention. Historical reasons for forgoing antitrust enforcement—such as the protectionist sentiment from earlier eras of rail and shipping regulation—no longer hold much force,[309] yet still seem to weigh heavily on the STB and the FMC as agencies. It is not entirely clear that these remain the reasons for de-prioritizing competition, rather than competition simply being overlooked by the agencies in these case studies. If the de-prioritization of competition is purposeful, the agencies should articulate their rationales, to distinguish intentional policy decisions from abandonment, and to enable those rationales to be further examined and perhaps debunked.

The case studies suggest this pattern repeats across various types of agencies, models of delegation, and economic rationales for regulation.

307. 46 U.S.C. § 41307(b)(1) (2018).
308. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 245 (1968).
309. *See supra* Section II.A.3.

While the FMC and the STB are independent agencies, the USDA is an executive-branch agency that exists under the auspices of the Secretary of Agriculture, part of the presidential cabinet.[310] The division of power among these agencies also varies, reflecting the different theories of how regulation and antitrust interact. There is little overlap between general antitrust law and the FMC's and the STB's powers—each has exclusive power over antitrust-like law in parts of its industry. But the USDA has shared power with the DOJ over its industry, and that power also overlaps with general antitrust law. Finally, the congressional rationale for regulation in each of these industries varies as well: In ocean shipping, Congress assumed collusive agreements were necessary to avoid perpetual overcapacity and rate wars.[311] In rail, modern regulation was meant to bring financial stability but also adequate competition to the industry after a number of bankruptcies.[312] And in meatpacking, the regulatory regime was imposed to prevent unfair practices by powerful stockyards and packers against farmers.[313]

Despite these varying characteristics of the agencies examined in this Article, the result is the same from each: antitrust abandonment. This suggests there is no specific set of economic conditions or agency characteristics that explains away antitrust abandonment. No single model of congressional delegation of power to agencies, nor a certain economic rationale for regulation, leads to the problem of abandonment. There is a repeating problem across various agencies when antitrust-like powers are delegated. This is "antitrust abandonment": a pattern of long-term disuse of antitrust enforcement powers by industry regulators, without clear justification, and despite indications of its likely need.

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310. Determining which agencies are "independent" can at times be unclear, but the term is commonly used to describe agencies that operate with a greater degree of autonomy and delegated authority than executive-branch agencies; that possess an array of powers over adjudication, investigations, and enforcement; and whose leadership is protected by limits on the presidential power of removal. Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51 (observing the lack of clarity in defining what constitutes an "independent" agency but listing common characteristics among independent regulatory commissions).

311. *See supra* note 34. The Shipping Act's antitrust exemptions (which allow certain agreements among ocean carriers) were intended to control competition, in order to achieve "greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service [and] . . . maintenance of American and European rates to foreign markets on a parity," among other benefits that could only be preserved by permitting "the trade to cooperate through some form of rate and pooling arrangement under Government supervision and control." H.R. DOC. NO. 63-805, at 416-18 (1914).

312. *See supra* notes 158-163 and accompanying text.

313. S. REP. NO. 85-704, at 1 (1957) (reflecting the congressional rationale for the 1921 passage of the Packers and Stockyards Act). The misconduct that led to the passage of the Packers and Stockyards Act was brought to congressional attention by a series of FTC reports, making it perhaps all the more ironic that the FTC was not then tasked with the Act's enforcement. *See supra* note 259 and accompanying text.

These results are case-based, and so not intended to provide a decisive indication that every regulator has or will abandon its antitrust powers. Rather, these case studies are meant to show that, collectively, there is a repeating issue of disuse without good reason for these powers.

Finally, this characterization of abandonment requires context on the broader development of antitrust law and regulation during the time examined here. Portions of this history, particularly the 1980s, were renowned as deregulatory eras. The Carter and Reagan administrations fundamentally reassessed U.S. economic policy, including in antitrust and regulation, and implemented the dramatic repeal of regulations across the economy with the intent to replace this control with open markets and competition. The legislative changes in shipping and rail described here embody this shift away from extensive regulation and toward increasing competition. In a general sense, then, less action by industry regulators might be expected during this period relative to earlier history.

However, multiple of the regulators here, in rail and shipping, *gained* antitrust-like powers during this era. This was because deregulation was intended to give way to competition and, with that, competition oversight more akin to antitrust law. So, although there was a distinct and indisputable move away from regulation in some of the history here, that general narrative does not explain why these agencies did not use their antitrust-like enforcement powers to carry out their newly competition-focused mandates.

The broader antitrust law context over the last forty years is also important to understanding antitrust abandonment. This period of antitrust was marked by a narrowing of the law, and by lessened liability for what was once anticompetitive conduct. The Chicago School famously brought forth an economic revolution in antitrust law in the 1980s and, along with it, the widespread perception that antitrust law's greatest risk was a false positive—that is, mistakenly condemning procompetitive conduct as a violation.[314] The Supreme Court adopted this view, transforming antitrust during this period into a version of itself that was decidedly more defendant friendly than in the past.

The disuse by industry regulators of their antitrust-like powers around this time could thus be cast as merely a manifestation of this broader era in antitrust. Antitrust law was waning, and with it perhaps the "other"

314. Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 2-7 (2015) (describing the transformation of antitrust by Chicago School thinking). *See generally* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007) (discussing how scholars from the University of Chicago and Harvard University have shaped antitrust law). Chicago School scholarship is often classically synonymized with ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1st ed. 1978); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); and Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

agencies with antitrust-like powers took their cue to let their antitrust powers lie fallow.

This is context, but it is far from a full explanation for antitrust abandonment. The antitrust abandonment traced here spans beyond the Chicago School era of restraint in antitrust law—both before and after—which has been undermined in recent years.[315] As early as the 1950s, the USDA was already being chastised by the Senate Judiciary Committee for its inaction. While most of the analysis here is during the STB's reign, from 1995 onward, its practices are a continuation of the legacy and specific rules of the precursor ICC, which created administratively inaccessible rate reviews and scarce reciprocal switching orders. Similarly in shipping, the history suggests that, before the Shipping Act of 1984, the FMC had stronger statutory powers to reject anticompetitive agreements—when it could do so directly without recourse to the courts—and still the Agency rarely concerned itself with competition.[316]

Finally, although the Chicago era saw a narrowing of substantive antitrust law, that does not explain away an absence of enforcement. No one would contend that during this period of antitrust law there was *no* enforcement—the DOJ and the FTC were still active. Contrast this with the industry regulators studied here, which had almost no antitrust-like enforcement over the same period. Broader developments in Chicago School antitrust might have influenced these regulators toward *less* antitrust enforcement and—if these regulators had been bringing cases—made it more difficult to win those cases. But this era of substantive legal change does not explain why such cases did not exist at all, and still do not.

B. Why Antitrust Abandonment Matters

This Article has hinted at, but not yet articulated, why antitrust abandonment matters. As the following Sections explain, antitrust abandonment is a problem because it creates unintended gaps in competition oversight in industries that are prone to anticompetitive conduct. In short, abandonment leaves real antitrust risk in its wake.

1. Abandonment Creates Unintended Gaps in Competition Policy

When industry regulators—some with exclusive enforcement power—fail to use their antitrust capabilities, it leaves unintentional gaps between regulation and antitrust law. Such gaps are a more acute problem

315. A Neo-Brandeisian school of antitrust law that pushes back on Chicago-era narratives has attracted much of the recent antitrust attention, and its proponents led both the DOJ and the FTC during the Biden administration. Baker, *supra* note 20, at 705 (noting the emergence of this Neo-Brandeisian movement); *see, e.g.*, Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 227-46 (2021) (describing but contesting the Chicago School vision for antitrust law).

316. *See supra* notes 122-125 and accompanying text (describing the earlier FMC history).

when the regulator that abandons its antitrust function has *exclusive* authority over anticompetitive conduct. Expert antitrust agencies are blocked from enforcement in certain areas of regulated rail and ocean shipping by statutory exemptions from general antitrust law.[317] When the industry-specific regulators that have exclusive authority are inactive—when they abandon their antitrust-like powers, as has occurred in the case studies here of ocean shipping, rail and meatpacking—this creates a lacuna in competition oversight. No agency is investigating or combatting anticompetitive practices.

This gap is unintentional, rather than by legislative design. Congress repealed what was once extensive regulation in rail and ocean shipping, and sought to replace it with competition and the antitrust-like law that seeks to maintain such competition. In meatpacking, the very purpose of the Packers and Stockyards Act was "to combat anticompetitive and unfair practices in the highly concentrated meat packing industry."[318] Congress envisioned legislative schemes in which an industry-specific regulator would either substitute for or overlap with the FTC and the DOJ in overseeing competition. This has not been the result. The regulator that was statutorily entrusted with competition oversight has not been carrying out this congressional mandate, in one case for more than 100 years.

Antitrust abandonment is framed here primarily as a problem of enforcement gaps. But it is concerning on a deeper level as well, as a failure of democratic control over agencies with delegated responsibility.[319] Congress uses legislation to confer certain of its powers onto federal agencies, which include an amalgam of legislative, executive, and judicial powers that depend on the specific agency.[320] Such delegation has become widely accepted and is a fundamental, necessary tool of modern state governance. Federal agencies then exercise delegated powers to investigate, to make rules, to hold hearings, and, as here, to enforce antitrust-like law in a particular industry.

By this logic, antitrust abandonment is a phenomenon that ought not exist. Congress tasks agencies with carrying out certain of its powers, and

317. *See supra* Sections II.A.1, II.B.

318. *See* United States v. Perdue Farms, Inc., 680 F.2d 277, 280 (2d Cir. 1982) (first citing H.R. REP. NO. 67-77 (1921); and then citing Stafford v. Wallace, 258 U.S. 495, 499-501, 514-15 (1922)).

319. This argument on failures of democratic agency control suggests that antitrust abandonment could be cast as a specific manifestation of a much broader administrative law problem of agency inaction or unresponsiveness. *See supra* note 41.

320. The exercise of this power is itself the subject of controversy where it involves the conferral of executive or judicial power. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992) (summarizing the opposing sides of the disagreement over the unitary executive, whose supporters claim, to varying degrees, that the Vesting Clause of Article II requires that all federal officers exercising executive power be subject to the direct control of the President, and whose opponents contend that Congress has the constitutional power to vest executive power in subordinate federal officers and to insulate these officers to some degree from presidential control).

the agencies, in turn, carry out those tasks. Yet, as this Article shows, abandonment occurs. In the case studies here, Congress expressed via legislation that industry regulators should combat anticompetitive acts, yet they have not done so. As Senator Watkins testified in 1957, the USDA's "almost complete lack of action" in support of competition enforcement under the Packers and Stockyards Act was a failure "to comply with the congressional mandate given the USDA in 1921 to prevent unfair trade practices in the meatpacking industry."[321] The STB's precursor agency was described as similarly unresponsive to political direction by a Deputy Assistant Attorney General: "[T]he ICC is an old agency, and set in its ways. On any absolute measure, there has been very little recent change despite the efforts made by every administration since President Truman's."[322]

When, as here, these regulators then decline to carry out these antitrust functions in any real way, it reflects a failure of congressional delegation as expressed through these statutes.[323] Instead of some form of competition oversight, as Congress intended, abandonment leaves an unintentional void in competition policy.

Antitrust abandonment is part of a repeating, broader problem of unintended space where regulation meets—or fails to meet—antitrust law. Howard Shelanski laments a different type of gap between antitrust and industry regulation, one left by economic cycles of deregulation.[324] He argues that the congressional repeal of industry regulation can create voids in competition policy because even as regulation recedes, removing industry oversight of competition, there often remain practical and common law hurdles to antitrust's re-entry into that space.[325] To avoid such gaps, Shelanski encourages stronger antitrust enforcement during periods of regulatory repeal or scaling back,[326] with antitrust law serving as a backstop against anticompetitive conduct.

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321. *House Meatpacker Hearings (1957)*, *supra* note 7, at 176 (statement of Watkins).

322. Joe Sims, *Inedible Tallow, the Maximum Charges Rule, and Other Fables: Motor Carrier Regulation by the ICC*, 10 TRANSP. L.J. 55, 63 (1978). Note this assessment was being expressed as of the late 1970s. *Id.*

323. *But see* Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 *passim* (2021) (arguing that Congress has acquiesced to judicial weakening of statutes as a form of realistic political compromise for antitrust statutes). Note, however, that Crane articulates this argument of legislative realism for the weakening of antitrust law by courts, not agencies. *Id.*

324. Shelanski, *supra* note 58, at 1940-44.

325. *Id.* at 1944-55. He argues such hurdles include judicial doctrine on the intersection of antitrust and regulation, which is slow to change, and as a result may continue to bar antitrust from previously regulated industries on the assumption that regulation is adequately addressing competition. *Id*. at 1943-44 (discussing the persistent effect of Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), and Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007)).

326. *Id*.

This Article adds to this course of literature with related insight on institutional roles.[327] The gap that Shelanski identifies is created by modification of the substantive law—regulation leaves, but then the common law of antitrust has trouble re-entering. Antitrust abandonment produces a similar problematic result in which neither competition law nor regulation is acting, but its cause is different: the institutional practices in enforcing the law. The law as written, or even as interpreted by the judiciary, is not the primary issue in abandonment. The regulators examined here *have* the statutory power to engage in antitrust-like enforcement. The problem is that they do not use it. Meanwhile the antitrust expert agencies—which are often concerned about anticompetitive conduct in the industry—are statutorily barred or chilled from acting. Effective competition policy where antitrust meets regulation depends not only on substantive theories of their overlap but also on the institutions that enforce such law.

Like the gaps Shelanski identifies, antitrust abandonment can also arise from eras of deregulation. Take, for example, the persistent and unjustified gap in oversight of certain competition in ocean shipping. Shipping Act amendments over the years have repealed shipping regulations in favor of increasing competition, in particular the amendments in the late 1990s that moved toward independent contracting.[328] While this oversimplifies somewhat, the transition should, in theory, have changed ocean shipping from a regulated industry to a largely deregulated industry with a combination of competition and antitrust oversight. When regulation exited, competition and antitrust should have entered as substitutes. This transformation was never truly completed. The antitrust law exemption remained in place, blocking antitrust law from application in areas of ocean shipping. At the same time, the sole agency with the power to prevent anticompetitive practices—the FMC—has abandoned its power to do so. A similar half-measure of transition occurred in rail, where a degree of deregulation led to increasing competition but no real antitrust oversight alongside it. This combination leaves behind a barren field where there is almost no antitrust oversight of agreements among ocean-shipping competitors or competition in regulated rail.

In these industries where there is no antitrust-agency backstop, the risk of harm from antitrust abandonment is at its greatest. But even where there remains shared agency authority—held by both antitrust agencies and industry regulators—abandonment can still be a problem, even if less acute. In meatpacking, the DOJ and the USDA share partially overlapping authority for enforcement of the antitrust-like provisions the Packers and

327. *See* Dogan & Lemley, *supra* note 67, at 729 (identifying another type of gap that can arise in practice between antitrust and regulation, when private actors engage in "regulatory gaming," using the regulation itself to engage in practices that exclude competition); *id.* ("Regulators cannot, should not, and do not substitute for antitrust courts in ensuring vibrant competitive markets.").

328. *See supra* note 105; *supra* text accompanying notes 143-144.

Stockyards Act. This case study adds perspective in an important way distinct from rail or shipping, because it suggests that antitrust abandonment is not solely an issue of exclusive-regulator authority. While the predicted harms to competition from abandonment are likely greater where only one agency has enforcement power and that agency is inactive,[329] abandonment can also occur in instances of shared authority between regulators and antitrust enforcers.

In this scenario of dual authority, antitrust enforcers should, at least in theory, serve as a backstop for competition oversight.[330] If industry regulators are not particularly concerned with competition, antitrust enforcers could still intervene. In the merger context, this has often been true. Where there is joint authority over mergers, the DOJ has often stepped in to prevent anticompetitive transactions when an industry regulator fails to take action.[331] In this scenario, there should be no gap or risk from antitrust abandonment because the DOJ fills it.

For conduct powers, though, this overlap may not function as well in practice as in theory. The DOJ has, at times, cast its role narrowly in meatpacking in light of the USDA's authority—despite the USDA's inaction on antitrust enforcement.[332] Shared authority may reduce the impact of antitrust abandonment, but it does not eliminate it if neither the antitrust enforcer nor the industry regulator is acting. It exists instead in a more complex form, where one agency's presumed action affects the other. Policymakers might expect that one agency or the other will act, but neither has done so robustly. The gap caused by abandonment still exists, though it is perhaps easier to fill, by activating the antitrust enforcer. The

329. For a discussion of such harms, see *infra* Sections III.B.2.a, III.B.2.b.

330. *But see infra* Section IV.B.3 (discussing interagency chilling effects between the USDA and the DOJ and the need for perceptions of shared enforcement responsibility).

331. For example, when the DOT declined to challenge anticompetitive airline mergers the DOJ chose to do so. In fact, after several mergers that the DOJ opposed but the DOT permitted, Congress returned merger review authority over airlines from exclusive DOT power to the DOJ in 1988. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3(c), 98 Stat. 1703, 1703-04 (repealed 1994); *Antitrust Issues in the Airline Industry: Hearing Before the S. Comm. on Com., Sci. & Transp.*, 106th Cong. 14 (1999) (statement of Joel I. Klein, Assistant Att'y Gen., Department of Justice) (discussing agency disagreement in the Trans World Airlines / Ozark and Northwest/Republic mergers). At the same time, industry regulators with joint authority are subject to regular criticism for their inaction on competition. The literature laments the lack of merger challenges by, for example, the DOT in airlines, *see* Paul Stephen Dempsey, *Regulatory Schizophrenia: Mergers, Alliances, Metal-Neutral Joint Ventures and the Emergence of a Global Aviation Cartel*, 83 J. AIR L. & COM. 3, 20 (2018) ("[T]he USDOT never met a merger it did not like, approving each of the twenty-one merger applications submitted to it, even those to which the DOJ vigorously objected . . . ."); FERC in energy industries, Garry A. Gabison, *Dual Enforcement of Electric Utility Mergers and Acquisitions*, 17 J. BUS. & SEC. L. 11, 20-21 (2017) (indicating that between 2006 and 2014, FERC approved 1,273 acquisitions and dispositions and denied only eight); and banking regulators, Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 456 (2020) (observing that the Federal Reserve has reviewed more than 3,500 merger applications from 2006 onward without a single denial).

332. See *infra* notes 448-449 and accompanying text, which discusses the DOJ's narrow view of its authority at times.

DOJ has authority to enforce the Packers and Stockyards Act alongside the USDA, and there are early signs that it is starting to do so.[333]

2. Antitrust Risk in the Abandonment Gaps

Antitrust abandonment creates unintended gaps in competition oversight. These gaps could be of little consequence if the pockets of industry where they exist were generally competitive, even without antitrust enforcement. But as the following Sections argue, quite the opposite is true. Each of the areas of industry where abandonment is happening displays several markers of antitrust risk. Ocean shipping, rail, and meatpacking all have histories of anticompetitive conduct, are more concentrated than ever before, and are now the subject of scholarly and policymaker concern over market power and anticompetitive misbehavior.

These factors point toward a need for close competition scrutiny, not abandonment. A history of antitrust misconduct suggests the risk it will repeat and often weighs in favor of greater antitrust oversight. Industry concentration, while not an antitrust violation in itself, is often viewed as increasing the risk of anticompetitive conduct. It makes it easier for firms to exert market power over consumers and others in the supply chain, because those stakeholders have few other firms to which they can switch. The fewer the firms—the more concentrated the industry—the easier it is thought to be to organize price-fixing or other collusive conduct, which pushes competition out, supply down, and prices upward.

a. Antitrust Risk in Ocean Shipping

During the period of FMC inaction on antitrust, the shipping industry has seen dramatic consolidation. Sixteen of the top twenty global shipping carriers have combined into just three alliances.[334] This is down from four alliances as recently as 2016,[335] and about 360 conferences around the world back in the early 1970s.[336] The combined market share of these alliances is approximately 96% of transpacific export shipments and almost 88% of imports.[337] Contrast this with the period from 1996 to 2011, when

333. Carstensen, *supra* note 18, at 24 (stating that "the antitrust agencies have not been as active and forceful in investigating and enforcing antitrust law standards as they ought to have been with respect [to] agricultural markets" and noting a particular need to focus on output-side harms). On the lack of USDA enforcement, see *supra* Section II.C.

334. *61st Annual Report for Fiscal Year 2022*, *supra* note 105, at 21-22 (noting three remaining alliances).

335. *See* Letter from Renata B. Hesse to Sec'y, *supra* note 96, at 2.

336. *See* Sagers, *supra* note 31, at 790 n.41.

337. *61st Annual Report for Fiscal Year 2022*, *supra* note 105, at 21-22 ("[T]he three global alliances [of shipping carriers] captured a combined market share of 87.6 percent in the transpacific import trade and secured approximately 96 percent of transpacific export trade in the first half of 2022."); *see also* Press Release, White House, *supra* note 140 (estimating that the major

"the leading three alliances operated only about 30% of global container shipping."[338] The DOJ observes that these concentration levels in the ocean-shipping industry in recent years are high enough to be "presumed likely to enhance market power."[339]

Policymakers, scholars, and antitrust enforcers have sounded the anticompetitive alarm in ocean shipping for years. The DOJ has openly criticized the FMC's "monitoring and reporting" approach as inadequate to ensure competition among carriers.[340] This includes the DOJ's publicly challenging the FMC's view that particular agreements are harmless for competition, and urging by the DOJ that the FMC take action.[341] The DOJ's concern is also reflected in its own active enforcement in adjacent markets and conduct around the edges of the Shipping Act's antitrust immunity, where it retains general antitrust jurisdiction.[342] Congress and the President have expressed similar concern over the concentration and potential lack of competition in ocean shipping. The recent Executive Order on Competition notes the consolidation of global shipping and calls on the FMC for more vigorous Shipping Act enforcement on particular issues.[343] In 2022, the White House reported that rates in several areas of shipping had skyrocketed—in some cases by 1,000%—with profit margins of carriers expanding dramatically as well.[344] It expressed concern that ocean carriers were using their market power to impose surprise fees, to change bookings, and to refuse carriage of goods from the United States.[345]

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alliances "now control 80% of global container ship capacity and control 95% of the critical East–West trade lines").

338. *See* Press Release, White House, *supra* note 140.

339. Letter from Renata B. Hesse to Sec'y, *supra* note 96, at 4.

340. *Id.* at 7 ("Monitoring and periodic reporting requirements, such as those the FMC has required of shipping alliances in the past, are insufficient to preserve competition in the container shipping market.").

341. *Id.* at 1 (urging the FMC to seek to enjoin a particular agreement among four ocean shippers as anticompetitive or at least "to ensure the Agreement is narrowly tailored to achieve procompetitive benefits while limiting the risk of anticompetitive harm").

342. *See infra* notes 438-442 and accompanying text.

343. Exec. Order No. 14,036 § 5(o), 3 C.F.R. 609, 620 (2022) (emphasizing enforcement and rulemaking specifically in the area of detention and demurrage); *see also id.* § 1, 3 C.F.R. at 610 (observing that "the global container shipping industry has consolidated into a small number of dominant foreign-owned lines and alliances, which can disadvantage American exporters").

344. Press Release, White House, *supra* note 140.

345. *Id*. Congress tried to respond to this concern in part with 2022 amendments to the Shipping Act that placed new emphasis on competition in the Act's purpose clause and imposed new rules limiting carriers' ability to engage in unfair or unreasonable refusals to ship goods. Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, § 2, 136 Stat. 1272, 1272 (codified at 46 U.S.C. § 40101) (emphasizing "competiti[on]" and "a greater reliance on the marketplace" in the purpose clause); *id.* § 7, 136 Stat. at 1274-76 (codified at 46 U.S.C. §§ 41102 note, 41104 & note) (prohibiting common carriers from denying available cargo space and from assessing unfair late fees called "demurrage" and "detention" fees).

The history of collusive agreements that characterizes ocean shipping exacerbates these concerns.[346] While cartel agreements in shipping are lawful when covered by the antitrust exception, this history shows these companies know how to collude, and have long done so. Each of the three global alliances has agreements filed with the FMC covering vessel and space sharing and coordinating scheduling, among other activity.[347] Any collusion under such agreements remains immune from antitrust law as long as the agreements are effectively filed with the Agency.

In gauging the antitrust risk, it is important to note that the nature of these filed agreements has changed over time. Under the historical conference system, the filed ocean-carrier agreements were price-fixing agreements, which but for the antitrust exception in shipping would be considered among the most egregious of antitrust violations. As shipping deregulated, carriers have replaced this direct rate-fixing with "voluntary guidelines" and information sharing on rates that proliferate across the industry.[348] Today, the filed agreements relate to information sharing, operational partnerships for vessel space sharing, and other coordination.[349] These types of agreements are not presumed anticompetitive like price-fixing but can certainly have anticompetitive effects, and when engaged in by competitors would ordinarily be subject to antitrust scrutiny. The existing agreements are among competitors in a concentrated industry and govern important aspects of ocean-shipping competition, all of which point to antitrust risk. Scholars opine that the antitrust exemption is still shielding conduct that would otherwise violate antitrust law, and enabling carriers to continue price-fixing and ancillary surcharging.[350]

This is not to suggest that the entire history of ocean shipping is characterized by anticompetitive conduct. The ocean-shipping industry has seen significant change in the economic and legal forces that shape it, such as massive technological evolution and trade globalization.[351] These changes have certainly driven industry consolidation,[352] and are not reexamined here.[353] Without minimizing the powerful impact of these develop-

346. Letter from Renata B. Hesse to Sec'y, *supra* note 96, at 4 ("Increases in concentration are of particular concern where, as in the shipping context, there is evidence of past collusion or anticompetitive behavior.").

347. *Fact Finding Investigation 29*, *supra* note 130, at 43.

348. *See supra* note 105.

349. *61st Annual Report for Fiscal Year 2022*, *supra* note 105, at 18 (explaining that, of the 353 agreements on file with FMC at the end of 2022, 263 involve common carriers and most of those are space-sharing agreements, 81 relate to marine terminals rather than carriers, and 9 are characterized as "assessment agreements," which is not explained).

350. Sagers, *supra* note 31, at 816-17.

351. *See id.* at 786-95.

352. *Id*. at 817-18.

353. For a discussion of the most significant of these exogenous industry changes, such as the development of "containerization" in which standard-sized carriers became used on ships, enabling easier intermodal transport to trailers and rail, see, for example, *id.* at 786-95.

ments, the FMC's history of inaction is long, and the risk factors for anticompetitive conduct have been high for some time. So long, in fact, that it becomes difficult to maintain that no anticompetitive enforcement was ever needed in the concentrated, competitor-agreement-riddled ocean-shipping industry.

The current state of the ocean-shipping industry—one of high concentration, with a history and suspicion of anticompetitive conduct—points to antitrust risk that merits oversight. Yet instead of such oversight there is a gap, created by antitrust abandonment. General antitrust enforcers are blocked from policing ocean carriers' agreements by the remaining legislative exception from antitrust law, while FMC appears to have abandoned its antitrust post. The only agency that can take action—FMC—has never brought a single case against economically powerful ocean carriers or engaged in any visible effort to police their anticompetitive agreements. If FMC is engaged in quasi-enforcement, such action is invisible and seems to reflect an incredibly high tolerance for competition risk.[354]

b. Antitrust Risk in Regulated Rail

The rail industry displays several characteristics that suggest antitrust risk is being created by antitrust abandonment. For at least four decades, the STB's antitrust-like powers have gone largely unused.[355] During the same period, the rail industry has grown highly concentrated and now faces concern over anticompetitive practices, though as noted above, regulated rail is a declining proportion of all rail traffic.[356] Within this industry, no agency is working to prevent anticompetitive conduct in regulated rail.

In 1980, when the Staggers Act ushered in the modern era of competition in rail, there were about forty Class I railroads in the United States.[357] Class I rail carriers are the largest according to categorization by annual operating revenues by the STB.[358] By about 2002, there were only seven major railroads remaining, and this has stayed approximately the same since.[359] The few remaining railroads are now owned by just four compa-

354. *See supra* Section II.A.3.

355. *See supra* Section II.B.

356. *See supra* text accompanying note 170.

357. Schmalensee & Wilson, *supra* note 31, at 140.

358. *Economic Data*, SURFACE TRANSP. BD., https://www.stb.gov/reports-data/economic-data [https://perma.cc/74S3-XAMS] (describing the regulatory thresholds by railroad class).

359. Schmalensee & Wilson, *supra* note 31, at 140; Marvin Prater, Adam Sparger & Daniel O'Neil, Jr., *Railroad Concentration, Market Shares, and Rates*, U.S. DEP'T. AGRIC. 1 (Feb. 2014), https://www.ams.usda.gov/sites/default/files/media/Railroad%20Concentration%2C%20Market%20Shares%2C%20and%20Rates.pdf [https://perma.cc/5NAJ-V4ER].

nies in a geographical split that makes essentially "two regional duopolies"—one in the East and one in the West.[360] The remaining companies earn more than ninety percent of rail revenues.[361]

Not all of this consolidation was necessarily problematic.[362] As railroads came out of the bankruptcies and financial distress of the late 1970s, consolidation served to eliminate overbuilt, overregulated railroads, improving the efficiency and stability of the industry.[363] But the 1980 figures of about forty Class I railroads when the Staggers Act was passed already reflect a proportion of this change, down from almost seventy Class I railroads in 1975.[364]

Despite the industry's becoming more financially stable, the STB continued to allow rail mergers well into the late 1990s. While this Article focuses on conduct rather than merger powers,[365] the highly concentrated state of the U.S. railroad industry is directly related to the STB's long-term disuse of its exclusive power to block or approve rail mergers. Since the passage of the Staggers Act, the ICC—and then its replacement agency, the STB—has been the only regulator with the authority to block mergers and other corporate transactions involving rail carriers.[366] Once approved by the STB, transactions become statutorily exempt from antitrust law.[367]

360. *Rail Competition and Service: Hearing Before the H. Comm. on Transp. & Infrastructure*, 110th Cong. 1 (2007) (statement of Sen. James L. Oberstar, Chairman, H. Comm. on Transp. & Infrastructure); *see also Oversight Hearing on the STB's Moratorium on Major Rail Mergers and 15-Month Rulemaking Proceeding on Future Mergers: Hearing Before the Subcomm. on Surface Transp. & Merch. Marine of the S. Comm. on Com., Sci. & Transp.*, 106th Cong. 9-10 (2000) (statement of Linda J. Morgan, Chairman, Surface Transportation Board) (discussing generally the rate of consolidation in the rail industry).

361. *An Introduction to Class I Freight Railroads*, RAILINC (Mar. 23, 2023), https://public.railinc.com/about-railinc/blog/introduction-class-i-freight-railroads [https://perma.cc/96RZ-G9ZH] (noting Class I railways account for ninety-four percent of all freight rail revenues).

362. Some of this change can also be explained for the more technical reason of "reclassification," which occurs when a railroad's revenues shrink to below the threshold that is used to define "Class I" railroads. Schmalensee & Wilson, *supra* note 31, at 140 n.11.

363. *See id*. at 140 (discussing the reasons for rail consolidation through to the early 2000s).

364. *Id.* at 139; *Railroad Antitrust Enforcement Senate Subcommittee Hearing*, *supra* note 147, at 2 (statement of Sen. Herb Kohl, Chairman, Subcomm. on Antitrust, Competition Pol'y & Consumer Rts., S. Comm. on the Judiciary).

365. The STB's disuse of its merger review powers offers another, albeit now historical, example of antitrust abandonment. It is not discussed separately here because the Article focuses on conduct rather than merger powers, and because the STB is free to apply a broader public-interest standard in its merger reviews that could prioritize policy matters other than competition in allowing mergers to proceed.

366. 49 U.S.C. § 11323 (2018) (requiring STB approval of the described railroad-involved transactions); *id.* § 11321(a) (explaining that the STB's powers are exclusive); *see also id.* § 11324(b), (c) (describing the factors and standard the STB must consider in evaluating mergers). The statute provides the STB with "extraordinarily broad discretion" to approve, deny, or impose conditions on such transactions. Pennsylvania v. STB, 290 F.3d 522, 527 (3d Cir. 2002) (quoting S. Pac. Transp. Co. v. Interstate Com. Comm'n, 736 F.2d 708, 721 (D.C. Cir. 1984)).

367. 49 U.S.C. § 11321(a) (2018) ("A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry

In the nearly four decades since it gained this power, the STB (or its precursor, the ICC) has only ever blocked two rail mergers.[368]

At least some of the mergers that the STB permitted were anticompetitive. When the STB approved a merger between the Union Pacific and Southern Pacific railways in 1996, the DOJ called it "the most anticompetitive rail merger ever proposed."[369] Throughout the 1990s, the STB gave little credit to the DOJ's objections to railway transactions,[370] despite the statutory requirement that the STB give "substantial weight to any recommendations of the Attorney General."[371] Even when just two duopolies remained, the STB insisted that these systems were somehow "competitively balanced."[372] The STB's passivity at times led to calls for the DOJ to take over its merger review powers in rail.[373]

Over time, though, even the STB began to concede that it was "seriously concerned" about the competitive consequences of the previously approved mergers and resulting industry consolidation.[374] The Agency

out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.").

368. *See* Grimm, *supra* note 37, at 87 (finding only two mergers that were prevented in this period). This does not appear to count any unofficially "blocked" rail mergers that were abandoned by the parties due to public pressure. *See, e.g.*, Jacquie McNish & Laura Stevens, *Canadian Pacific Drops Efforts to Merge with Norfolk Southern*, WALL ST. J. (Apr. 11, 2016, 7:37 PM), https://www.wsj.com/articles/canadian-pacific-drops-efforts-to-merge-with-norfolk-southern-1460375864 [https://perma.cc/ZS62-B67G].

369. *Testimony by Anne K. Bingaman, Assistant Att'y Gen., Before the Surface Transportation Board*, DEP'T OF JUST. 2 (July 1, 1996) [hereinafter *Bingaman Testimony*], https://www.justice.gov/archive/atr/public/testimony/0718.pdf [https://perma.cc/LXZ2-A36T] ("[N]o one is going to build another railroad to serve these markets. Approval of this merger would result in a monopoly in many markets and a rail duopoly throughout the West—forever.").

370. Massa, *supra* note 37, at 441-42 (observing the STB's disregard for opposition to mergers during the 1990s). Note that some of the earlier opposition was not considered by the DOJ to be "outright": in 1996, DOJ leadership noted in testimony to the STB that, "[o]f the many rail mergers over the last twenty years, the Department has opposed only two outright, both of which were disapproved by the ICC" (the STB's precursor agency). *Bingaman Testimony*, *supra* note 369, at 3.

371. 49 U.S.C. § 11324(d)(2) (2018).

372. *Oversight Hearing on the Surface Transportation Board: Hearing Before the Subcomm. on Surface Transp. & Merch. Marine of the S. Comm. on Com., Sci. & Transp.*, 107th Cong. 9-10 (2001) (prepared statement of Linda J. Morgan, Chairman, Surface Transportation Board).

373. Comm. for a Study of Freight Rail Transp. & Reg. & Transp. Rsch. Bd., *supra* note 185, at 204 (recommending that the power to approve rail mergers be transferred to the DOJ). At present, the DOJ advises the STB on mergers. This study recommended that this be flipped, such that the STB would advise the DOJ instead. *Id.*; *see also* Schmalensee & Wilson, *supra* note 31, at 153 (noting the study's recommendation that power to approve railroad mergers be transferred to the DOJ).

374. Pub. Views on Major Rail Consolidations, 4 S.T.B. 546, 549 (2000) ("We at the Board, like members of the shipping public, are seriously concerned about the competitive consequences of this level of industry restructuring . . . .").

eventually imposed a moratorium barring any further railroad consolidation,[375] which was upheld by the D.C. Circuit.[376] There were no major railroad mergers for decades afterward,[377] though at least one was permitted in 2023 with conditions intended to preserve competition.[378] The damage to industry concentration, though, had been done. Only two duopolies remain—any further Class I rail mergers would result in a regional monopoly.

This concentration exacerbates the risk of anticompetitive conduct in rail. The mergers left behind an industry with very real service problems that failed to realize the benefits promised for customers at the time the transactions were permitted.[379] A 2019 report to STB observes that captive shippers in particular "have no realistic avenue for relief from what they view . . . as abusive practices by powerful, dominant railroads."[380] More recently, the Chair of the STB frankly observed the likelihood of anticompetitive practices in rail and their economic impact:

> Since joining the Board more than five years ago, it has been apparent to me that a lack of competition in the rail industry has allowed monopolistic practices to cause not only an increase in rail prices but a severe deterioration in the quality of rail service. That deterioration in service quality has been a real depressant on the nation's economy . . . .[381]

As noted above, the antitrust risk created by STB inaction is mitigated by the decline of regulated rail as a proportion of overall rail traffic. Since the DOJ retains the power to enforce in *un*regulated rail, this also means that lower and lower amounts of rail traffic are immune from antitrust law.

Still, rail is an extremely concentrated industry, and the subject of suspicion that anticompetitive conduct is occurring. This suggests the need for close antitrust attention industry-wide, yet antitrust exemptions persist,

375. The moratorium was initially temporary, *see id.* at 546, 548, then was permanently imposed, *see* Major Rail Consolidation Procedures, 66 Fed. Reg. 32582 (June 15, 2001) (codified at 49 C.F.R. §§ 1180.0-.11).

376. W. Coal Traffic League v. STB, 216 F.3d 1168, 1170 (D.C. Cir. 2000) (upholding the STB's initial, fifteen-month moratorium).

377. Grimm, *supra* note 37, at 87-88 (observing at the time that the last railroad merger was in 1998). In 1999-2000, two railways sought to merge but ultimately withdrew their application. *Burlington, CN Pact Dies*, CNN MONEY (June 20, 2000), https://money.cnn.com/2000/07/20/deals/burlington/index.htm.

378. Press Release, Surface Transp. Bd., STB Approves CP/KCS Merger with Conditions and Extended Oversight Period (Mar. 15, 2023), https://www.stb.gov/news-communications/latest-news/pr-23-07 [https://perma.cc/DB4C-K8PJ].

379. Major Rail Consolidations, 4 S.T.B at 548 ("[T]he rail sector and the shipping public have been struggling to recover from the disruptions associated with the most recent round of mergers. Those consolidations regrettably have been accompanied by a number of serious service problems . . . . Promised customer benefits have not yet been fully realized, and carrier relationships with customers, rail employees, and local communities have been strained.").

380. Rate Reform Task Force, *supra* note 207, at 11.

381. STB Press Release on Final Rule for Reciprocal Switching, *supra* note 184, at 3.

and leave the DOJ unable to police misconduct in regulated rail. Meanwhile, the STB's powers remain largely abandoned and disused due to the complex and costly barriers that the STB itself has erected. While the Agency recently passed a new rule to try to make competitive access orders available for the first time, it is too soon to assess its impact.[382] For this new rule to be effective, the STB will have to overcome a powerful, lifelong legacy that involves little use of its antitrust-like powers.

c. Antitrust Risk in Meatpacking

Finally, like regulated rail and ocean shipping, U.S. meatpacking is more concentrated than ever before, and has been for decades.[383] Mergers and consolidation in the industry accelerated beginning in the 1980s and have led to ever-increasing shares for ever-fewer companies.[384] Back in 1980, the four largest companies in beef, hog, and chicken processing each held respective market shares in the low- to mid-30% range.[385] Today, the "Big Four" of beef packing now control over 80% of the wholesale beef market.[386] The top four hog-processing firms control approximately 64% of the market, while the four largest chicken processors hold an estimated 53% of the broiler market.[387] Industry concentration is often expressed in antitrust analysis using the Herfindahl-Hirschman Index, a measure thought to reflect high levels of concentration when it exceeds 1,800.[388] For broiler chickens, this figure is over 2,500 for almost 90% of the U.S. processing market.[389]

These shares are also stable across these meatpacking industries, having remained at similar levels or grown in each of these industries since at

382. *See supra* Section II.B.

383. U.S. GEN. ACCT. OFF., GAO/RCED-92-36, OVERSIGHT OF LIVESTOCK MARKET COMPETITIVENESS NEEDS TO BE ENHANCED 3 (1991), https://www.gao.gov/assets/rced-92-36.pdf [https://perma.cc/7J82-9ZJ3] (observing that the meatpacking industry "is now more concentrated than it was in 1921" when the Packers and Stockyards Act was passed, and has been for "decades").

384. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092, 16094 tbl.1 (Mar. 6, 2024) (to be codified at 9 C.F.R. pt. 201).

385. *Id.*

386. *Id.*

387. *Id.* Broiler chickens account for an estimated 98% of all chicken meat sold in the United States. Yaffe-Bellany, *supra* note 17. Several of these poultry companies stand accused of antitrust claims of conspiracy to fix prices and rig bids. *See supra* notes 17-18. Private plaintiffs also filed suits alleging conduct against broiler chicken processors that predate the DOJ's action. *See supra* note 17.

388. *See, e.g.*, U.S. DEP'T JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 5 (2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [https://perma.cc/33DA-RNAC] ("Markets with an HHI greater than 1,800 are highly concentrated . . . ."). Note, however, that this guidance concerns the merger context rather than the conduct-type antitrust violations that are the focus of this discussion.

389. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. at 16096 (explaining that nearly 90% of growers "are facing an integrator HHI of at least 2,500 . . . suggest[ing] that most contract broiler growers in the U.S. are thus in markets where the live poultry dealers have the potential to exercise market power").

least as far back as 2005.[390] This stability is often another indicator of antitrust risk, as few other companies have entered to compete.

While concentration does not necessarily mean that anticompetitive conduct is occurring, observers have long suspected it in meatpacking industries.[391] By 1991, the U.S. General Accounting Office reported that in meatpacking, "[t]he rise in concentration may increase the opportunities for buyers to use anticompetitive practices that could lower the prices paid to producers to below the level that would be set in a competitive market."[392] A number of scholars have also observed the susceptibility of meatpacking to anticompetitive conduct. In recent decades, meatpacking, particularly poultry, has shifted in large part to advance contracting for sales, in place of the negotiated or spot-market sales that were once common.[393] As far back as 2010, scholar Peter Carstensen explained that these advance poultry contracts, which have replaced any real public (spot) market, "can be very abusive in their dealings with farmers."[394] In the few areas where multiple buyers for poultry remain, he argued the firms still tend not to compete.[395]

More recently, policymakers and other scholars have joined this critique, sounding the alarm over packers' using their buyer power to engage in abusive and opaque contracting practices in beef, pork, and, in particular, poultry.[396] The vertical integration of packers means that farmers are contracting with the same parties on both ends of their business: packers are both their suppliers of young animals for raising and their buyers of the raised animals for processing.[397] The result, commentators argue, is the power to squeeze farmers, leaving them with little choice or power over

390. Scope of Section 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566, 92575 tbl.5 (Dec. 20, 2016) (noting four-firm concentration in livestock, hogs, and broilers from 2005 to 2015), *withdrawn*, Scope of Section 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594 (Oct. 18, 2017).

391. *See* sources cited *supra* note 302.

392. U.S. GEN. ACCT. OFF., *supra* note 383, at 3.

393. See Scope of Section 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. at 92573 tbls.2 & 3, which shows large shifts in the percentage of cattle and hogs sold through negotiated (spot-market) sales and through advance-contracted sales. For example, in 2005, nearly sixty-five percent of fed cattle were sold on the spot market; by 2015 this figure had dropped to just above twenty-five percent of sales. *Id.*

394. Carstensen, *supra* note 18, at 12.

395. *Id*.

396. Hafiz & Miller, *supra* note 14 (lamenting the anticompetitive effects of vertical integration in chicken and pork contracting practices); Kades, *supra* note 18, at 10 (summarizing selected concerns over anticompetitive contracting practices); Carstensen, *supra* note 18, at 9-11 (expressing concern over anticompetitive contracting practices in beef, chicken, and, to a lesser extent, pork processing); Letter from Rep. Steve King to William Barr, Att'y Gen., and Sonny Perdue, Sec'y of Agric. (Apr. 14, 2020), https://www.legistorm.com/stormfeed/view_rss/1463576/member/318/title/king-seeks-doj-usda-investigation-of-illegal-price-manipulation-in-cattle-meatpacking-industry.html [https://perma.cc/4BWC-2WCW] (calling for an investigation into "potential market and price manipulation, collusion, restrictions on competition and unfair and deceptive practices under antitrust laws and the Packers and Stockyards Act").

397. Hafiz and Miller, *supra* note 14.

whom to contract with, and creating opportunities for the exclusion of competition.[398] The USDA has just begun to take rulemaking action in response to such concerns, but instead of a competition-focused perspective it has viewed this misconduct primarily through a fairness or deception lens.[399] Very recently, the DOJ has brought a case in poultry with claims under both general antitrust law and the consumer protection provisions of the Packers and Stockyards Act.[400] While this is a positive step toward filling the abandonment gap, the evidence in the case also serves to confirm that anticompetitive conduct was occurring.[401]

This concentration and suspicion of anticompetitive conduct in meatpacking exists alongside a history of anticompetitive action in the industry. The Packers and Stockyards Act was passed for the purpose of combatting anticompetitive and unfair practices in the highly concentrated meatpacking industry,[402] which the FTC had found were extensive and concerning.[403] The industry has only grown more concentrated since.

* * *

None of this discussion proves anticompetitive conduct is occurring in meatpacking, ocean shipping, or regulated rail, nor does it set out to. Instead, it shows that many factors which would ordinarily support close antitrust scrutiny are present in these areas of abandonment: high and growing concentration among few firms, histories of anticompetitive conduct, and frequent suspicion and concern that market power is being abused. Further, each industry plays an essential role in the U.S. economy, moving goods in and across the country and feeding citizens. All of this commends careful attention to competition—not the polar opposite of antitrust abandonment that is now occurring. Competition oversight is needed and appropriate in these areas of the economy, which makes antitrust abandonment a pressing problem.

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398. *Id.*; Kades, *supra* note 18, at 10-11; Carstensen, *supra* note 18, at 9-11.

399. All recent USDA regulatory action has focused on subsections 202(a) and (b) of the Act, which may not require proof of anticompetitive effects, *see supra* note 252, and are focused on fairness and deception. *See* Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092 (Mar. 6, 2024) (to be codified at 9 C.F.R. pt. 201); Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. 83210, 83224 (Nov. 28, 2023) (to be codified at 9 C.F.R. pt. 201) (requiring new disclosures to improve the transparency of contractual dealings in the poultry-tournament system); Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. 53886 (proposed June 28, 2024) (to be codified at 9 C.F.R. pt. 201). While fairer markets may well set the stage for more robust competition, deception and fairness are typically the domain of consumer protection law, whereas antitrust law focuses directly on competition.

400. *See infra* note 427.

401. *See infra* note 427.

402. *See* H.R. REP. NO. 67-77, at 1-3 (1921); United States v. Perdue Farms, Inc., 680 F.2d 277, 281 (2d Cir. 1982) (observing that this was Congress's purpose in passing the Act).

403. *See supra* text accompanying note 260.

IV. The Cure and Prevention of Antitrust Abandonment

This Part considers the legal and policy implications of the antitrust abandonment now occurring, and how to avoid it in the future. It argues that fixing this abandonment requires a significant shift in expectations—away from action by long-dormant industry regulators and toward action by expert antitrust law enforcers. Achieving this shift will require at least two actions: (1) legislative change to repeal arcane antitrust exceptions in some industries, and (2) more subtle changes in perceptions of the need for antitrust enforcement in regulated industries.

A. Shifting Expectations of Antitrust-Like Enforcement Away from These Industry Regulators

First and foremost, the pattern of antitrust abandonment demonstrates that policymakers are overdue for an important shift in their expectations that regulators will enforce antitrust-like law. Lawmakers, along with scholars and to some extent antitrust agencies, have long anticipated that the industry regulators examined here will someday begin to use their antitrust enforcement powers. This history of antitrust abandonment suggests this expectation has been unreasonable, or at least unrealistic, for decades or in one instance, for more than a century. Instead, the general assumption should be that these regulators, and perhaps other, similar regulators, are unlikely to use antitrust enforcement powers to any great extent. This shift has important implications for policy and law.

Because of the current expectation of action, Congress and other stakeholders have pushed regularly for these industry regulators to use their antitrust-like powers.[404] With the right combination of chastising, encouraging, and other prompting, the sense seems to be that these regulators will start enforcing. This perspective was revived most recently in President Biden's 2021 Executive Order on Competition, which expresses a policy of antitrust law enforcement, and points to the agencies examined here, among others, to achieve this.[405]

But as these case studies in antitrust abandonment show, the FMC, the STB, and the USDA are not using their antitrust powers, and never have to any real extent. This is as true as it is unchanging. None of the usual policy levers or political controls seem to move these agencies to use their statutory powers to prevent anticompetitive acts in a sustained or effective way, or even at all in some instances. At a certain point, this history of

404. *See supra* Part II.

405. Exec. Order No. 14,036 §§ 1, 2(c), 2(e), 3 C.F.R. 609, 609-12 (2022) (expressing a policy of antitrust law enforcement; analogizing to "traditional antitrust laws" the Packers and Stockyards Act, the Shipping Act of 1984, and the ICC Termination Act of 1995; and noting that the USDA, the FMC, and the STB are among the agencies and departments that administer "such or similar authorities" to the antitrust laws).

abandonment makes the very expectation of enforcement by these regulators unreasonable in itself.

The longstanding abandonment of antitrust enforcement powers traced throughout this Article suggests that the expectation that these non-antitrust agencies will actively enforce antitrust law is misplaced, or at least outsized relative to the likelihood of action. The problem may be in part the results of the disuse, but it is also the expectation that such disuse will change—Congress and scholars continue to treat it as mutable and somehow unexpected, when the enforcement records of the agencies examined here suggest quite the opposite. While the contention here is not that abandonment will necessarily occur when an industry regulator is tasked with antitrust enforcement, this examination of antitrust abandonment suggests that the problem has occurred often enough that it should be accounted for in competition policy and legislation.

This observation is not offered as an indictment of, or to blame, the regulators themselves. Antitrust abandonment should, in a sense, be entirely predictable. Ask a resource-constrained government agency to add another responsibility to its mandate—one that is outside its areas of specialization, and for which it lacks the necessary expertise, much less any particular concern—and that agency is likely to be inactive in carrying out that responsibility.

Rather, the point is that antitrust abandonment calls for a change in expectations of regulator action that underlie policy. Instead of anticipating these regulators will suddenly start acting more like antitrust enforcers, this history suggests policymakers should understand that such enforcement is likely to be modest or non-existent. It is not likely to be fruitful to continue to push these industry regulators to use their dormant antitrust enforcement powers. This approach has not worked in the past and there are no clear reasons why it would now. It would be much more realistic and useful, in light of this pattern of abandonment, for policymakers to pursue the goal of active antitrust enforcement through other means.

Such acknowledgment—that this antitrust-like enforcement is unlikely to occur—is important because of the policy changes it should precipitate. This is not a dystopian call to give up on these regulators by any stretch. Regulators possess specialized industry expertise, which makes collaboration important to the success of antitrust enforcers in regulated industries. Rather, this shift in expectation is an essential precursor to better and more effective allocation of enforcement power over antitrust-like law. It is a reorientation that seeks to improve decision-making about institutional roles, and the related reform of existing statutory powers to allocate antitrust powers, now and in the future.

This shift has immediate policy implications. Take, for example, the latest effort to prompt regulators to engage in competition enforcement: President Biden's 2021 Executive Order on Competition. The Order, in

essence, tasks every federal agency with promoting competition in various ways, calling for a "whole-of-government" approach to competition policy and enforcement.[406] Its goal is laudable: activating the federal government apparatus as a whole, to encourage competition across the U.S. economy.

In the specific sense of enforcement expectations, though, the Order is in tension with the lessons of antitrust abandonment. The Order strongly implies that the regulators examined in this Article should use their antitrust enforcement powers. It begins by declaring an overarching policy of "enforc[ing] the antitrust laws."[407] It then calls specifically on the agencies examined here, pointing to their empowering legislation as analogous to "the traditional antitrust laws,"[408] and their authorities as similar to those of antitrust agencies, though industry-specific.[409] The Order indicates that these statutes charge such agencies with protecting competition, including by "policing . . . abusive business practices."[410]

In no uncertain terms, the Order then specifically directs several of the regulators examined here to enforce—despite their abysmal track records of using their antitrust-like enforcement powers. It encourages the Federal Maritime Commission to "vigorously enforce the prohibition of unjust and unreasonable practices" under the Shipping Act for detention and demurrage.[411] It pushes the Secretary of Agriculture, through the USDA, to take action to "further . . . the vigorous implementation" of the Packers and Stockyards Act in relation to competition.[412] While the Order does not specifically demand action on the antitrust-like powers examined here, that is in part because two of the agencies are independent. The core message of enforcement is hard to miss, with the Order mentioning the term "enforce" or "enforcement" thirteen times.[413]

The case studies in this Article suggest that pressing these beleaguered industry regulators to suddenly use their long—or in some cases, always—dormant antitrust-like powers is unlikely to have much effect. Such pressure has been tried before for these regulators with little to show by way of results.[414] The Order, in that sense, is repeating history without clarifying what distinguishes this effort from others in the past. The push

406. *Id.* § 2(g), 3 C.F.R. at 612.

407. *Id.* § 1, 3 C.F.R. at 610.

408. *Id.* § 2(c), 3 C.F.R. at 611-12 (analogizing to the Packers and Stockyards Act, 7 U.S.C. §§ 181-231 (2018); the Shipping Act of 1984, 46 U.S.C. §§ 40101-41309 (2018); and the ICC Termination Act of 1995, 49 U.S.C. §§ 1301-1326, 10101-16106 (2018), which created the STB and granted it the powers held by its precursor, the Interstate Commerce Commission).

409. Exec. Order No. 14,036 § 3(a), 3 C.F.R. 609, 612 (2022).

410. *Id.* § 2(d)(i), 3 C.F.R. at 612.

411. *Id.* § 5(o)(i), 3 C.F.R. at 620 (specifically calling for enforcement "in the context of detention and demurrage pursuant to the Shipping Act, as clarified in 'Interpretive Rule on Demurrage and Detention Under the Shipping Act,' 85 Fed. Reg. 29638 (May 18, 2020)").

412. *Id.* § 5(i)(i), 3 C.F.R. at 615-16.

413. *See id. passim*.

414. *See supra* Part II.

for enforcement by these agencies is not likely to be fruitful in closing abandonment gaps.

To be clear, this skepticism is specific to the enforcement by these regulators of antitrust-like law. It is far from a wholesale rejection of the Order. The Order calls for other types of action, such as collaboration among agencies, agency rulemaking, and for agencies to consider how their policies may affect competition. These actions are not addressed by this Article's study of enforcement records, but may be more reasonable and achievable. For example, I have argued elsewhere that agency collaboration is invaluable in modern digital regulation.[415]

It is worth distinguishing among these various agency powers and obligations over competition,[416] particularly the fairer administrative responsibilities for competition *policy* impacts or the like on one hand, and the seemingly futile pressure on these regulators for antitrust *enforcement* on the other. The Order also seeks to imbue federal agencies with the obligation to consider the effects of their policies on competition, which seems more useful and fairer than asking for them to enforce antitrust law. There is evidence that such policy consideration is achievable. Agencies like the FCC have long considered competition in carrying out their regulatory mandates. The SEC, while choosing to prioritize other pillars of its mandate, also considers the effects of its policies on competition and has recently sought to revitalize the centrality of competition to its mandate.[417] It is reasonable to prevail upon these regulators to consider and encourage competition where it is part of their mandate, as the Order does.[418]

Further, the Order specifically instructs that the regulators discussed here shall consider rulemaking on specific aspects of fairness in their industries.[419] These agencies have taken much action in response.[420] In fact, so far, the effects of the Order on the regulators studied here are consistent with this distinction between antitrust-like enforcement as unlikely on one hand, and action like rulemaking that is more realistic on the other. Much of the response to the Order by the regulators examined here has been to pass new rules. The USDA has been productive, with at least three issued

415. Erika M. Douglas, *Constructing the Digital Regulatory Ecosystem: Agency Collaboration*, 26 VA. J.L. & TECH. 1 (2023).

416. *See* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT, at xv, 141-43 (2011) (arguing that enforcement is "not the only" means of agencies' setting antitrust policy, and later suggesting that rulemaking is an underused alternative tool at the FTC).

417. Robert J. Jackson, Jr., Comm'r, Sec. & Exch. Comm'n, Competition: The Forgotten Fourth Pillar of the SEC's Mission (Oct. 11, 2018), https://www.sec.gov/newsroom/speeches-statements/speech-jackson-101118 [https://perma.cc/Z5ZR-KYHA] (calling for a renewal of attention to competition within the SEC's mandate).

418. Exec. Order No. 14,036 § 2(d)(iii), (iv), 3 C.F.R. 609, 612 (2022).

419. *Id.* § 5, 3 C.F.R. at 614-23.

420. *See infra* notes 422-425 and accompanying text.

or pending new rules, on contracting transparency in live poultry,[421] anti-discrimination in meatpacking,[422] and the consumer protection–like powers under subsections 202(a) and (b) of the Packers and Stockyards Act.[423] The STB has issued a new rule on reciprocal switching to try to make orders for competitor access more available.[424] The FMC has proposed a rule on unfair refusals to deal, though the DOJ has already objected to the FMC's overly permissive approach to its substance.[425] This study of antitrust abandonment of enforcement does not seek to examine the history of rulemaking by these agencies, except to refer to it where intertwined with enforcement.

This action stands in contrast to the antitrust-like enforcement record of these agencies, where the status quo has largely continued after the Order. The FMC has not filed any Shipping Act cases challenging anticompetitive conduct by ocean carriers. Nor has the STB granted any reciprocal switching remedies, though it has a single pending rate review as of late 2023.[426] The USDA has not filed any Packers and Stockyards Act cases under subsections 202(c) through (g). The antitrust-like enforcement record of these regulators is the same as it always has been—virtually nonexistent.

Perhaps the most significant enforcement in these areas of law comprises two very recent, DOJ-led cases that allege consumer protection violations of the Packers and Stockyards Act in poultry, an area of meat processing where the USDA does not have statutory power to bring its own

421. Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. 83210 (Nov. 28, 2023) (to be codified at 9 C.F.R. pt. 201) (requiring new disclosures to improve transparency of contractual dealings in the poultry tournament system).

422. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092 (Mar. 6, 2024) (to be codified at 9 C.F.R. pt. 201) (combatting practices that discriminate on the basis of a protected ground in commercial interactions in meatpacking).

423. Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. 53886 (proposed June 28, 2024) (to be codified at 9 C.F.R. pt. 201). This rule seeks to clarify that competitive effects are not required for a subsection 202(a) case, which is one of the consumer protection–like powers the USDA holds under section 202. *See also Agricultural Competition: A Plan in Support of Fair and Competitive Markets*, *supra* note 305, at 2, 8 (identifying USDA's other (non-enforcement) actions in response to the Executive Order, such as direct monetary assistance to producers and setting up an online portal for competition complaints).

424. *See supra* Section II.B.2 (discussing the new reciprocal switching rule).

425. U.S. Dep't of Just., Comment Letter on Proposed Rule on Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier 5 (Oct. 21, 2022), https://www.justice.gov/atr/page/file/1567946/dl [https://perma.cc/5QKC-FP7P] (encouraging the FMC to consider including a termination of prior profitable dealings as an indicator of unreasonableness, which is a common indicator in antitrust law but not included in the FMC's proposed rule).

426. *Quarterly Status Report of Rate Complaint Cases Before the STB – 3rd Quarter 2023*, SURFACE TRANSP. BD., https://www.stb.gov/wp-content/uploads/Report-on-Rate-Case-Review-Metrics-Third-Quarter-September-30-2023.pdf [https://perma.cc/B3FQ-JXU5] (listing every rate review in the STB's history from 1996 to present with the case result, and noting Omaha Public Power District v. Union Pacific Railroad Co., filed in 2022).

administrative actions.[427] These claims do not invoke the antitrust-like provisions of the Act examined here, but instead were brought under the consumer protection–like subsections of section 202, as well as section 1 of the Sherman Act.[428] Still, the fact that Packers and Stockyards Act claims have been filed at all is significant, as is the USDA's cooperation in these cases. If anything, though, the actions being brought by the DOJ reinforce the solution proposed below: to empower antitrust enforcers to bring cases, in collaboration with regulators.[429]

While the Order is used here as a current example, it is not alone in doubling down on misplaced expectations that industry regulators will enforce antitrust-like law. Recent legislative action in shipping provides another example. The Ocean Shipping Reform Act of 2022 confers several new powers on the FMC. Notably for this discussion, this Act tasks the FMC with determining "whether congestion of the carriage of goods has created an emergency situation of a magnitude such that there exists a substantial, adverse effect on the competitiveness and reliability of the international ocean transportation supply system"—and, if it has, to assess the scope of a necessary order to resolve the situation.[430] This places the FMC once again in the role of assessing the competitiveness of the industry, despite its historical difficulty in doing so. The amendments leave the antitrust exemption for shipping once again untouched.[431]

This redoubling of FMC responsibility, while perhaps reasonable to advance other regulatory goals, seems misplaced when it comes to achieving or supervising competition. Even when the FMC possessed the power to reject carrier agreements outright at the time of filing, from 1961 to 1984, it never exercised that power to any great effect. And the FMC has always had the power to challenge carrier agreements after filing. It has never done so. The primary problem for competition is not a lack of agency power granted by the statutory text, but rather a lack of *exercise* of that power. The expectation should be that this oversight will continue to be minimal or at least light-handed, and that is not reflected in these 2022 amendments.

Given the history of antitrust abandonment by such regulators, these recent legislative and executive pushes for industry regulators to join in

427. *See Koch Foods* Complaint, *supra* note 279 (alleging section 202(a) violations and a Sherman Act violation); *Cargill* Complaint, *supra* note 18 (alleging a section 202(a) violation and a Sherman Act violation).

428. *See Koch Foods* Complaint, *supra* note 279; *Cargill* Complaint, *supra* note 18.

429. *Cf. Agricultural Competition: A Plan in Support of Fair and Competitive Markets*, *supra* note 305, at 14-16 (discussing the USDA-DOJ collaboration).

430. Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, § 18(b), 136 Stat. 1272, 1281-82.

431. There are, however, recent bills that propose to eliminate much of the exemption. *See* Ocean Shipping Antitrust Enforcement Act of 2023, H.R. 1696, 118th Cong. (2023) (proposing to repeal 46 U.S.C. § 40307 (2018), the antitrust exception, but preserve the exception for certain other agreements).

antitrust enforcement seem misplaced. The experience across industries with antitrust abandonment suggests that these regulators are either unable to or uninterested in taking up the mantle of antitrust enforcement.

Worse, if a push for these industry regulators to use their antitrust powers suddenly worked—for the first time—it could do more harm than good. It is not clear whether these industry regulators have the substantive expertise to evaluate anticompetitive conduct or to make well-founded decisions on when to intervene. At times, it appears almost certain they do not. While such expertise varies by agency,[432] the FMC, for example, has often contended that the shipping markets it oversees are competitive while the DOJ has reached the opposite conclusion. A sudden decision by these regulators to use their antitrust enforcement powers, unless accompanied by a serious build-out of antitrust competency, could lead to unjustified interventions and false positives that harm competition in these important industries.

B. Shifting Expectations of Enforcement Toward Antitrust Expert Enforcers

To achieve effective antitrust enforcement in abandoned spaces—which this Article assumes is desirable—the shift in expectations must not just be *away* from industry regulators. It must also move *toward* the empowerment of some other entity or entities that are likely to enforce antitrust law in these abandoned spaces. The prime candidates to bear these expectations of enforcement are the agencies that bring the vast majority of federal antitrust cases in general antitrust law: the DOJ and the FTC.[433] It would be more productive for policy and law to focus on reviving DOJ or FTC authority in these regulated spaces than to continue to press non-antitrust agencies to enforce long-abandoned, stray antitrust provisions.

This Section first explains why these federal antitrust enforcers are motivated experts that are more likely to act in these areas of abandonment, given the chance. It then examines what is required to achieve such a shift. The first practical step in rail and ocean shipping is legislative change to empower expert antitrust enforcers, and this Section examines several possible forms this change could take.

Importantly, though, this Section argues that legislative change is not adequate, standing alone, to reactivate antitrust enforcement in areas of abandonment. There must also be a shift in agency perception of the need

432. The STB seems likely to have developed some substantive expertise around competition through its analysis of competition in rate reviews. However, if the STB's competition powers were suddenly used more widely, they could disrupt markets more than enable them. Other agencies, like the FMC, seem to have trouble recognizing competition problems in their industries. *See supra* Section II.A.

433. Other possibilities include state attorneys general and private plaintiffs.

for antitrust action in these regulated industries, to create a sense of shared responsibility for action alongside regulators.

1. A Preliminary Matter: Antitrust Expert Enforcers Are Likely to Be More Active Enforcers in Areas of Antitrust Abandonment

This Article anticipates that expert antitrust agencies—the DOJ and the FTC—will be more active in competition enforcement than the industry regulators examined here. There are several good reasons for this expectation.

First, achieving more antitrust enforcement than the status quo in these areas of industry would not take much on the part of the DOJ or the FTC. The point of this examination of antitrust abandonment is that there has been almost *no* enforcement by the industry-specific regulators considered here. For example, in nearly forty years, the FMC has brought exactly zero Shipping Act cases to address unreasonable anticompetitive effects of ocean-carrier agreements.[434] The records of the USDA and the STB are similarly sparse. Relative to this baseline, even *some* claims by government plaintiffs would be an improvement.

While active enforcement would be ideal, even a realistic threat of antitrust claims by the DOJ or the FTC could have positive effects on competition in these industries. Right now, the industry participants in areas of antitrust abandonment have long known that no one is watching. They can rest assured that their anticompetitive acts are highly unlikely to be caught by industry regulators—or if they are caught, that enforcement action is unlikely. The DOJ and the FTC would pose a new and credible risk of expert investigation and enforcement, because these federal enforcers regularly bring credible cases. This threat casts a shadow larger than any cases themselves. It changes the risk assessment for bad actors by increasing the likelihood that their anticompetitive conduct within the industry will be discovered and prosecuted. Even a modicum of antitrust action by the DOJ or the FTC should have the effect of chilling anticompetitive conduct beyond the companies subject to the enforcement.

Several factors suggest that these expert antitrust enforcers are interested in more active enforcement in shipping and rail. The DOJ has regularly sought the repeal of the Shipping Act's antitrust exemption and has pushed the FMC to be more active in policing anticompetitive shipping agreements.[435] The DOJ has publicly disagreed with FMC inaction in specific cases and has more broadly opposed the FMC's view that monitoring

434. *See supra* Section II.A.

435. *See* Letter from Renata B. Hesse to Sec'y, *supra* note 96, at 2; *Hearing on Shipping Act Reforms (2000)*, *supra* note 120, at 48 (statement of Nannes) ("[T]he Antitrust Division does not believe that the ocean shipping industry has extraordinary characteristics that warrant the exemption from the antitrust laws that it currently enjoys."); ADVISORY COMM'N ON CONFS. IN

without enforcement is adequate to maintain competition in shipping.[436] Throughout the 1990s, the DOJ similarly and publicly disagreed with mergers that the STB approved—as noted above, calling one transaction "the most anticompetitive rail merger ever proposed."[437] As further evidence of likely action, where the DOJ still retains remnants of antitrust jurisdiction over shipping and related businesses, it has been engaging in recent enforcement.[438] This includes a series of cases the DOJ brought from 2014 to 2016 for price-fixing, bid-rigging, and market allocation in non-containerized ocean shipping, which ended with fines of over $230 million and several prison terms.[439] The DOJ has also prosecuted freight transporters between the United States and Puerto Rico for price-fixing and bid-rigging,[440] and has actively scrutinized mergers in related industries such as shipping-

OCEAN SHIPPING, *supra* note 121, at 69 (noting antitrust agencies "favor the removal of antitrust immunity"). There is, however, an exception to this modern trajectory in the deregulatory era of the early 1980s. *See* Letter from Kevin D. Rooney, Assistant Att'y Gen. for Admin., Dep't of Just., to William J. Anderson, Dir., Gen. Gov't Div., U.S. Gen. Acct. Off. (Jan. 13, 1982), *reprinted in* U.S. GEN. ACCT. OFF., GAO/PAD-82-11, CHANGES IN FEDERAL MARITIME REGULATION CAN INCREASE EFFICIENCY AND REDUCE COSTS IN THE OCEAN LINER SHIPPING INDUSTRY app. 1, at 38 (1982) (calling for greater freedom for shippers to collude with "restrictive business practices").

436. *See supra* Section II.A.3.

437. *Bingaman Testimony*, *supra* note 369, at 2 ("[N]o one is going to build another railroad to serve these markets. Approval of this merger would result in a monopoly in many markets and a rail duopoly throughout the West—forever.").

438. As explained above, the Shipping Act leaves the following subjects to antitrust law: carrier conduct outside the bounds of an FMC-filed agreement, 46 U.S.C. § 40307(a)(3)(A), (B) (2018), carrier mergers and acquisitions, *id.* § 40301(c), and domestic shipping and agreements involving foreign-to-foreign shipping that still meet a threshold for effects on U.S. commerce, *id.* § 40307(a)(4) (exempting foreign agreements unless they have a "direct, substantial, and reasonably foreseeable effect on the commerce of the United States"); *see also* Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950, 957 (9th Cir. 1991) (affirming an FMC finding that it lacked jurisdiction over entirely foreign shipping).

439. Brent Snyder, Deputy Assistant Att'y Gen., Dep't of Just., Remarks at the Yale Global Antitrust Enforcement Conference (Feb. 19, 2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust [https://perma.cc/H9Q2-J2GS] (referring to these shipping conspiracy cases as "the largest domestic conspiracy ever prosecuted in terms of affected commerce"); Press Release, Dep't of Just., International Shipping Executives Indicted for Colluding on Bids and Rates (June 27, 2017), https://www.justice.gov/opa/pr/international-shipping-executives-indicted-colluding-bids-and-rates [https://perma.cc/4TB9-8FAE] (summarizing fines in ocean-shipping cases involving non-containerized cargo). Non-containerized cargo is also termed "roll-on, roll-off" cargo and includes products such as automobiles, construction equipment, and agricultural equipment. As the name implies, this cargo is rolled onto and off of a vessel instead of being placed into cargo containers.

440. Press Release, Dep't of Just., Former Executive Convicted for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico (Jan. 29, 2013), https://www.justice.gov/opa/pr/former-executive-convicted-role-price-fixing-conspiracy-involving-coastal-freight-services [https://perma.cc/ELE9-8EJW] (describing coastal water freight cases ending in forty-six million dollars in criminal fines and prison sentences for five individuals). As domestic transportation, this business is not subject to the Shipping Act exemption.

container-handling equipment,[441] and refrigerated shipping containers.[442] This recent DOJ activity, despite the Shipping Act exemption, signals the Agency's interest in the shipping industry and strongly suggests that if given authority it would actively enforce.

Enforcement action is made all the more likely by its centrality to the purpose and mandate of the FTC and the DOJ. The Antitrust Division of the DOJ and the FTC's Bureau of Competition exist to pursue competition enforcement and policy. Because competition is core to their mandate, these expert agencies are more likely than industry regulators to engage in antitrust enforcement. The industry regulators in the case studies here, in contrast, have mandates that range far beyond the antitrust-like provisions examined in this Article. Their portfolios of responsibility encompass an array of considerations related to safety, access, financial stability of the industry, and other matters of broader public interest. This collection of goals may include some that are in tension with competition, such as the portion of the STB's mandate that tasks it with ensuring the financial soundness of the industry.[443] This explains, at least in part, why the antitrust enforcement powers of these industry regulators have fallen by the wayside. As scholars Stacey L. Dogan and Mark A. Lemley observe, "agencies that view competition as secondary—or view it through the lens of a particular industry's characteristics and interests—are less likely to create and enforce rules that optimally encourage competition."[444] For antitrust expert enforcers, by contrast, such action is the very reason for their existence. This centrality of competition to their role in the administrative state makes it more likely that the DOJ and the FTC will actively enforce in abandoned areas of the economy, given the opportunity.

The day-in and day-out focus on competition at the DOJ and the FTC also makes enforcement more likely because it gives these agencies the expertise needed to spot competition concerns—something that seems to be a challenge for some industry-specific regulators. This expertise argument extends to the law as well, as the language of the antitrust-like provisions examined here is quite similar to the antitrust laws that the FTC and the DOJ already enforce. This suggests that these expert antitrust agencies are

441. Press Release, Dep't of Just., Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue (Mar. 29, 2022), https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department [https://perma.cc/EYK5-323N]. The parties ultimately abandoned the transaction.

442. Press Release, Dep't of Just., Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (Aug. 25, 2022), https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk [https://perma.cc/W6TT-2DV7]. Here too, the parties ultimately abandoned the transaction.

443. *See* 49 U.S. Code § 10101 (2018) (describing a number of federal rail transportation policy goals, including "foster[ing] sound economic conditions in transportation").

444. Dogan & Lemley, *supra* note 67, at 698.

well positioned to bring their institutional knowledge to bear in these new contexts.

In sum, the DOJ and the FTC have expertise, mandates, and track records that suggest they are likely to be active enforcers of now-abandoned antitrust provisions. Instead of pressuring industry-specific regulators that have long abandoned their antitrust powers, policy and law should emphasize change that clears the way for expert antitrust enforcers to act in these economically important industries.

2. Legislative Reform Is Required to Close Abandonment Gaps in Regulated Rail and Ocean Shipping

How can this shift toward DOJ or FTC enforcement power be achieved in practical terms? First and most clearly, legislative change in rail and ocean shipping will be required. Right now, arcane exemptions from general antitrust law continue to bar the DOJ and the FTC from acting in areas of regulated rail and ocean shipping.[445] The first requirement to pave the way for active antitrust enforcement is thus legislative change, to grant expert antitrust enforcers the power to combat anticompetitive acts in these areas of abandonment. Such amendments could take two likely forms: (1) the repeal of antitrust exemptions to enable the application of general antitrust law, and/or (2) amendments to industry-specific statutes to empower the DOJ or the FTC to enforce the antitrust-like provisions of the Shipping Act and the Staggers Act. (The Packers and Stockyards Act requires no such legislative change, because there is no equivalent antitrust exemption, and enforcement authority is already shared with the DOJ.)[446]

While this is not the first Article to call for the repeal of the statutory antitrust exemptions in rail or ocean shipping, the message bears repeating. The pattern of antitrust abandonment in the case studies here offers further evidence of the need to eliminate these persistent antitrust law exemptions, and the value of antitrust re-entry. The removal of these exemptions is necessary for the DOJ or the FTC to begin applying general antitrust law to ocean-shipping agreements and regulated rail traffic. While legislative reform is easy to suggest and hard to achieve, there is unprecedented enthusiasm for reviving antitrust law of late, and these changes should be framed as an integral part of achieving this revival.

The second option is less discussed but offers another useful approach to achieve antitrust oversight of these industries: grant the DOJ or the FTC the power to bring claims under industry-specific statutes. Legislative amendments to the Shipping Act and the Staggers Act could grant these

445. *See supra* Sections II.A, II.B (explaining the antitrust exemptions in ocean shipping and regulated rail).

446. *See supra* Section II.C.

federal antitrust agencies rights of action like those now held only by the FMC and the STB. Such changes would place the DOJ or the FTC into a statutory role similar to that of these industry regulators to combat anticompetitive practices. For example, § 41307 of the Shipping Act could be amended to grant the DOJ or the FTC the power to pursue an injunction in federal court against any agreement that is "likely, by a reduction in competition," to result in either "an unreasonable reduction in transportation service" or "an unreasonable increase in transportation cost."[447]

This solution reflects that there is nothing clearly wrong with these legislative provisions as written. Rather, the primary problem is their disuse. Granting new enforcement powers to more motivated and interested enforcers has the potential to fix this dilemma by turning dusty old provisions into legislation that is actively enforced. This solution could be used instead of, or in addition to, the repeal of exemptions from the general antitrust laws.

This is not a call for the elimination of powers held by these industry-specific regulators. Their disused antitrust-like powers could be left in their original form. If, for example, the FMC was suddenly inspired to embark on a course of antitrust enforcement under the Shipping Act, it would be able to do so, just as it could before any change to grant the DOJ or the FTC enforcement powers under the industry statute. The proposal is additive in its results: two or more enforcement agencies rather than one inactive regulator would have the power to take antitrust action. Either or both of these legislative changes would narrow the existing gaps in antitrust oversight and enforcement left by abandonment.

3. Beyond Legislation to Shared Responsibility: Changing Perceptions of the Need for Antitrust Enforcement in Regulated Industries

This study shows that legislative change is likely required for antitrust enforcement to occur in areas of abandonment where the industry regulator has exclusive authority, like rail and shipping. At the same time, the experience in meatpacking adds another layer of insight: legislative change to dual authority with antitrust agencies may not be sufficient, standing alone, to achieve enforcement. The USDA and the DOJ already share the power to enforce the antitrust-like provisions of the Packers and Stockyards Act. Yet little enforcement occurs. If tomorrow Congress passed legislative amendments to grant the DOJ and the FTC power over regulated rail and ocean shipping, this experience suggests that may not lead to active antitrust oversight. Something more is required to revitalize antitrust enforcement in these spaces.

447. 46 U.S.C. § 41307(b)(1) (2018).

Beyond legislative reform, this Section argues that closing gaps in antitrust oversight also requires a fundamental change in antitrust agencies' perceptions of the need for enforcement in once-regulated industries. Instead of viewing antitrust as a tool that fills the interstices left by regulation in these areas, enforcers should see it as an overlapping brace of law—one that is present, important, and applicable at least up until any true point of conflict with regulation. This nuance is missed by the tendency of debates and scholarship to focus on the first hurdle of legislative repeal of the remaining antitrust exemptions.

Consider the DOJ's self-described perception of its responsibilities over meatpacking competition and markets, which at various points in time has cast DOJ in a secondary role to the industry regulator even in promoting competition. In 2000, the special counsel appointed within the DOJ for the express purpose of overseeing antitrust enforcement in agricultural marketplaces described the DOJ's authority as "narrow."[448] This was despite the Agency's equal enforcement authority to the USDA under section 202 of the Packers and Stockyards Act and in fact somewhat greater powers in the specific area of poultry. The special counsel emphasized the USDA's regulatory function, noting that while antitrust laws have a "role in helping keep markets competitive, they will never address all of the complex issues facing American agriculture in this time of change."[449]

While this Article is not dismissing the complexities of agricultural market competition, it seems a blunt reason for inaction. In truth, these remarks reflect a shrinking or a self-constraining of the DOJ's role, conceiving of it thinly in the face of the USDA's regulatory authority. A decade later in 2010, not much had changed. Attorney General Eric Holder conceded in joint hearings with the USDA that the DOJ that had "quite frankly" not "been nearly as active as it needed to be" in agricultural markets.[450] Whatever the reason, in an important sense the DOJ seemed to have viewed itself as having lessened responsibility for anticompetitive conduct in meatpacking.

This USDA primacy is reinforced by the tendency of literature and Congress to center blame on the USDA, rather than the DOJ, for inaction under the Packers and Stockyards Act. It also tends to emphasize solutions that require the USDA to change[451]—even though both agencies hold the

448. Douglas Ross, Special Couns. for Agric., Antitrust Div., U.S. Dep't of Just., Antitrust Enforcement and Agriculture, Address Before the 2000 USDA Agricultural Outlook Forum 2 (Feb. 24, 2000), http://www.usdoj.gov/atr/public/speeches/4422.pdf [https://perma.cc/K67J-83M2].

449. *Id.* at 3.

450. Poultry Hearing, *supra* note 302, at 28 (statement of Eric Holder, Att'y Gen. of the United States).

451. *See, e.g.*, Khan Comment, *supra* note 15, at 2 (urging the USDA to issue rules under the Packers and Stockyards Act "specific[ally] prohibiti[ng] . . . deceptive, unfair, and discriminatory contract terms and business practices"); Kades, *supra* note 18, at 58-98 (recommending steps

power to enforce the Act's antitrust-like provisions over beef and pork processing.[452]

At a more general level, recent Supreme Court decisions have pushed this view of antitrust as narrow in the face of regulation. Over the last fifteen years or so, the Court has increasingly cast antitrust and regulation as substitutes rather than complements in certain regulated industries, in a change from past jurisprudence. For example, the Court has declined to extend antitrust liability for refusals to deal in regulated telecommunications services, finding that where there exists "a regulatory structure designed to deter and remedy anticompetitive harm," "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[453] In a later case, the Court lightened the legal standard to show implied immunity from antitrust law for regulated securities conduct, in effect squeezing antitrust law out of that regulated space.[454] These decisions reflect an assumption that industry regulators will carry out their competition functions and, in doing so, make antitrust unnecessary in their areas of regulatory oversight, at least in telecommunications and securities law.[455]

While this jurisprudence has not been directly applied to the regulatory regimes examined in this Article, it perpetuates a view that regulation and antitrust are alternative rather than overlapping legal tools.[456] The record of abandonment developed here suggests that this perspective—that antitrust is not needed where regulators oversee competition—is incorrect for rail, ocean shipping, and meatpacking. The history of abandonment refutes the assumption that regulators in these industries will dutifully carry out their competition functions, and weakens the accompanying view that antitrust is extraneous to regulation. The case studies in this Article

that the USDA can take to revitalize Packers and Stockyards Act enforcement). *But see* Carstensen, *supra* note 18, *passim* (faulting inaction by all three agencies—the FTC, the USDA, and the DOJ—and encouraging greater action in each of their respective realms of responsibility).

452. *See supra* text accompanying note 247.

453. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004).

454. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 274 (2007) (declining to apply antitrust scrutiny to conduct already regulated by securities law because allowing antitrust suits regarding such conduct would present "a substantial danger that [broker-dealers and other defendants] would be subjected to duplicative and inconsistent standards" by courts exercising jurisdiction under the antitrust laws (alteration in original) (quoting United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 735 (1975))).

455. *See* Samuel N. Weinstein, *Financial Regulation in the (Receding) Shadow of Antitrust*, 91 TEMP L. REV. 447, 465-67 (2019) (finding that claims of antitrust immunity based on *Credit Suisse* have not often been successful in areas of regulation beyond securities).

456. *See* Shelanski, *supra* note 58, at 1943 (explaining that *Credit Suisse* and *Trinko* "render antitrust and regulation more like substitutes and less like complements"); *supra* Part I (discussing the differing views about whether antitrust law and regulation are substitutes for or complements to each other).

demonstrate that industry regulators rarely enforce their antitrust-like provisions,[457] and should disabuse antitrust enforcers of this judicial notion that regulation eliminates the need for antitrust enforcement.

This suggests the need for a change in antitrust agencies' perceptions to achieve antitrust oversight of the industries examined here. An effective solution must not only change the law, where needed, but also change antitrust agencies' perceived marginalization. The key is not just the repeal of antitrust exceptions, but also to reduce the hesitancy of expert antitrust agencies to act in what are, or were once, regulated spaces. Antitrust agencies must believe that oversight of these industries is necessary and their responsibility.

This Article contributes to this shift toward an emphasis on shared enforcement responsibility. It offers a historical record that challenges any notion that industry regulators are addressing anticompetitive conduct in rail, shipping, and meatpacking. If the DOJ or the FTC is given the power to enforce in exempted areas of ocean shipping and rail, the baseline expectation should not be that regulators are actively enforcing industry-specific, antitrust-like provisions. Rather, it should be skepticism that regulators will use their antitrust enforcement powers. From this perspective, shared oversight from antitrust agencies becomes both required and valuable.

The key emphasis is on "shared," though, not sole, responsibility. While this Article argues for more power to be shifted to antitrust enforcers to fill the gaps of antitrust abandonment, it does not seek the exclusion of industry regulators. Quite the opposite—the most effective enforcement is likely to come from deep collaboration between antitrust enforcers and industry regulators, as I have argued in other contexts.[458]

Such joint efforts would bring to bear the complementary expertise of both agencies. The FTC and the DOJ contribute skills as enforcers with extensive knowledge on competition, but their mandates span much of the economy. The industry regulators examined here are not enforcers, and less strong on competition theory, but they are masters of the industries they supervise day in and day out. They have advanced knowledge of these highly complex industries that is invaluable to effective antitrust or antitrust-like enforcement efforts. Collaboration between regulators should take forms that include joint investigations with antitrust enforcers, expert consultation to develop theories of harm and strategies, and case referrals.

Indications of such collaboration have been growing of late, one encouraging result of the whole-of-government approach to competition that should continue. The DOJ has entered into memoranda of understanding with the Federal Maritime Commission, as well as with the Secretary of

457. *See supra* Part II (discussing industry regulators' disuse of their antitrust-like enforcement powers in ocean shipping, rail, and meatpacking).

458. *See* Douglas, *supra* note 415.

Agriculture at the USDA. These include a recent memorandum specific to collaboration on Packers and Stockyards Act enforcement, which may be beginning to produce results: the DOJ has now brought the first section 202 Packers and Stockyards Act cases in quite some time. Although these claims invoke the consumer protection subsections, not the antitrust-like provisions discussed here,[459] they also include claims under the Sherman Act.[460] The USDA played a role in investigating and referring the case.[461] It seems too soon to declare victory in revitalizing the Packers and Stockyards Act's antitrust-like provisions, but these cases suggest the change in agency perception called for by this Section—toward shared responsibility and collaboration—is possible, and perhaps forthcoming from the DOJ.

More and broader collaboration should be part of future competition policy, including a memorandum of understanding on regulated rail between the DOJ and the Surface Transportation Board. Most importantly, though, the work must be done across these agencies to bring these agreements to life in a durable and effective way. Without active, ongoing collaboration among these agencies, these agreements do little.[462] This sort of collaboration can only be built up from a starting assumption that antitrust is necessary and applicable in areas of industry regulation.

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459. *See supra* notes 251-256 and accompanying text.

460. *Koch Foods* Complaint, *supra* note 279, at 16-18 (asserting that contractual exit penalties are an unfair practice under section 202(a) of the Packers and Stockyards Act and an unreasonable restraint of trade under section 1 of the Sherman Act); *Cargill* Complaint, *supra* note 18, at 1, 71-72 (alleging that two of the four defendants violated section 202(a) of the Packers and Stockyards Act by engaging in deceptive practices in their contracts to compensate the poultry "growers" under the so-called "tournament system," which pits chicken growers against each other to determine their compensation in an opaque manner); *Cargill* Complaint, *supra* note 18, at 69-71 (asserting that certain collaboration among poultry producers violates section 1 of the Sherman Act). Both cases settled, with the *Koch* settlement proposal filed at the same time as the complaint. *See* Stipulation and Order, United States v. Koch Foods Inc., 23-CV-15813 (N.D. Ill. Nov. 15, 2023), https://www.justice.gov/d9/2023-11/418165.pdf [https://perma.cc/K8UN-UKXQ]; Proposed Final Judgment, *Koch*, 23-CV-15813 (Nov. 9, 2023), https://www.justice.gov/d9/2023-11/418161.pdf [https://perma.cc/U2AT-8XZZ]; Modified Final Judgment, United States v. Cargill Meat Sols. Corp., No. 22-CV-01821 (D. Md. Apr. 9, 2024), https://www.justice.gov/d9/2024-08/424533.pdf [https://perma.cc/B234-LYBT]; Modified Final Judgment, *Cargill*, 22-CV-01821 (Apr. 9, 2024), https://www.justice.gov/d9/2024-08/424531.pdf [https://perma.cc/N4EY-NZHP]; Press Release, U.S. Dep't of Just., Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers (July 25, 2022), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy [https://perma.cc/U2AA-2BAF].

461. *Agricultural Competition: A Plan in Support of Fair and Competitive Markets*, *supra* note 305, at 16 (noting that "USDA has been working with DOJ on investigations affecting competition in the livestock and poultry markets").

462. Douglas, *supra* note 415, at 14-16 (examining the weaknesses of memoranda of understanding, and arguing this tool for agency collaboration can lack durability and consistency).

C. Looking Ahead: Antitrust Abandonment Should Inform the Future Allocation of Agency Powers

So far, these solutions have focused on closing the antitrust abandonment gap for existing agencies. But the new reality called for here—the need to shift away from unrealistic expectations of regulator enforcement and toward antitrust-agency-led collaboration—is just as applicable to future congressional decisions on agency power.

A similar risk of abandonment arises any time Congress chooses to splinter off antitrust powers and to grant competition oversight exclusively—or even just primarily—to an industry regulator instead of antitrust enforcers. Antitrust abandonment suggests that Congress should expect a real possibility that future grants of antitrust-like enforcement power to industry regulators will go unused. Assuming Congress thinks antitrust oversight is desirable, this means it should exercise caution before granting such powers to industry regulators. This caution is merited because it is quite possible such power will go unused by those regulators—that is the main message of this Article. Granting antitrust power to an industry regulator would once again risk leaving a gap in which there is no antitrust-like oversight, if the new industry regulator fails to use its powers. Such disuse creates a risk of harm to competition, one that is exacerbated when the grant of antitrust-like powers is exclusive, meaning that general antitrust law and its enforcers are barred.

Caution is also called for because, once granted, these antitrust-like powers and exceptions from general antitrust law are incredibly sticky. As the case studies above show, grants of antitrust enforcement powers to industry regulators have persisted, even when no longer supported by economics or industry reality.[463] These allocations of antitrust power tend to remain over time despite (1) repeated amendments to these statutes to liberalize previously regulated markets in ways that encourage competition; (2) the elimination through economic change, or the disproof in theory, of the original rationales for special treatment of certain industries; (3) the repeated failures of the regulatory agencies to use their competition powers; and (4) growing concentration and complaints of competition problems in the industries with antitrust exemptions. Even when policymakers decide that a regulator's antitrust authority should end—as they did where this Article began, with the Senate Judiciary Committee calling for the removal of the USDA's authority to enforce the Packers and Stockyards Act—these grants of agency power seem almost incapable of retraction. In short, these powers and antitrust exceptions are persistent—irrationally so.

463. *See, e.g.*, *supra* Section II.A.3 (explaining that the original rationale for special regulation of ocean shipping no longer holds, such as the perception that industry economics were particularly unique).

This unjustified stickiness should weigh against granting these antitrust-like enforcement powers to regulators to begin with.

This is not to say that every industry regulator will necessarily ignore its future antitrust enforcement obligations. It also not opining on the reason these regulators do not engage in antitrust-like enforcement. Instead, it explains several real and pressing scenarios of antitrust abandonment to demonstrate the problems it can create. Splintering off antitrust enforcement can produce unintended gaps in competition enforcement within concentrated, economically important areas of industry, leaving those areas at risk of unaddressed anticompetitive conduct and harm. Policymakers should stop expecting these gaps suddenly to be filled, and be cautious about recreating such gaps in the future.

While regimes in shipping, rail, and meatpacking may look like historical artifacts, these lessons from abandonment apply to institutional design choices being made today. Policymakers are in the midst of intense debates over the division of antitrust enforcement powers in digital markets. Should the United States enact a new regulatory regime to govern competition in digital markets? If so, which agencies should enforce those new laws? The European Union recently passed sweeping new digital regulation for large tech platforms,[464] which has made these questions even more pressing in the United States. This has led to several recent U.S. legislative proposals to create special rules for digital competition.[465]

Antitrust abandonment informs this debate because, in the absence of digital regulation, antitrust enforcers have played a prominent role in fighting the power of digital giants—litigating major cases against Google,[466] Meta,[467] and Amazon.[468] In part because of its enforcement action in this area, some legislative proposals would appoint the FTC as the

464. Council Regulation 2022/1925, 2022 O.J. (L 265) 1; Council Regulation 2022/2065, 2022 O.J. (L 277) 1.

465. *See, e.g.*, Digital Platform Commission Act, S. 4201, 117th Cong. §§ 4(b)(3), (4), 5(b)(1)(B) (2022) (proposing a federal digital regulator, emphasizing its purpose of promoting competition, and empowering that regulator to create rules on interoperability); American Innovation and Choice Online Act, H.R. 3816, 117th Cong. § 2(b)(1), (9) (2022) (proposing to prohibit large digital platforms from restricting interoperability with competitors); Augmenting Compatibility and Competition by Enabling Service Switching Act, H.R. 3849, 117th Cong. (2021) (proposing mandated interoperability among large social media services to promote competition); Open App Markets Act, S. 2710, 117th Cong. (2022) (proposing rules to limit certain self-favoring practices among operators of app stores).

466. *See* Amended Complaint, United States v. Google LLC, No. 20-CV-03010 (D.D.C. Jan. 15, 2021), https://www.justice.gov/atr/case-document/file/1428271/dl [https://perma.cc/8N4Y-T8UT].

467. Substitute Amended Complaint for Injunctive and Other Equitable Relief, FTC v. Meta Platforms, Inc., No. 20-CV-03590 (D.D.C. Sept. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf [https://perma.cc/JK9A-3ATR].

468. Amended Complaint, FTC v. Amazon.com, Inc., No. 23-CV-01495 (W.D. Wash. Mar. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/01712024.03.14RedactedAmendedComplaint%20%28002%29.pdf [https://perma.cc/UR8P-MZER].

most logical agency to enforce new digital rules.[469] Other proposals would instead create a new digital regulator.[470] Leading scholars are just beginning to address this institutional question of which agencies are best suited to enforce new digital regulation.[471]

If Congress passes new regulation of digital competition, this history of abandonment counsels against exceptions in antitrust law for regulated conduct.[472] Exempting regulated digital activity from antitrust law would repeat past congressional mistakes, by recreating the risk of antitrust abandonment by industry regulators. If digital regulators again chose not to enforce antitrust-like provisions, there would be no general antitrust law backstop to police anticompetitive conduct in digital markets. To avoid this problem, antitrust law and regulation should be cast as overlapping complements, applying alongside each other at least up until the point of any conflict. This has been the European approach, where new digital regulations apply in conjunction with antitrust law.[473]

At an institutional level, the history of abandonment also weighs in favor of ensuring antitrust enforcers can continue to bring cases in digital spaces. For digital regulation, this shared power could be achieved through either of the same approaches canvassed above for existing law—by continuing to apply general antitrust law to regulated digital competition or by granting antitrust enforcers the power to bring antitrust-like cases under the new sectoral law.

As above, it will be important not just to have shared enforcement power written into law but also to create it in day-to-day reality. Antitrust

469. *See, e.g.*, American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022); Augmenting Compatibility and Competition by Enabling Service Switching Act, H.R. 3849; Open App Markets Act, S. 2710; *cf.* American Innovation and Choice Online Act, H.R. 3816 (establishing a new Bureau within the FTC—an existing federal agency—to regulate digital markets). *See generally* William E. Kovacic, *Adaptable Platforms for Platform Regulation: The Role of the Federal Trade Commission*, 7 J.L. & INNOVATION 106 (2024) (arguing that the FTC should be the agency that enforces new digital regulations).

470. *See, e.g.*, Digital Platform Commission Act, H.R. 7858, 117th Cong. (2022); Digital Platform Commission Act, S. 4201. *See generally* Stigler Comm. on Digit. Platforms, *Final Report*, GEORGE J. STIGLER CTR. FOR STUDY ECON. & ST. 100 (Sept. 16, 2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf [https://perma.cc/VP4W-BHHX] (calling for the establishment of a new federal digital regulator); Tom Wheeler, Phil Verveer & Gene Kimmelman, *New Digital Realities; New Oversight Solutions in the U.S.: The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight*, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL'Y 6 (Aug. 20, 2020), https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf [https://perma.cc/9D4B-RMY4] (same).

471. *See, e.g.*, Kovacic, *supra* note 469 (examining the FTC's suitability to act as the enforcement agency for a new regulatory regime applicable to large technology companies).

472. There may need to be some accommodation if, at some point, antitrust law and the digital regulation conflict. But that scenario cannot be addressed in any detail until the content of any such digital regulation is determined.

473. Council Regulation 2022/1925, art. 1(6), 2022 O.J. (L 265) 1, 27 (providing that the regulation is "without prejudice" to the application of the major provisions in European Union competition law).

agencies must believe that antitrust enforcement remains useful, necessary, and their responsibility in digital markets, despite new regulation. Setting this expectation is likely to be easier on the blank slate of digital regulation, where there is no legacy of hesitation stemming from past industry regulation that may give pause to antitrust enforcers as in rail, ocean shipping, and meatpacking. Since antitrust enforcers are already actively bringing major digital cases, this is likely to continue as long as the new legislation permits it. With these approaches to legislation and perceptions of shared responsibility, any new digital regulatory regime can avoid the past mistakes that allowed for antitrust abandonment.

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Where antitrust abandonment creates a gap in competition enforcement, these proposals close it. Each brings a new resiliency to competition enforcement over the long term. Piecemeal apportionment of antitrust responsibility has created the space for the enforcement failures described here. While antitrust enforcement will always wax and wane with the policies of specific administrations, the change envisioned here will create a more robust baseline of competition oversight, with less potential or ability to revert to zero in important sectors of the economy due to regulator inaction. By shifting law and perceptions to cast the relationship between regulation and antitrust as overlapping, these proposals provide for a more robust power allocation that paves the way for antitrust enforcers to proceed in spaces of antitrust abandonment, now and in the future.

Conclusion

Across much of the economy, expert antitrust agencies—the FTC and the DOJ—have the power to promote competition by enforcing antitrust law. From time to time, though, Congress has splintered off antitrust-like enforcement power, instead granting it to a handful of industry regulators. Some of these regulators have the exclusive power to enforce antitrust-like law in portions of their industries, while others share enforcement duties with the DOJ.

This Article identifies a significant and repeating problem among these regulators: they almost never use their antitrust-like powers. It constructs three representative cases studies in vital sectors of the economy, looking at ocean shipping, regulated rail, and meatpacking. The Article examines each regulator's track record of fighting anticompetitive conduct, and it finds that none have brought more than a small number of antitrust cases—despite holding their powers for between thirty and over a hundred years. It argues this scant enforcement is not well explained by a lack of need, given that each industry bears hallmarks of antitrust risk: increasing

concentration, a history of collusion, and current suspicion of competition misconduct.

The Article coins the term "antitrust abandonment" to describe this striking pattern of unexplained disuse of antitrust-like powers. It argues that antitrust abandonment is a problem, because it leaves unintended gaps in competition enforcement and poses a real risk of economic harm to consumers and other stakeholders in these concentrated industries.

The Article concludes by examining how to cure antitrust abandonment and avoid it in the future. It argues for a significant shift in current expectations among policymakers and agencies, away from the unreasonable expectation that these regulators will use their long-dormant antitrust powers, and toward the empowerment of expert antitrust enforcers, the FTC and the DOJ, to act in abandoned spaces. Achieving this change will require legislative reform, but also a more nuanced shift in the perceptions of agencies, to conceive of antitrust as overlapping and applicable alongside industry regulation.