COORDINATING MARKET ACTORS FOR THE PUBLIC GOOD: COMPETITION POLICY AS THE INDUSTRIAL POLICY OF DEMOCRATIC ECONOMIC GOVERNANCE

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CPI ANTITRUST CHRONICLE May 2025

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We argue that industrial policy characterizes the ways that governments shape markets in order to achieve a specific outcome, especially during moments of economic transition, and that competition policy provides the means for industrial policy strategies to achieve an outcome essential to the health of democratic societies: democratic economic governance. Competition policy provides governments with powerful legal tools to ensure that markets remain fair, open, and resilient and that dangerous concentrations of economic power are prevented. We assert that competition policy is and must be a fundamental component of industrial policy by reviewing how market concentration can threaten industrial policy outcomes, and that competition policy and industrial policy tools can work together to address these threats. Given the unpredictability of long-term outcomes during economic transitions, competition policy tools must be used to prevent incumbent firms from resisting change or monopolizing new markets—and to ensure that emerging industries are designed to be fair, open, and resilient. By placing competition policy at the center of industrial strategy, governments can preserve democratic oversight of markets and ensure that the benefits of economic transitions are broadly and fairly shared.

I. INTRODUCTION

In recent years, it has been common to hear that the United States is experiencing a revival of industrial policy, usually in reference to Biden Administration policies like the Inflation Reduction Act ("IRA") or CHIPS and Science Act, which use government subsidies and other incentives to catalyze the domestic production of critical technologies such as semiconductors and electric vehicles.

Under this narrative, industrial policy is the policy toolkit most associated with government-induced industry growth — it is the policy toolkit that creates (or opens) new markets,[2] or shifts capital resources into targeted sectors.[3]

If we were to follow this logic, it might appear that industrial policy and competition policy are antithetical to each other, with the former policy toolkit aiming to encourage growth by shielding sectors from the forces of market competition, and the latter aiming to expose companies and sectors to greater competitive market discipline.[4]

Traditional competition policy experts might scoff at such a reductionist description of their field, and well they should. But the reductionism of this common narrative applies just as well to its description of industrial policy. Neither field should be characterized by a focus on firm or industry size, but rather on the broader outcomes that they aim to create in markets, and in society.

In this paper, we argue that industrial policy characterizes the ways that governments shape markets in order to achieve a given outcome, and that competition policy provides the means for industrial policy strategies to achieve an outcome essential to the health of democratic societies: democratic economic governance.

In our first section, we define this relationship between industrial policy, competition policy, and the goal of democratic economic governance.

In our second section, we look at the process by which industrial policy can guide an economy through a transition, and discuss ways that competition policy approaches protect the goal of democratic economic governance. We use this section to highlight how industrial policy and competition policy strategies must work in tandem to address (1) the harms caused by concentrated markets; (2) incumbent firms' resistance to change and innovation; (3) risks that incumbent industries will capture the gains of industrial policy; (4) risks that industrial policy will create concentrated markets; and (5) the rise of monopoly nations in the international economy. We conclude by reviewing the implications of this analysis on our current moment of transition.

II. INDUSTRIAL POLICY, COMPETITION POLICY, AND DEMOCRATIC ECONOMIC GOVERNANCE

Industrial policies are the mechanisms that governments use to shape markets — and, more importantly, the mechanisms they use to coordinate actors within a sector of the economy in the pursuit of a given outcome. Industrial policies allow governments to influence the types of goods and services available in communities, their price, and the methods in which they are produced. Industrial policies also influence which jobs will be available, to whom, in which region, of what quality, requiring which skills, and providing how much income. This means that the various fields of socio-economic policy, from trade policy to labor policy to competition policy, can all be part of an industrial policy strategy, just as industrial policy strategies can be developed around the goals of any of these fields.

Furthermore, industrial policies are critical to a government's ability to initiate and guide change. People and firms resist change and the instability that it brings — but a society that remains unchanging faces economic and industrial stagnation and decline, especially as other countries continue to innovate and grow. Market competition can be a powerful driver of change among market actors, encouraging them to innovate to survive. However, the drivers of change often come from outside of markets — from new social expectations, for example, or from environmental shocks — and market forces are imperfect indicators of what is in the public interest. Worse, powerful market incumbents characteristically use their position to encourage change that helps them further consolidate power, and to divert any benefits that come from change back towards them. Because transitions affect not just markets, but also the degree of opportunity and power within society, governments have a responsibility to actively guide them toward outcomes that serve the public interest.

2 Stephen Cohen & J. Bradford DeLong, Concrete Economics: The Hamilton Approach to Economic Growth and Policy (2016).

3 Todd Tucker, *Industrial Policy and Planning: What It Is and How to Do It Better*, Roosevelt Inst. (July 2019).

4 E.g. D. Daniel Sokol, *Tensions between Antitrust and Industrial Policy*, 22 Geo. Mason L. Rev. 1247 (2015) ("Sound antitrust law and policy is in tension with industrial policy.").

American history is filled with such industrial policy-backed socio-economic transitions.[5] The U.S. industrialized — transitioning from the agrarian economy designed to support British mercantilist interests into a more self-sufficient and economically diversified economy — through a mix of tariffs, public procurement and investments, and a host of other policies that became known as the American System. Meanwhile, the agrarian economy of the American South was long defined by government policies enforcing, expanding, and eventually eradicating the markets of enslaved people. Westward expansion was driven by government sale and distribution of (militarily acquired) land, both to farmers and the railroad companies that would connect them to national markets. The New Deal and wartime mobilization spread new industrial opportunities across the country, preparing the U.S. to become the leading manufacturing exporter in the world, with Cold War public investments in research expanding the country's financial and living standard gains from innovation.

The last major transformation of the American economy has taken place over the course of the last forty years. There exists a lot of discussion about the varying interest groups and power dynamics that cemented neoliberal economic theory as the leading orthodoxy of American economic policymaking. From an industrial standpoint, however, this paradigm underpinned a policy strategy aimed at transitioning the U.S. from an economy centered on manufacturing to one centered on services — and in particular, what were considered high-value-add, high-productivity, high-skilled services like finance and software engineering.

The vision behind this change can perhaps be seen most clearly through the shift in American trade policy that occurred during the 1980s and 90s. The U.S. ensured that the World Trade Organization ("WTO") expanded global oversight into trade in services, like telecommunications, through agreements like the General Agreement on Trade in Services ("GATS") and Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Meanwhile, regional and bilateral free trade agreements like the North American Trade Agreement ("NAFTA") facilitated the offshoring of American manufacturing capabilities to countries like Mexico or China that had lower production costs. Taken together, the U.S. government was pursuing a trade strategy designed to reduce the role of manufacturing in the American economy in favor of protecting American exports of services and intellectual property from its innovation sectors; Americans would earn their income from the highest-value activities in global supply chains, while benefiting from access to cheaper goods from abroad. This trade strategy complemented domestic deregulatory policy that expanded the role of finance in the economy, such that market actors from across industries would come to be governed according to the profit-maximizing priorities of the financial industry.[6]

It should be no surprise that the "revival" of industrial policy discourse in the U.S. has coincided with a similar "revival" in the use of policies and legal tools from across economic policy fields. This has less to do with the U.S. government deciding that it should use policies like tariffs or antitrust enforcement just for the sake of using them — as implied by debates that frame policymaking as the choice between more or less government action — than it does with the fact that the priorities of the U.S. government have shifted in the face of rapidly evolving and transnational socio-economic challenges. This change in the underlying priorities of the government has required policymakers to change their industrial policy strategy, adopting a different set of policy tools to achieve a different set of policy outcomes.

Looking at the challenges ahead, it is clear that new industrial strategies are needed to help guide the American economy through at least four critical transitions. The first is the climate transition in which the U.S. must minimize carbon emissions across all its industries, strengthen industrial resilience to increasingly frequent climate shocks, and rapidly expand the production and adoption of green technologies that will underpin the future global economy.

Second is the technology transition, in which the U.S. must encourage innovation for digital technologies, like AI, while protecting the rights and interests of the varied industries and stakeholders that may come to depend on these technologies.

Third, the U.S. must manage a demographic transition, rapidly expanding the supply of care services for the country's aging population, while helping industries adapt to a shrinking native labor force.

Finally, the U.S. needs a resiliency transition, in which it increases domestic manufacturing and diversifies its global supply chains for critical technologies to reduce risks from climate or geopolitical shocks.

Although each of these transitions has different goals and will require different policy strategies to achieve, they all share one critical priority: to succeed, these transitions must create an economy that supports and strengthens democratic social and economic governance; that

5 Cohen & DeLong, *supra* note 2; Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective (2002); Steven K. Vogel: Marketcraft: How Governments Make Markets Work (2018).

6 Cohen & DeLong, *supra* note 2; Vogel *supra* note 5; Ann Pettifor, *State of Emergency*, Bos. Rev. (Sept. 15, 2021), https://www.bostonreview.net/forum_response/state-of-emergency/.

keeps markets open, fair, and accountable to democratic institutions; and that ensures market benefits are widely shared rather than captured by entrenched private interests.

"Democracy" is rarely cited as an explicit goal of industrial policy. But the ongoing assaults on democratic norms and institutions in the U.S. and globally are strong evidence that this is a mistake. It bears repeating in these times that democracy is in the public interest, in that it is the form of government with the greatest capacity to create and distribute wealth widely and equitably across a society.[7] Promoting democratic governance, and democracy more broadly, does not require that people sacrifice their economic wellbeing in the interest of higher ideals of equality and justice. Instead, democratic ideals like equality, justice, and fairness are what protect the rights and material interests of all people, and all market actors.

A democratic government that is accountable to the public should define its priorities and develop industrial strategies to achieve them, reflecting the public interest: ensuring that the economy produces the goods, services, jobs, and incomes that people need for their own well-being, while preventing behaviors that cause social harms. This is not the case for all types of governments, as non-democratic governments frequently use industrial policy to reward political allies, and weaken alternative centers of power.[8] Once again, the motivations behind the use of industrial policy matters.

A commitment to democratic governance also matters to a government's selected strategy because industrial policies, with their potential to transform social and economic aspects of a society, fundamentally impact that society's governing institutions. The new economic opportunities created through industrial policies create new sources of market power which, if allowed to concentrate, can easily translate into political power.

Furthermore, one of the greatest risks of any industrial strategy is that the beneficiaries of the government's policies will use the power they have gained from these policies to rent-seek, ensuring that markets continue to be favorable for them, even if their gains come at the public's expense. This can include lobbying for continued public support, for preferred industry regulations, or even for lax enforcement of competition or other rules. Thus, industrial policies can cause concentrations of power that ultimately undermine the goals that the government set out to achieve in the first place.

This is what makes competition policy such a critical component of any industrial strategy in a democratic society. Competition policy establishes the foundational rules for lawful market conduct and coordination.[9] Ultimately, competition policy helps structure economic incentives so that firm behavior aligns with socially beneficial goals such as investment in innovation, productive capacity, and worker wages and benefits, all of which support and advance the aims of industrial policy initiatives deployed to manage or induce an economic transition. When properly implemented, competition policy helps ensure that the benefits of transition — such as increased innovation, productive investment, and higher wages — are broadly shared and that markets remain open, fair, and democratic.

III. COMPETITION POLICY CONTRIBUTIONS TO INDUSTRIAL POLICY STRATEGIES

Competition policy defines how firms compete and sets the boundaries of acceptable conduct. It is, therefore, an essential component of industrial policy strategies and helps ensure that market actors do not undermine the government's policy goals by placing their own interests ahead of the public's.

This section looks at how industrial policy strategies respond to, or are threatened by, firm attempts to use their power to unfairly distort markets, and discusses how American competition policy complements industrial policy efforts to protect the public interest. In particular, we discuss policy strategies to address: (A) the harms of market concentration; (B) incumbent firms' resistance to change; (C) the capture of industrial policy gains by incumbents from adjacent industries; (D) the capture of industrial policy gains by new monopolists; and (E) the rise of monopoly nations in the international economy.

A. Addressing the Problem of Monopoly

Industrial policies are often introduced to address the consequences of monopolization and other unfair market behavior. For example, governments may want to increase supply, or lower prices of a good or service that is important to the public's welfare, such as pharmaceutical drugs. Competition policies should therefore be an integral part of the industrial policy strategy used to address these harms.

7 Amartya Sen, *Democracy as a Universal Value*, 10 J. Dem. 3 (1999).

8 Chris Miller, Putinomics: Power and Money in Resurgent Russia (2018).

9 *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378 (2020).

Competition policy delivers fair markets and democratic economic governance by placing limits on how corporate power can be exercised, including the methods of competition firms use to succeed in the marketplace and how firms may coordinate.[10] This is evident in the language of American antitrust laws. Section 2 of the Sherman Act prohibits monopolization and attempts and conspiracies to monopolize.[11] Section 2 — written as an add-on provision to target dominant firms attempting to unilaterally control a market[12] — functionally defines the desired market outcome as one in which the success of firms is determined through "[the development of a] superior product, business acumen, or historic accident," rather than "the willful acquisition or maintenance of…power."[13] Other antitrust provisions tackle different methods of competition to shape firm behavior. For example, Section 7 of the Clayton Act prohibits mergers "in any line of commerce…[where] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[14] This law is an incipient statute, where the risk of adverse competitive effects is sufficient to trigger a violation.[15] In the 1960s, courts enjoined mergers that caused firms to gain a market share as low as 7.5%.[16]

By delineating between permissible and prohibited forms of competition, the antitrust laws promote fair competition and protect the public interest — without requiring the government to define the unique social importance of every economic sector. Fair market competition is a desired outcome protected by the law because market concentration allows individual firms to extract rents and otherwise gain at the expense of other market actors, and more broadly at the expense of the public interest. This implies that competition policy, when consistently and vigorously enforced, is a preventative measure — a form of industrial policy intended to create market conditions across all sectors that reduce the risk of adverse outcomes like high prices, under-supply, low innovation, or even an erosion in the quality or quantity of jobs in a sector.

Nevertheless, market concentration and unfair practices continue to be problems in industries that deliver critical goods and services. For example, a major driver of high prices for generic pharmaceutical drugs, like insulin, is the high market concentration of the pharmaceutical manufacturing industry.[17] Approximately 40% of generic drugs are produced by a single manufacturer.[18] Pharmaceutical companies frequently extend their monopoly over the production and sale of drugs past the expiration of their patent through practices like predatory pricing, which make it difficult for new manufacturers to enter the market and increase competition.[19]

In these instances, we have gone past the point of needing to defend fair competition as a goal in and of itself; competition policy is now the mechanism for achieving other industrial policy priorities. Increased antitrust law enforcement can therefore be an important means of combating illegal practices, like predatory pricing, that harm the public by concentrating markets. [20] However, the failure of competition policy to act as a preventative measure means that increased enforcement will often have to take place alongside other measures that address the harms directly — even if these measures do not address the root cause of the problem. For example, the IRA imposed a $35 cap on Medicare beneficiaries' monthly out-of-pocket insulin expenses.[21]

Beyond increasing antitrust law enforcement, competition policy analysis can inform industrial strategies that attempt to increase market competition through other policy means, such as using public resources to support the growth of other competitors. For example, the California government has contracted a nonprofit drug producer to manufacture and sell affordable insulin — a tactic intended to incentivize

10 See Tara Pincock & Daniel A. Hanley, *Rules of the Game: Sports as a Lens for Understanding Fair Competition* (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5144173.

11 15 U.S.C. § 2.

12 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60-61 (1911).

13 *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

14 15 U.S.C. § 18.

15 *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

16 *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (enjoining a merger between two firms that would have resulted in a company with 7.5% market share.); *United States v. Aluminum Co. of America (Rome Cable)*, 377 U.S. 271 (1964) (enjoining a merger of a firm with 27.8% market share that attempted to acquire a firm with 1.3% market share).

17 Ernst R. Berndt, Rena M. Conti & Stephen J. Murphy, *The Landscape of US Generic Prescription Drug Markets, 2004-2016* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23640, July 2017), https://www.nber.org/papers/w23640.

18 *Ibid.*

19 Nick Dearden, Pharmanomics: How Big Pharma Destroys Public Health (2023).

20 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

21 Inflation Reduction Act, Pub. L. No. 117–169, 136 Stat. 1818 (2022).

the three incumbent insulin manufacturers to lower their prices, and keep them low in the long term.[22] An alternative to this arrangement would be publicly-owned manufacturing — just as the military long produced its own vaccines and other critical drugs — using public options to maintain competition in critical industries.[23] Thus, industrial policy becomes the mechanism for advancing competition policy priorities, and vice versa.

B. Overcoming Incumbent Resistance to Change

Industrial policy is closely associated with the process of change and moments of economic transition. As a precondition for this change, it is in the public interest to support innovation that can generate the new technologies or practices that will make up the industries of the future, and thus supply new benefits to the public.[24] However, incumbent firms resist economic change, because change can threaten their market dominance and their profits, or create unpredictable financial returns. Competition policy can thus help ensure that markets are open to new players and new innovations.

Companies that stifle innovation are effectively withholding the benefits of the innovation — including the economic gains from the growth of new industries — from the public. For example, the former telecommunications monopolist AT&T deliberately withheld a number of technologies from the public that had been developed or acquired by Bell Labs, but that threatened their profits from providing telephone services.[25] AT&T was eventually required to enter into a sweeping settlement with the government, resulting in its patent portfolio being released to competitors in the telecommunications and electronics appliances industries. These other companies soon used them to develop technologies like the answering machine, modems, and, eventually, the internet.[26]

In another example, the automaker General Motors ("GM") responded to a 1990 California mandate for automakers to deliver zero-emission vehicles within a decade by taking control of the intellectual property of Ovonic Battery Company, and developing an electric vehicle ("EV") prototype, EV1, intended to demonstrate the economic infeasibility of achieving the mandate; GM canceled its EV program by 2000 and sold its shares of Ovonic to Texaco.[27] Meanwhile, in Japan, Toyota partnered with Matsushita (now Panasonic) to develop the hybrid Prius, laying the groundwork for Japan to build world-leading EV and battery industries.[28]

Among the more notable ways that incumbents resist change is through killer acquisitions, in which a firm uses their capital reserves to acquire a competitor in order to neutralize any threats to their business model. Scholars have conservatively estimated that between five and seven percent of mergers are killer acquisitions.[29] This implies that today's leading technology companies — who between 1987 and 2018 acquired over 700 companies — have reaped significant benefits from stifling new competitors and preventing the growth of potentially socially beneficial innovations that could challenge their business status quo.[30]

In addition to killer acquisitions, other practices, like refusals to deal or exclusive dealing arrangements, can undercut new competitors in ways that prevent them from gaining the skills, capital, or networks to innovate or otherwise challenge the incumbent. For example, attempts by companies like Deere to deny customers the right to repair their own equipment prevent independent repair businesses from entering the market, and thus gaining skills and opportunities to profit from innovation. [31] Similarly, the classic *Lorain Journal Co. v. United States* Supreme Court decision centered on a local newspaper using its monopoly power to undermine a new radio

22 Audrey Stienon, *Public Pharma's Biggest Barrier*, Am. Prospect (Jan. 5, 2024), https://prospect.org/health/2024-01-05-public-pharmas-biggest-barrier.

23 Ganesh Sitaraman & Anne L. Alstott, The Public Option: How to Expand Freedom, Increase Opportunity, and Promote Equality (2019).

24 Ganesh Sitaraman, *Industrial Revolutionaries*, Am. Prospect (Sept. 10, 2020), https://prospect.org/economy/industrial-revolutionaries-franklin-hamilton-madison-jackson/.

25 Daniel A. Hanley, *Structuring Competition to Foster Socially Beneficial Innovation*, Competition Pol'y Int'l: Antitrust Chronicle 8 (Sept. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4586770.

26 Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018).

27 Matthew Eisler, *Public Policy, Industrial Innovation, and the Zero-Emission Vehicle*, 94 Bus. Hist. Rev. 779 (2021).

28 *Ibid.*

29 Colleen Cunningham, Florian Ederer, & Song Ma, *Killer Acquisitions*, 129 J. Pol. Econ. 649 (2021).

30 Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, Am. Antitrust Inst. 4-5 (July 8, 2019). *See also* Walter Adams & James W. Brock, *The Proposed Emasculation of Section 7 of the Clayton Act*, 65 Neb. L. Rev. 813, 819 (1986).

31 Daniel A. Hanley, *Per Se Illegality of Exclusive Deals and Tyings as Fair Competition*, 37 Berkeley Tech. L.J. 1057, 1083-84 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4101909; Daniel A. Hanley, Claire Kelloway, & Sandeep Vaheesan, *Fixing America: Breaking Manufacturers' Aftermarket Monopoly and Restoring Consumers' Right to Repair*, Open Markets Inst. 16 (Apr. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089852.

competitor by refusing to deal with any local business that advertised on the radio — thus suppressing the growth of what would become a new industry. [32]

A basic function of competition policy is to prevent this sort of behavior, and thus to allow the public to benefit from new innovation, and the resulting emergence of new types of business, jobs, and industries.

The classic mechanism for preventing killer acquisitions is Section 7 of the Clayton Act, with its prohibition of mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly." Furthermore, Congress enacted separate, sector-specific restrictions in critical industries like telecommunications, railroads, electrical transmissions, and banking.[33] Once incumbents have gained a stranglehold on market innovation, divestitures and structural breakups of companies, like AT&T (on three separate occasions) have been a common remedy imposed by courts.[34]

Meanwhile, practices like exclusive deals and refusals to deal are actionable under the Sherman Act, as well as under Section 5 of the Federal Trade Commission ("FTC") Act.[35] While the FTC is the only agency empowered to enforce this provision, Section 5 covers a broad range of exclusionary practices that may not meet the higher legal thresholds of other antitrust laws. Section 5 also has lower procedural and evidentiary barriers, making it a critical tool for addressing emerging or subtle forms of unfair market behavior.[36] Section 5, therefore, offers a flexible and forward-looking legal framework for keeping essential channels of commerce open and ensuring that economic transitions remain competitive, innovative, and broadly beneficial.[37]

C. Preventing Incumbent Capture of Adjacent Industries

One of the primary uses of industrial policy is to help an industry to grow and so that it may generate public benefits like increased supply, new jobs, and competition. This is often done using policies like trade protections or subsidies that create new opportunities for market actors to earn profits in a given sector. However, an important question of industrial policy is which market actors will capture the gains of this growth.

Unfortunately, the market actors that are often best placed to capture the gains of industrial policies are the incumbent firms in adjacent sectors, whose priorities may not align with the public priorities driving the industrial policy.

Incumbent firms may enter adjacent markets in order to avoid having to invest in building up their own capabilities in a growing sector — especially if that sector competes with the incumbent. For example, evidence presented in the FTC's lawsuit against Facebook's parent company, Meta, shows that Facebook acquired Instagram and WhatsApp in order to avoid having to invest in building its own photo-sharing and telecommunications products, and to reduce the competition that the company faced from these services.[38]

Competition policy is therefore an important means of ensuring that dominant firms cannot leverage their existing power to gain an unfair advantage, or to stifle competition, in adjacent markets. Once again, the most important tools are consistent oversight over mergers and enforcement of competition policy rules. The antitrust laws, for example, restrict the use of tying arrangements, which companies can use to extend their dominance into new markets by combining, or mandating the use of two separate products or services.[39]

Furthermore, Congress has repeatedly established industry-specific safeguards to prevent companies from using market power in one area to gain an unfair advantage in another, or to limit systemic economic risk. For example, the Glass-Steagall Act prohibited investment banks

32 *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). For more on the adverse effects of refusals to deal, *see* Daniel A. Hanley, *Illuminating the Anti-Coercion Foundations of Refusals to Deal,* Competition Pol'y Int'l: Antitrust Chronicle (Sept. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4974547.

33 Daniel A. Hanley, *Administrative Antimonopoly*, Open Markets Inst. (Feb. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044077.

34 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60-61 (1911); Daniel A. Hanley, *America's Fourth Estate: History and Law*, Open Markets Inst. 12, 19 (Nov. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4628618. For a defense of break ups as an antitrust remedy, *see* Rory Van Loo, *In Defense of Breakups: Administering A "Radical" Remedy*, 105 Cornell L. Rev. 1955 (2020).

35 15 U.S.C. § 45.

36 *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 371 (1965).

37 Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. Pa. J. Bus. L. 645 (2017).

38 Brendan Benedict, *Zuckerberg on the Stand: The Trial to Break Up Facebook Starts Monday*, Big Tech on Trial (Apr. 10, 2025), https://www.bigtechontrial.com/p/zuckerberg-on-the-stand-the-trial.

39 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958).

from operating as commercial banks.[40] Similar provisions exist in the Air Mail Act of 1934 (separating aircraft carriers and aircraft equipment manufacturers),[41] the Hepburn Act (prohibiting railroads from transporting goods in which they have a "direct or indirect interest"),[42] and the Panama Canal Act of 1912 (separating railroads and ocean carriers operating in the Panama Canal).[43] Congress has also empowered federal agencies to enact similar restrictions. The Federal Communications Commission ("FCC"), for example, developed Fin-Syn rules that separate television networks from the television studios and production houses that produce their content.[44] Similarly, the FCC's media ownership rules limit the number of media outlets that any corporation can own, and historically prevented any one entity from simultaneously owning a broadcast (radio or TV) station and a newspaper in the same geographic area.[45]

Meanwhile, common carriage obligations require firms to treat all customers and trading partners on equal and non-discriminatory terms, limiting opportunities for adjacent incumbents to discriminate against the firms in a new industry.[46] The Robinson-Patman Act, for example, prevents firms from arbitrarily selling their goods at discriminatory prices to favored customers, and prevents large firms from demanding preferential treatment due to their size.[47] In select industries, particularly in transportation, Congress has imposed common carriage obligations by statute; railroads and ocean carriers being prominent examples.[48] Given their central importance to the digital economy, cloud providers like Amazon, Microsoft, and Google have inherited a similar role to the railroads in that they control essential technological highways that interconnect our entire technological infrastructure and can unilaterally determine who can access the digital economy. As such, policymakers should undoubtedly extend common carriage obligations to services like cloud computing, ensuring that competition and access remain open, fair, and democratic.

Finally, competition policy analysis is critical for ensuring that industrial policy strategies incorporate diverse policy mechanisms to not only avoid the capture of growing sectors but also to ensure that unfair market behavior does not threaten the public goals of the industrial policy.

A growing threat to current industrial policy strategies is that of capture by the financial industry — and in particular, by private equity. Much like the Gilded Age money trusts of the 19th century, private equity funds use their financial power to acquire businesses across industries and reshape their behavior for their own benefit, often at the expense of other stakeholders.[49] Private equity has been particularly destructive across care industries (like nursing homes, hospitals, hospice care, home care, or child care) that provide services essential to public welfare, and where the profitability of private businesses is largely dependent on the public money (i.e., subsidies) provided through programs like Medicare or Medicaid. Despite making substantial profits from the public money being invested in care industries, private equity tactics largely undermine public priorities for these sectors. Private equity-owned care businesses are more likely to offer lower quality services to customers, lower wages and poorer job quality to their workers, and to risk bankruptcy and thus a reduction of care supply to a community.[50]

Competition policy has started offering limited protection against the threat of private equity capture. Private equity funds are increasingly engaging in serial acquisitions, entering highly fragmented markets and profiting from market consolidation. Although this means that

40 Banking Act of 1933, ch. 89, §§ 16, 20, 21, and 32, 48 Stat. 162.

41 Air Mail Act of 1934, 48 Stat. 933 (1934).

42 Hepburn Act, Pub. L. No. 59-337, § 1, 34 Stat. 584, 584 (1906).

43 Panama Canal Act of 1912, Pub. L. No. 62-337, § 11, 37 Stat. 560.

44 Hanley, *supra* note 34, at 15.

45 *Ibid.*

46 For a background on common carriage obligations, *see* A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. Hist. Rev. 53 (2005); Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 (1914); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283 (1996).

47 15 U.S.C. § 13; *FTC v. Henry Broch & Co.*, 363 U.S. 166, 174 (1960) ("Congress enacted the Robinson-Patman Act to prevent sellers and sellers' brokers from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale of goods."); *see also* Daniel A. Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act*, 52 Hofstra L. Rev. 313, 319-325 (2024) (describing the Robinson-Patman Act as an anti-discrimination law).

48 49 U.S.C. § 11101(a) (railroads); 46 U.S.C. § 41102(c) (ocean carriers).

49 Brendan Ballou, Plunder: Private Equity's Plan to Pillage America (2023); Eileen Appelbaum & Rosemary Batt, Private Equity at Work: When Wall Street Manages Main Street (2014).

50 Atul Gupta, Sabrina T. Howell, Constantine Yannelis, & Abhinav Gupta, *Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28474, Aug. 2023), https://www.nber.org/papers/w28474; Eileen Appelbaum, Emma Curchin & Rosemary Batt, *Profiting at the Expense of Seniors: The Financialization of Home Health Care*, Ctr. Econ. & Pol'y Rsch. (Sept. 27, 2023), https://cepr.net/publications/profiting-at-the-expense-of-seniors-the-financialization-of-home-health-care/; Richard M. Scheffler et al., *Monetizing Medicine: Private Equity and Competition in Physician Practice Markets*, Am. Antitrust Inst. (July 10, 2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI-UCB-EG_Private-Equity-I-Physician-Practice-Report_FINAL.pdf.

individual acquisitions are quite small, the controlling law, aptly summarized in the 2023 Merger Guidelines, empower U.S. competition policy regulators to consider the cumulative impact of serial acquisitions in determining whether to block future acquisitions.[51] Competition policy enforcement can also be used to prevent private equity funds, and their portfolio companies, from using unfair market tactics to limit competition in local markets,[52] or even exclusive deals between the different companies in a private equity fund's portfolio.

Beyond these tactics, competition policy can inform efforts to use other industrial policy tactics to strengthen competitors to private equity-backed companies.[53] Competition policy considerations can be embedded in the ways that public funding is distributed to different industries. For example, Massachusetts has capped the share of public childcare funding available to any single company, thus restricting the profitability of using serial acquisitions to capture the market.[54] Policymakers can also prioritize public programs for small businesses, nonprofits, and co-ops for funding, or create public service suppliers that set the baseline for quality, price, and accessibility. It is also important to empower industry regulators, or public program administrators, to monitor market health, and know how to identify signs of unfair business practices that can be brought to competition policy enforcers.

D. Prevent New Monopolists

Finally, among the most critical tasks of any industrial policy strategy is ensuring that the industries it is transforming come out at the other end with fair, pro-democracy markets. Whether or not an industrial policy strategy manages to protect an industry from capture or coercion from incumbent firms and adjacent industrial actors, it must prevent the firms in this sector from becoming the next generation of monopolists.

The history of the American railroad industry offers a cautionary tale about government policies that fail to position democratic governance and competition considerations at the forefront of their strategies. Throughout the nineteenth century, the U.S. federal government, along with state governments, provided immense support to railroad companies to encourage the expansion of this sector — which in turn promoted growth in agricultural and heavy industrial production.[55] The federal government ultimately transferred about 179 million acres of land — equivalent to seven percent of the continental U.S. — to private railroad companies, giving them control not only of the rails themselves, but also of many of the western settlements that were constructed around them.[56]

However, the government's strategy did not adequately anticipate the consequences of the enormous power that the railroad companies would accumulate. Not only were the railroad companies unscrupulous in their behavior towards each other, but they also leveraged their position as a critical transportation provider to extort rents from the manufacturing and agricultural producers that depended on their services, and used their market power to expand their own business into adjacent sectors.[57] Although the railroad companies successfully built a nationwide transportation network, they ultimately developed an industry so corrupt and exploitative of other stakeholders that it placed an enormous strain on the democratic governance of the country itself.

Fortunately, in large part due to the enormous political backlash that grew in response to the corruption of the railroad and other Gilded Age robber barons, the U.S. now has a series of laws — like the Interstate Commerce Act and its many subsequent amendments, [58] the antitrust laws, and institutions like the FTC — intended to ensure that the government can prevent any industry, firm, or financier from gaining a similar chokehold over the American economy. However, it remains primarily in the hands of lawmakers and policy experts to enforce these rules against unfair behavior, even when the perpetrators are in critical industries receiving other forms of government support. The history of the railroads

51 U.S. Dep't of Justice & the Fed. Trade Comm'n, Merger Guidelines (Dec. 2023).

52 *See* Press Release, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas*, FTC.gov (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

53 Audrey Stienon & Melissa Boteach, *Children Before Profits: Constraining Private Equity Profiteering to Advance Child Care as a Public Good*, Nat'l Women's L. Ctr. & Open Markets Inst. (June 2024), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/66798e200b1524426bb44b79/1719242272751/Children+Before+Profits+-+WEB.pdf.

54 An Act ensuring affordability, readiness and learning for our youth and driving economic development, S.2697 (2024) (Massachusetts), https://legiscan.com/MA/text/S2697/id/2953697.

55 Lloyd J. Mercer, Railroads and Land Grant Policy: A Study in Government Intervention 2 (1982).

56 *Ibid.* at 6-7.

57 Joseph R. Blasi, Richard D. Freeman, & Douglas L. Kruse. The Citizen's Share: Reducing Inequality in the 21st Century (2014); Cohen & DeLong, *supra* note 2; David B. Danbom, Born in the Country: A History of Rural America (1995).

58 Interstate Commerce Act, 24 Stat. 379 (1887).

shows that even industries that have been structured to yield public benefits on one area of the economy can attempt to stifle innovation and competition that threatens their market position, and to capture the gains from other growing sectors.

Competition policy enforcement must therefore be incorporated into industrial policy strategy from the start, and industrial strategies must be designed to reduce opportunities for industries to use the power they gain from the government's support to weaken democratic economic governance and fair competition.

To start, industrial strategies should aim to create market conditions that direct firms towards desired behaviors and outcomes, rather than attempt to provide targeted assistance to a specific set of preferred firms. This latter "national champion" approach is exceptionally risky because it reduces the competitive pressures that these firms face, and implies that these firms will receive government support irrespective of whether they succeed in promoting public interest priorities.

Instead, industrial policies should be applied fairly across an industry. For example, the government should provide open access to subsidies for all qualifying firms — just as the Post Office Act of 1792 allowed all newspapers to use the U.S. mail system at low rates in order to help build a robust news and information distribution system to buttress the nascent American democracy.[59] The government can also set uniform and open standards for services and parts, allowing more firms to adjust their operations and provide services for tasks.[60]

Industrial strategies should also incorporate policies to encourage growth among varied firms, providing extra support to smaller or weaker firms as needed for them to remain active in the sector. Government procurement can be structured to solicit bids, and source from, multiple providers — as was the norm for NASA when partnering with private firms during the Apollo Mission.[61] The government can also authorize small providers to increase their coordination in order to achieve economies of scale, so that they can compete with larger firms while maintaining deconcentrated markets. For example, the 1942 Small Business Mobilization Act authorized businesses to coordinate in streamlining wartime production without violating antitrust laws.[62]

Industrial strategies should nevertheless set conditions that link government support to firms' contributions to the public interest. This can include caps on the amount of money that firms can use to pay executives or investor dividends while they are receiving government payments. The government can also impose licensing requirements to prevent firms from wielding their intellectual property to lock-in or extort dependent firms.[63] Firms that fail to advance these priorities, including firms that abuse the power they gain through government policies, should lose this support.

Each of these mechanisms proactively prevents the concentration of power and any one firm from exclusively benefiting from a particular government initiative facilitating an economic transition, all while keeping markets open and fair.

E. Monopoly Nations

The laws and institutions governing competition policy are designed to structure national markets. However, unfair market dynamics also exist in the international economy — with the main difference that the monopolistic actors are countries rather than companies.

A recognition of the parallels between the trade and competition policy fields is not new. The Hirschman-Herfindahl Index, now used to measure market concentration within an industry, was initially developed by Albert Hirschman in 1945 to measure countries' dependence on their trade partners as part of his analysis of how countries exploit their trade relationships to accumulate national power.[64]

59 An Act to Establish the Post-Office and Post Roads Within the United States (the Postal Act of 1792), 1 Stat. 232 (1792); *see also* Hanley, *supra* note 34, at 7-9.

60 For example, the FCC sets interconnection standards for telecommunications systems. See Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1899 (2002).

61 Mariana Mazzucato, Mission Economy: A Moonshot Guide to Changing Capitalism (2021).

62 Small Business Mobilization Act, ch. 404, §§ 1101–1112, 56 Stat. 351 (1942). For additional background on the Small Business Mobilization Act and its antimonopoly underpinnings, *see* Basel J. Musharbash & Daniel A. Hanley, *Toward a Merger Enforcement Policy That Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act*, 63 Duquesne L. Rev. 1, 117 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4745310.

63 Jonathan M. Barnett, *The Great Patent Grab, in* The Battle Over Patents: History and Politics of Innovation 213 (Stephen H. Haber & Naomi R. Lamoreaux, eds., 2021) ("[Between 1941–1959] an estimated 40,000– 50,000 patents, representing 8 percent of all unexpired patents at that time[, were under a compulsory licensing requirement due to antitrust litigation].").

64 Albert O. Hirschman, National Power and the Structure of Foreign Trade (1945).

Despite these warnings, our existing international economic system, governed by institutions like the WTO, was designed with an insufficient appreciation of the risks of market concentration. By incentivizing industries to geographically concentrate their productive capabilities to lower costs and maximize efficiency, the system enabled the rise of monopoly nations, like China, on whom the world is now dependent for the supply of critical goods — including goods, like critical minerals, batteries, EVs, and solar panels which are essential to the success of the climate and technology transitions.[65] Like monopolist firms, monopoly nations can leverage their control over supply chain chokepoints to extort their trade partners during economic or geopolitical disputes, and can protect their industrial advantage by, for example, dumping underpriced goods on global markets to undercut the growth of potential competitors.[66]

Monopoly nations, of course, cannot be broken up like a monopolistic company to restore fair market competition. Instead, competitors need to be built up, using industrial policy, to offer alternative sources of supplies of critical goods. The Biden Administration's Inflation Reduction Act and CHIPS and Science Act both represented attempts to support American production of critical goods, like EVs and semiconductors, and reduce risks from supply chain chokepoints.[67]

However, the goal of American industrial policy should not be to make the U.S. the sole producer of the goods that Americans consume. Concentrating critical industries solely in the U.S. perpetuates many of the resiliency risks that exist in today's economy, especially given the growing risks from climate shocks disrupting concentrated production. Furthermore, American industries are strengthened by competition with foreign rivals. The U.S. therefore needs an industrial strategy that, in each critical sector, works in tandem with other countries to build up multiple sources of production that compete with, yet reinforce each other. For example, U.S. lawmakers could consider ways to require critical industries to source from multiple countries — with domestic producers counting as only one source of supply.[68] Not only will this help make the global economy more resilient in the face of growing climate and geopolitical risks, but it will also help spread the economic gains of industrial growth across countries and regions.[69]

While industrial policy is needed to rebuild global productive capabilities, the challenge in the long-term will be to reform the international trade system to prevent production from concentrating in any country once industrial policy support is removed. The expertise of the competition policy field will be invaluable in these discussions to help define what a fair international economy looks like, and what kinds of institutions are needed to rein in the power of both monopoly nations and monopolistic multinational firms.

IV. CONCLUSION

The world is embarking on a moment of profound economic transformation. If we are successful, countries like the U.S. will come out on the other side of this transition with a society that is cleaner and more sustainable; where people can access the goods and care services that they need at every stage of their lives; where people's jobs pay them wages that enable them to achieve ever higher standards of living; and in which people can use new, advanced technologies to innovate and imagine even better futures. The key to this success is to ensure that we navigate this economic transition through democratic governance, ensuring that no industry or company or individual is able to concentrate power and divert the direction of change towards ends that benefit them over the public.

Unfortunately, we are starting this journey facing numerous threats from concentrated power — many of which are a direct consequence of the laissez-faire industrial policy strategies implemented in recent decades. The climate transition, long delayed by incumbent fossil fuel and other incumbent industries, is dependent on new industries heavily concentrated in China. The finance and tech industries, which were among the greatest beneficiaries of the deregulatory choices of the last transition, are spreading their influence across the economy, including into critical care and emerging green tech sectors. In doing so, they are reshaping markets to increase their own wealth and power at the expense of society. Meanwhile, the U.S. and China seem poised to enter into a zero-sum struggle for supremacy in the global economy, both of them preparing to weaponize their respective control over market chokepoints to inflict economic harm on the other.

65 The U.S. controls its own chokepoints, notably over military equipment, international financial systems, and telecommunications infrastructure. See Edward Fishman, Chokepoints: American Power in the Age of Economic Warfare (2025); Henry Farrell & Abraham Newman, Underground Empire: How America Weaponized the World Economy (2023).

66 Janet Yellen, Secretary of the Treasury, *Remarks on the U.S. - China Economic Relationship at Johns Hopkins School of Advanced International Studies* (Apr. 20, 2023), https://home.treasury.gov/news/press-releases/jy1425.

67 Inflation Reduction Act, Pub. L. No. 117–169, 136 Stat. 1818 (2022); CHIPS and Science Act, Pub. L. No. 117–167, 136 Stat. 1366 (2022).

68 Barry C. Lynn, *Manufacturing and Liberty*, Wash. Monthly (Jan. 8, 2023), https://washingtonmonthly.com/2023/01/08/manufacturing-and-liberty/.

69 Katherine Tai, U.S. Trade Representative, *Remarks at the National Press Club on Supply Chain Resilience* (June 2023), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/june/ambassador-katherine-tais-remarks-national-press-club-supply-chain-resilience.

It is clear that a decentralized, democratic, fair, and open economy is not a natural outcome of an economic transition. It is a deliberate political and economic choice, made possible by democratically enacted laws and institutions. Industrial policy will be critical for guiding countries through these transitions, but alone, it cannot achieve broad-based prosperity or resilient democratic markets. Without competition policy as a fundamental component of its implementation, industrial policy instead risks facilitating new and entrenching current concentrations of private power rather than promoting inclusive economic transformation.

As governments deploy industrial strategies to guide economies through major transitions, competition policy must be placed at the forefront — not as a secondary concern but as a primary condition for success. It is the instrument that ensures that economic change serves the public good rather than allowing private empires to capture and control the future.

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