

**Senator Elizabeth Warren**  
**“Reigniting Competition in the American Economy”**  
**Keynote Remarks at New America’s Open Markets Program Event**  
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**\*\*\*As Prepared for Delivery\*\*\***

Thank you, thank you. As Barry mentioned, before I was a Senator, I was a law professor. What he didn’t say is that I taught contracts, secured transactions, and bankruptcy – all courses related to the functioning of competitive markets. I love markets! Strong, healthy markets are the key to a strong, healthy America.

That’s the reason I am here today. Because anyone who loves markets knows that for markets to work, there has to be competition. But today, in America, competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.

Evidence of the problem is everywhere. Just look at banking. For years, banks have been in a feeding frenzy, swallowing up smaller competitors to become more powerful and, eventually, too big to fail.<sup>1</sup> The combination of their size, their risky practices, and the hands-off policies of their regulators created a perfect storm, resulting in the worst financial crisis in 80 years. We know that excessive size and interconnectedness promotes risky behavior that can take down our economy – and yet, today, eight years after that financial crisis, three out of the four biggest banks in America are even bigger than they were before the crisis and two months ago five were designated by both the Fed and the FDIC as “too big to fail.”<sup>2</sup>

The concentration problem—and particularly the idea of “too big to fail” in the financial sector—gets a lot of attention. But the problem isn’t unique to the financial sector. It’s hiding in plain sight all across the American economy.

In the last decade, the number of major U.S. airlines has dropped from nine to four.<sup>3</sup> The four that are left standing—American, Delta, United, and Southwest—control over 80% of all domestic airline seats in the country.<sup>4</sup> And man, are they are hitting the jackpot now. Last year those four big airlines raked in a record \$22 billion in profits.<sup>5</sup> Eighteen billion alone came from fees for baggage and legroom and pay toilets. Ok, the last one was a joke, but what have passengers received in return for their higher costs? Fewer flights and worse service.<sup>6</sup> Airline complaints rose 30 percent just from 2014 to 2015.<sup>7</sup>

The list goes on. A handful of health insurance giants—including Anthem, Blue Cross Blue Shield, United Healthcare, Aetna, and Cigna—control over 83 percent of the country’s health insurance market.<sup>8</sup>

Three drug stores—CVS, Walgreen’s, and Rite Aid—control 99% of the drug stores in the country.<sup>9</sup>

Four companies control nearly 85% of the U.S. beef market, and three produce almost half of all chicken.<sup>10</sup>

Some people argue that concentration can be good because big profits encourage competitors to get into the game. This is the perfect stand-on-your-head-and-the-world-looks-great argument. It says that there's no competition today, but maybe there will someday be competition.<sup>11</sup> The truth is pretty basic—markets need competition now. So I want to talk about five reasons to be concerned about the decline of competition.

The first problem is that less competition means less consumer choice.<sup>12</sup> When consumers can purchase similar products from multiple competitors, they force market players to constantly seek out new ways to reduce prices and increase the quality of goods and services to get their business. But when companies consume their rivals instead of competing with them, consumers can get stuck with few or no alternatives. Prices go up, and quality suffers.

Consider Comcast, the nation's largest cable and internet service provider. Comcast has consolidated its position by buying up rivals.<sup>13</sup> Today, over half of all cable and internet subscribers in America are Comcast customers.<sup>14</sup> And last year was Comcast's best year in nearly a decade.<sup>15</sup> But while big telecom giants have been consuming each other, consumers have been left out in the cold—facing little or no choice in service providers and paying through the nose for cable and internet service. Over a third of Americans who theoretically have access to high speed internet don't actually subscribe because the price tag is too high.<sup>16</sup> And the data are clear: Americans pay much more for cable and internet than their counterparts in other advanced countries and, in return, we get worse service.<sup>17</sup>

The second reason the decline in competition should cause concern is that big guys can lock out smaller guys and newer guys. Take a look at the technology sector—specifically, the battle between large platforms and small tech companies.

Google, Apple, and Amazon provide platforms that lots of other companies depend on for survival. But Google, Apple, and Amazon also, in many cases, compete with those same small companies, so that the platform can become a tool to snuff out competition. Look at some examples.

In 2012, FTC staff concluded that Google was using its dominant search engine to harm rivals of its Google Plus user review feature. Among other things, the staff produced evidence showing that Google promoted its own Google-branded content over its rivals even though those rivals would have otherwise had top billing through its organic search algorithm.<sup>18</sup> The FTC commissioners ultimately sided against the conclusion of their staff, but the European Commission has moved forward with formal charges on similar allegations, and Europeans may soon enjoy better protections than U.S. consumers.<sup>19</sup>

Apple has received attention over similar issues. The latest example is its treatment of rival music-streaming companies. While Apple Music is easily accessible on the iPhone, Apple has placed conditions on its rivals that make it difficult for them to offer competitive streaming

services. The FTC is investigating those issues and deciding whether to sue Apple for antitrust violations.<sup>20</sup>

Amazon has faced similar charges. Last year, groups representing thousands of authors claimed that Amazon uses its position as the dominant bookseller to steer consumers to books published by Amazon to the detriment of other publishers and that it extracts larger and larger shares of book profits from publishers, which discourages publishing houses from publishing riskier books or books written by lesser-known authors.<sup>21</sup>

Google, Apple and Amazon have created disruptive technologies that changed the world, and every day they deliver enormously valuable products. They deserve to be highly profitable and successful. But the opportunity to compete must remain open for new entrants and smaller competitors that want their chance to change the world again.

The third problem created by less competition is that when competition declines, small businesses can be wiped out – and our whole economy can suffer. Look at what is often referred to as the Wal-Mart effect. Wal-Mart is big, and it's powerful. It delivers anywhere from 30 to 50 percent of the products Americans consume, and it controls over half of all groceries sold in some major cities.<sup>22</sup>

Wal-Mart's gigantic size gives it a competitive advantage over small businesses. And often, when Wal-Mart moves into town, small businesses collapse because they can't compete with the price leverage Wal-Mart has built with its suppliers.<sup>23</sup>

Wal-Mart is notorious for the low wages and poor working conditions it offers, and the Wal-Mart effect has an impact on suppliers as well—forcing them to cut their own workers' wages and benefits to keep Wal-Mart's business.<sup>24</sup> Workers who cannot survive on those wages turn to public assistance, including housing, health care and food stamps, that is subsidized by other taxpayers. Wal-Mart workers alone are estimated to collect about \$6 billion a year in federal taxpayer subsidies just to survive.<sup>25</sup> That means the low, low prices that Wal-Mart advertises are paid for, in part, by high, high tax subsidies that every other American pays for. In the meantime, Wal-Mart's investors pocket the high, high profits.<sup>26</sup>

The fourth problem is that concentrated markets create concentrated political power. The larger and more economically powerful these companies get, the more resources they can bring to bear on lobbying government to change the rules to benefit exactly the companies that are doing the lobbying. Over time, this means a closed, self-perpetuating, rigged system – a playing field that lavishes favors on the big guys, hammers the small guys, and fuels even more concentration.

This is a big one – and it should terrify every conservative who hates government intervention. Competitive markets generate so many benefits on their own that the government's only role in those markets should be simple and structural – prevent cheating, protect taxpayers, and maintain competition. Concentrated markets dominated by a handful of powerful players, on the other hand, don't produce the consumer benefits that flow from robust competition. Instead, the benefits are sucked up by a handful of executives and large investors, and their lobbying remains focused on protecting the giant corporations. Government intervention in concentrated markets

inevitably becomes more and more complex and technocratic, as it attempts to impose complicated regulations in an effort to recreate the benefits of competitive markets.

It's costly, it's inefficient, and it plays right into the hands of the big guys, who can afford to throw armies of lawyers at the regulatory process. Small players end up having to shoulder regulatory compliance costs that make it even harder for them to compete, while big players use their resources and political clout to win loopholes, carveouts, and rollbacks that favor themselves and make it even harder for new competitors to survive. Over time, the result is a trifecta: more intrusive government, more concentration, and less competition.

Finally, concentration has contributed to the decline of what was once a strong, robust middle class in this country. As corporations get bigger, and bigger, and bigger, a handful of managers get richer, and richer, and richer. And god-bless—in America, we celebrate success. But what about everybody else? What about small business owners and community bankers – people who used to be able to hold their own with big guys but now find it harder and harder to keep up with the armies of corporate lawyers and lobbyists determined to rig the economy against them? What about the employees at Wal-Mart who scrape by on help from the food pantry and Medicaid, but who never have enough money to build any security? What about them? They are stuck.

Concentration is not the only reason for rising economic insecurity, but it is one of them. Concentrated industries result in concentrated profits. It's the ultimate price squeeze. When markets are not competitive, big businesses are able to extract monopoly profits by setting prices that are higher and higher above the cost of making an item or providing a service. In 2014, the top 500 largest firms pocketed 45 percent of the global profits of ALL American businesses.<sup>27</sup> And the vast majority of those profits went to the wealthiest of the wealthy. As of 2013, the wealthiest 1 percent of Americans held nearly half of all the stock and mutual fund assets held by all Americans.<sup>28</sup>

And who gets a shot at their own dream? When big business can shut out competition, entrepreneurs and small businesses are denied their shot at building something new and exciting.

Left unchecked, concentration will destroy innovation. Left unchecked, concentration will destroy more small companies and start-ups. Left unchecked, concentration will suck the last vestiges of economic security out of the middle class. Left unchecked, concentration will pervert our democracy into one more rigged game.

But the good news is that this isn't the first time America has faced this threat. We have been here before, and we know the way out.

More than a century ago, America was in the midst of a transformation from a nation of small shopkeepers, craftsmen, and farmers to a country of giant corporations. As greater and greater economic and political power concentrated in a smaller and smaller number of firms, America decided we needed some new policies – simple, structural rules – to level the playing field. Congress created antitrust law to address the concentration of wealth and power in the hands of the few, passing the Sherman Anti-Trust Act and Clayton Anti-Trust Act. Progressive-Era

reformers like Teddy Roosevelt, William Howard Taft, and Woodrow Wilson were trust-busters, people who fought the power that monopolies wield in the economy and in politics.

The original purpose of these laws was to fight concentrated economic *and* political power. One hundred years ago, Congress understood that these two factors were forever intertwined. Arguing for passage of the Sherman Act in 1889, Senator John Sherman famously declared: “If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life.”<sup>29</sup>

A generation later, Supreme Court Justice Louis Brandeis worried that the “concentration of economic power” was so great that “private corporations are sometimes able to dominate the state.”<sup>30</sup> The corporate system was becoming akin to the “feudal system,” that would mean “the rule of a plutocracy.”<sup>31</sup> Brandeis declared that without vigilance, our government would be controlled by the very rich and the very powerful.

Under Franklin Roosevelt, antitrust enforcement took off. With Thurman Arnold at the helm, the Justice Department’s Antitrust Division grew from 18 lawyers to 500 and ramped up litigation. In Arnold’s five years running the Division, those lawyers brought almost as many cases as there had been in the previous thirty-five years.<sup>32</sup> Antitrust law was real—and American corporations knew it.

But starting in the 1970s, the story began to change. In the late 1970s, Robert Bork wrote an influential book rejecting the idea of competition as the driving rationale for antitrust law.<sup>33</sup> Bork argued that the government should weigh the costs of less competition against the claims of greater economic efficiency that consolidation could create. In his view, if a monopoly persisted, it was because the monopolist was more “efficient” than its competitors. If not, the market would correct itself and the former-monopolist would be driven out—no need for government in his make-believe world. Bork proudly ignored all of the harms caused by concentrated political or economic power that had motivated Congress to pass strong antitrust laws in the first place.

Bork’s framework limits antitrust thinking even today. When coupled with the deregulatory ideology of the Reagan era, the Bork approach to antitrust law meant that government largely stepped out of the way and let companies grow larger and larger.<sup>34</sup>

Now the country needs more competition – and more competitors – to accelerate economic growth, more competition to promote innovation, and more competition to reduce the ability of giant corporations to use their money and power to bend government policy and regulation to benefit themselves.

So how do we get more competition? And how do we do it without new legislation that would require cooperation from a Congress awash in campaign contributions and influence peddling?

We can start with a President and an Executive Branch willing to once again enforce our laws in the way Congress originally intended them to be enforced. We have the tools—right now—to reinvigorate antitrust law. Here are three ways to do it:

First: Hold the line on anticompetitive mergers.<sup>35</sup> The DOJ and FTC are at the front lines of the battle over mergers. These two agencies already have the authority to stop harmful mergers in their tracks. Too often, though, they don't use that authority. There's no question that antitrust enforcement has picked up since the Reagan administration. The largest increases in merger challenges were during the Clinton and Obama years, and the Obama administration has challenged a higher percentage of mergers than any administration since before Reagan's.<sup>36</sup> But mergers are outrunning enforcement. While the DOJ and FTC have opposed some huge mergers recently,<sup>37</sup> many others have slipped through with little push back. In fact, 2015 was the biggest year for mergers in U.S. history—both in terms of the number of mergers and the size of mergers.<sup>38</sup>

It has become fashionable in recent decades for the DOJ and FTC to allow mergers with serious antitrust implications to go forward IF the merging entity agrees to certain conditions. For example, one or both of the merging companies might need to sell off parts of its business, or the new entity might agree to change business practices in ways that supposedly would preserve competition despite increased market concentration.<sup>39</sup> These conditional approvals are sold as a win-win. There's just one problem – too often, they don't work.

A recent analysis of mergers challenged by the DOJ or FTC between 1999 and 2003 concluded that stopping mergers is the best way for regulators to prevent high price hikes down the road.<sup>40</sup> The study compared product prices before and after mergers and found that, when the DOJ and FTC allowed mergers to proceed with conditions attached, dramatic price increases still usually followed. By comparison, when regulators opposed the mergers altogether, prices rose at a fraction of the pace.<sup>41</sup>

The other problem with relying on conditions to offset the impact of bad mergers is that regulators who didn't have the political chops to block the deal in the first place are very unlikely to force the companies to break up after the fact, even if the companies blow off the conditions. In other words, enforcement of merger conditions is weak at best. Even when companies meet conditions, like selling off some assets, they sometimes just turn around and buy back the same assets they originally sold off. Literally. That actually happens. That's what happened after Hertz was permitted to merge with Dollar Thrifty and Albertsons was allowed to merge with Safeway. In both cases, the divested parts of the business declared bankruptcy, and the bigger companies just bought back part of the companies they sold off.<sup>42</sup>

The lesson is clear: where a merger raises fundamental antitrust concerns, regulators need to stand tall and say no.

Number Two: Closely scrutinize vertical mergers. Vertical monopolies exist when one company owns multiple parts of its supply chain – manufacturing, production, distribution, and sales. Again, size creates an advantage. When there's no competition anywhere in the chain, other businesses are locked out and die. The DOJ and FTC should approach vertical mergers with the same skepticism as horizontal mergers. As an aside, the guidelines that apply to vertical mergers haven't been reissued since 1984, and the world has changed a lot since then.<sup>43</sup> Revising those guidelines would be a good start.

Number Three: Require ALL agencies to promote market competition and appoint agency heads who will do so. Too often, the DOJ and FTC are viewed as the only agencies responsible for promoting competition. Promoting competition should be taken seriously across the Executive Branch. Some examples:

- The FDIC, the Federal Reserve, and other agencies have a role to play in making sure that financial institutions don't become so large that their smaller competitors don't have the opportunity to serve American families and small businesses.
- The FCC and FTC both have a role to play in making sure that small, innovative tech companies can develop newer and better ways for us to connect with each other without being crushed by the big guys.
- The Agriculture Department has a role to play in making sure that poultry farmers and produce growers aren't held hostage to the whims of giant firms.

In April, the White House issued an Executive Order requiring all government agencies to identify ways that they can play a role in increasing competition. That is exactly the right place to start.<sup>44</sup> We need strong regulators who will promote competition across all agencies – not just at the DOJ and FTC. We need strong regulators who draw the line on mega-mergers and on concentration across the economy. We need strong regulators who believe in competition because *personnel is policy*.

These are just a handful of steps that the President and federal agencies can take to restore and defend competition, but there is much more to do at all levels of government. And there are a lot of good ideas out there. Earlier this month, the Roosevelt Institute issued a report laying out a number of ways to check corporate, financial, and monopoly power.<sup>45</sup> And today, the Center for American Progress released a paper discussing the harmful effects of excess market power and proposing an extensive set of reforms designed to reinvigorate competition policy. Proposals include adopting a public interest standard for enforcement actions, placing the burden on merging companies to prove mergers will not harm competition, and requiring agencies to release more information about their enforcement actions. Those proposals could make a real difference.

Strong Executive leadership could revive antitrust enforcement in this country and begin, once again, to fight back against dominant market power and overwhelming political power.

But we need something else too – and that's a revival of the movement that created the antitrust laws in the first place.

For much of our history, Americans organized and protested against the forces of consolidation. As a people, we understood that concentrated power anywhere was a threat to liberty everywhere. It was one of the basic founding principles of our nation. And it threatens us now.

Competition in America is essential to liberty in America, but the markets that have given us so much will become corrupt and die if we do not keep the spirit of competition strong. America is a country where everyone should have a fighting chance to succeed—and that happens only when we demand it.

Thank you.

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<sup>1</sup> *How Banks Got Too Big To Fail*, Mother Jones, January/February 2010, available at <http://www.motherjones.com/politics/2010/01/bank-merger-history>.

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<sup>3</sup> David Koenig and Scott Mayerowitz, *Airline consolidation has created airport monopolies, increased fares*, The Denver Post, July 19, 2015, available at [http://www.denverpost.com/business/ci\\_28501683/airline-consolidation-has-created-airport-monopolies-increased-fares](http://www.denverpost.com/business/ci_28501683/airline-consolidation-has-created-airport-monopolies-increased-fares).

<sup>4</sup> Jack Nickas, *Airline Consolidation Hits Smaller Cities Hardest*, Wall Street Journal, Sep. 10, 2015, available at <http://www.wsj.com/articles/airline-consolidation-hits-smaller-cities-hardest-1441912457#:M1ZMKtAVWk5eBA>.

<sup>5</sup> Jad Mouawad, *Airlines Reap Record Profits, and Passengers Get Peanuts*, New York Times, Feb. 6, 2016, available at [http://www.nytimes.com/2016/02/07/business/energy-environment/airlines-reap-record-profits-and-passengers-get-peanuts.html?\\_r=0](http://www.nytimes.com/2016/02/07/business/energy-environment/airlines-reap-record-profits-and-passengers-get-peanuts.html?_r=0).

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<sup>7</sup> Hugo Martin, *Airline complaints rise 30% in 2015; airfare gripes nearly double*, Los Angeles Times, Feb. 18, 2016, available at <http://www.latimes.com/business/la-fi-complaints-against-airlines-in-2015-20160218-story.html>.

<sup>8</sup> David McLaughlin, *Health Insurer Deals Face Market Review That Felled Past Tie-Ups*, Bloomberg, May 23, 2016, available at <http://www.bloomberg.com/news/articles/2016-05-23/health-insurer-deals-face-market-review-that-felled-past-tie-ups>.

<sup>9</sup> Nathan Bomey, *Walgreens in \$17.2B deal to acquire Rite Aid*, USA Today, Oct. 28, 2015, available at <http://www.usatoday.com/story/money/2015/10/27/walgreens-rite-aid/74684642/>.

<sup>10</sup> Christopher Leonard, *How the Meat Industry Keeps Chicken Prices High*, Slate, Mar. 3, 2014, available at [http://www.slate.com/articles/life/food/2014/03/meat\\_racket\\_excerpt\\_how\\_tyson\\_keeps\\_chicken\\_prices\\_high.html](http://www.slate.com/articles/life/food/2014/03/meat_racket_excerpt_how_tyson_keeps_chicken_prices_high.html).

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<sup>14</sup> *Turn it Off*, The Economist, Mar. 15, 2014, available at <http://www.economist.com/news/leaders/21598997-american-regulators-should-block-comcasts-proposed-deal-time-warner-cable-turn-it>.



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<sup>23</sup> See, e.g., Carlena Cochi Ficano, *Business Churn and the Retain Giant: Establishment Birth and Death from Wal-Mart's Entry*, Social Science Quarterly 94, no. 1 (March 2013).

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<sup>32</sup> Gary Reback, *Free the Market* (Penguin: New York, 2009), 23.

<sup>33</sup> See Robert Bork, *The Antitrust Paradox: A Policy at War With Itself* (Basic Books: New York, 1978).

<sup>34</sup> See Dylan Matthews, interview with Barak Orbach, 'Antitrust was defined by Robert Bork. I cannot overstate his influence,' Washington Post, Dec. 20, 2012, available at <https://www.washingtonpost.com/news/wonk/wp/2012/12/20/antitrust-was-defined-by-robert-bork-i-cannot-overstate-his-influence/>; Lina Khan, *How to Reboot the FTC*, Politico, Apr. 13, 2016, available at <http://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090>.

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<sup>37</sup> See, e.g., David McLaughlin and Andrew M Harris, *Staples-Office Depot Merger Collapses After Block by Judge*, Bloomberg, May 10, 2016, available at <http://www.bloomberg.com/news/articles/2016-05-10/staples-office-depot-merger-blocked-as-anticompetitive>; Renae Merle, *Halliburton, Baker Hughes call off \$34 billion merger*, Washington Post, May 1, 2016, available at <https://www.washingtonpost.com/news/business/wp/2016/05/01/halliburton-baker-hughes-call-off-34-billion-merger/>.

<sup>38</sup> Maureen Farrell, *2015 Becomes the Biggest M&A Year Ever*, Wall Street Journal, Dec. 3, 2015, available at <http://www.wsj.com/articles/2015-becomes-the-biggest-m-a-year-ever-1449187101>.

<sup>39</sup> Khan, *How to Reboot the FTC*.

<sup>40</sup> Kwoka, Jr., *Does Merger control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 Antitrust L. J. 619.

<sup>41</sup> *Id.* at 641.

<sup>42</sup> David McLaughlin, *Hertz Set to Buy Advantage Locations, Undercutting FTC*, Bloomberg, Apr. 18, 2014, available at <http://www.bloomberg.com/news/articles/2014-04-17/hertz-set-to-buy-advantage-locations-undercutting-ftc>; Robert Anglen, *Albertson's buys back stores feds forced it to sell*, The Arizona Republic, Nov. 25, 2015, available at <http://www.azcentral.com/story/money/2015/11/25/albertsons-buys-back-stores-feds-forced-sell/76383234/>.

<sup>43</sup> See, e.g., Steven C. Salop and Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners* (revised draft), November 2015, available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2542&context=facpub>; U.S. Department of Justice, *Non-Horizontal Merger Guidelines*, originally issued in 1984, available at <https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf>.

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<sup>44</sup> President Barack Obama, Executive Order—Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth for the American Economy, Apr. 15, 2016, *available at* <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>.

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