Keeping Merger Enforcement Relevant in the Modern Global Economy

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JFTC International Symposium

May 19, 2017—Tokyo, Japan

Challenges for Merger Policy

- Technological change
- Firms with global reach
- Large Scale platforms/networks

Some Worrisome Economic Trends: Is There a Link to Mergers?

- Increased market concentration
- Globally dominant firms
- Rising income inequality
- Reduced opportunities for small business
- Lost jobs and reduced employment security

Criticism of Antitrust Enforcement

- Some commentators say merger enforcement has been unwilling or unable to meet the challenges of the modern global economy, contributing to the trends above
  - Have enforcement agencies been too permissive?
  - Are antitrust tools and theories of harm up-to-date enough to identify harmful mergers?

Four Questions:

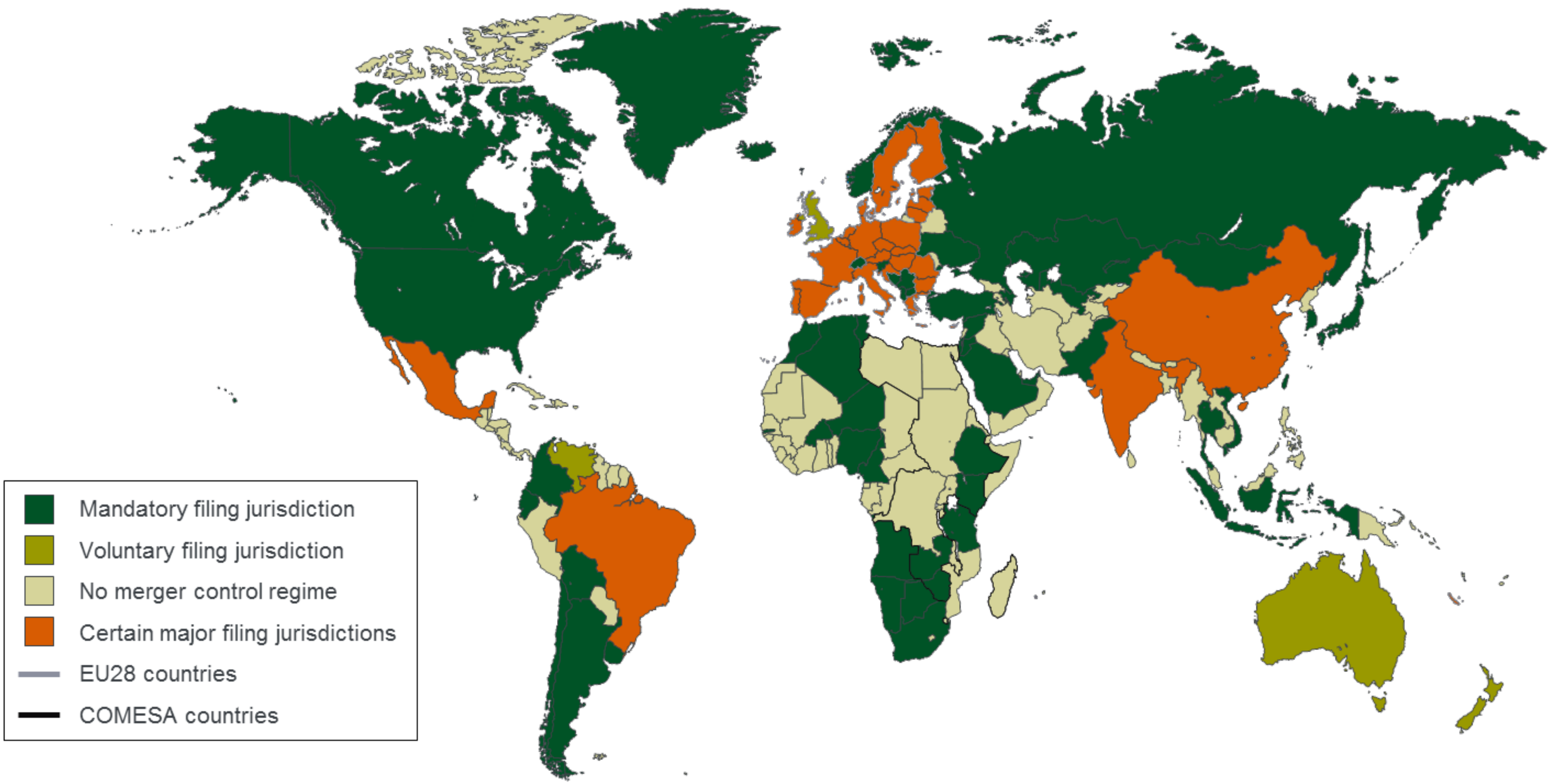
- What are the recent criticisms of merger policy?
- Can troubling economic trends be correlated with diminished merger enforcement?
- How can merger enforcement play an effective role in the modern global economy?
- Should merger policy move beyond its focus on efficiency to include other policy goals?

Recent Criticism of Merger Enforcement

- Many key industries are highly concentrated: digital platforms . . . but also other very important markets (like health care, airlines . . . and beer!)
- Agencies have approved many horizontal mergers (e.g. airlines and beer) and vertical mergers (e.g. digital services, health care)
- Markets have in general become increasingly concentrated across many economies
- Small businesses and individual entrepreneurs face higher entry barriers and reduced opportunities

But Merger Enforcement Has Not Been Weak in Recent Years

Merger Enforcement has Increased Around the World



Successful Challenges, and New Theories of Harm

- Theory: market power over targeted buyers
  - Sysco/US Foods: blocked in court by FTC
  - Staples/Office Depot: blocked in court by FTC
  - Electrolux/GE: blocked in court by DOJ
- Theory: innovation reducing effects
  - Thoratec/HeartWare, blocked by FTC
  - Halliburton/Baker Hughes, blocked in court by DOJ
  - Applied Materials/Tokyo Electron, blocked by DOJ

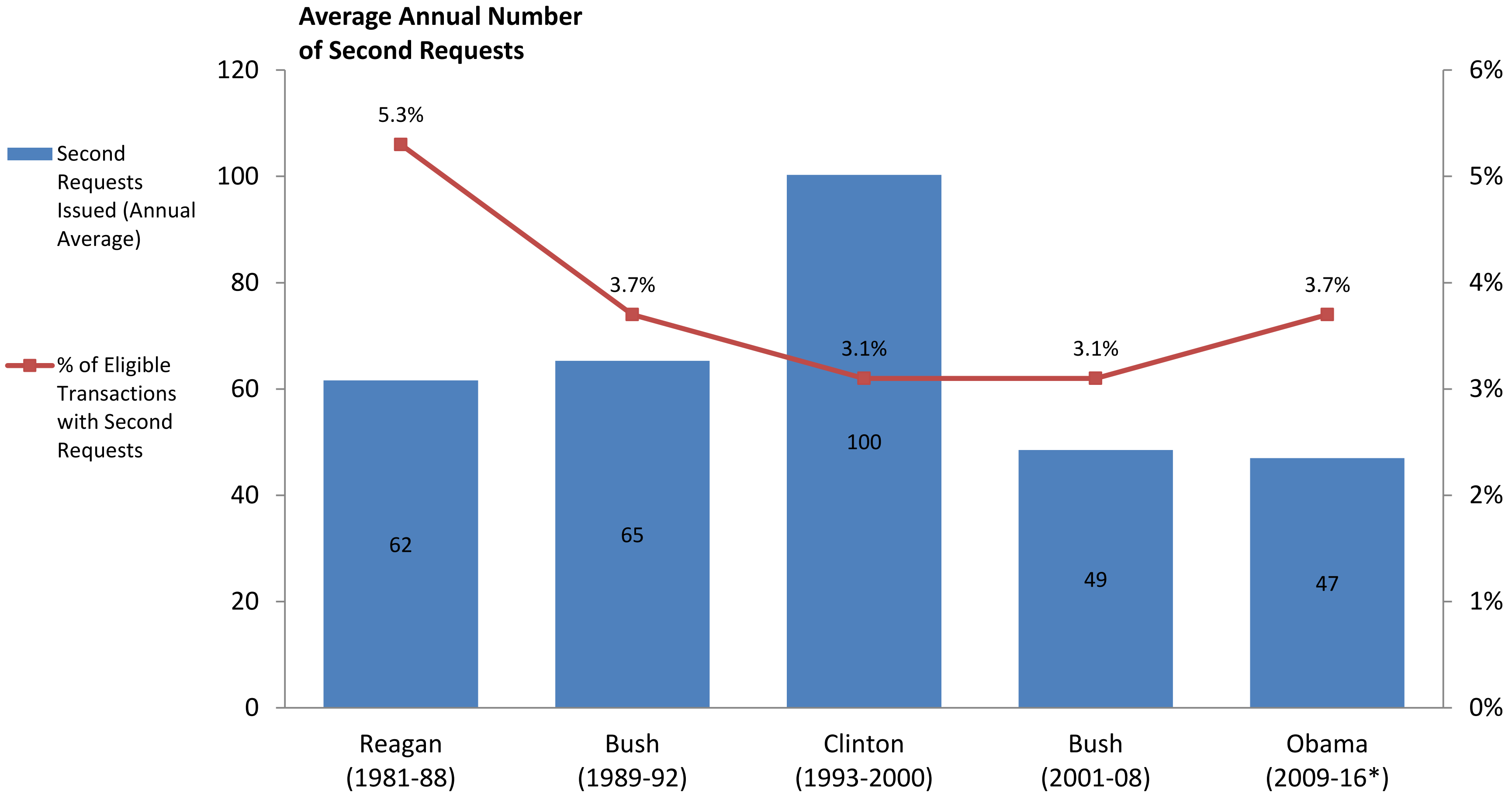
(Successful Challenges, cont'd)

- Theory: harm to service standards
  - Electrolux/GE
- Theory: reduction in product variety
  - Halliburton/Baker Hughes
- Theory: customer data and privacy concerns
  - Google/ITA, remedies required by DOJ
- Theory: vertical foreclosure against rivals
  - Comcast/NBCU, remedies required by DOJ/FCC

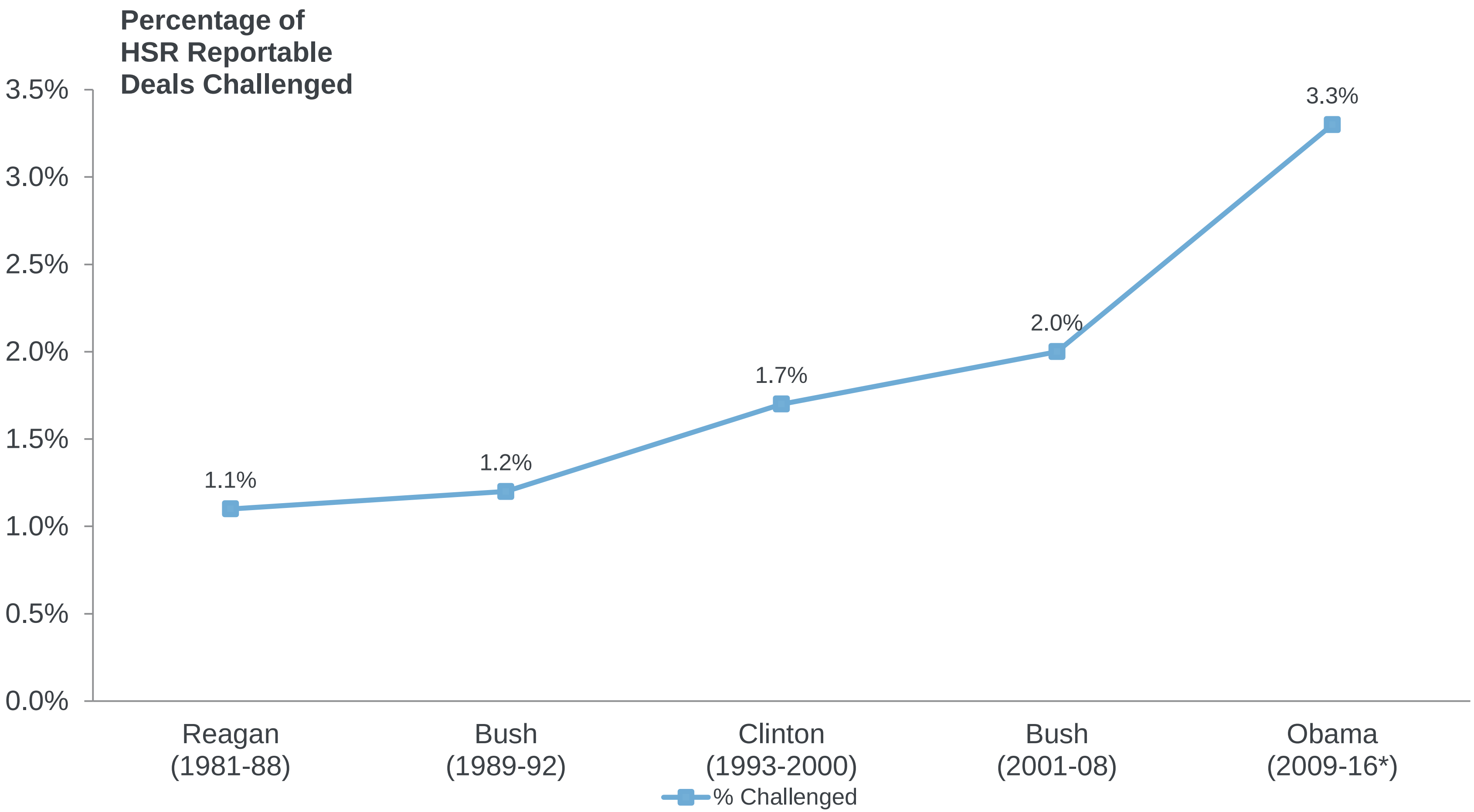
Trends in U.S. Enforcement Metrics

- Key metrics show that over time:
  - The proportion of mergers receiving “second requests” has been increasing
  - The proportion of transactions that the U.S. antitrust agencies are challenging is increasing
  - The proportion of challenged cases that are going to trial has been increasing

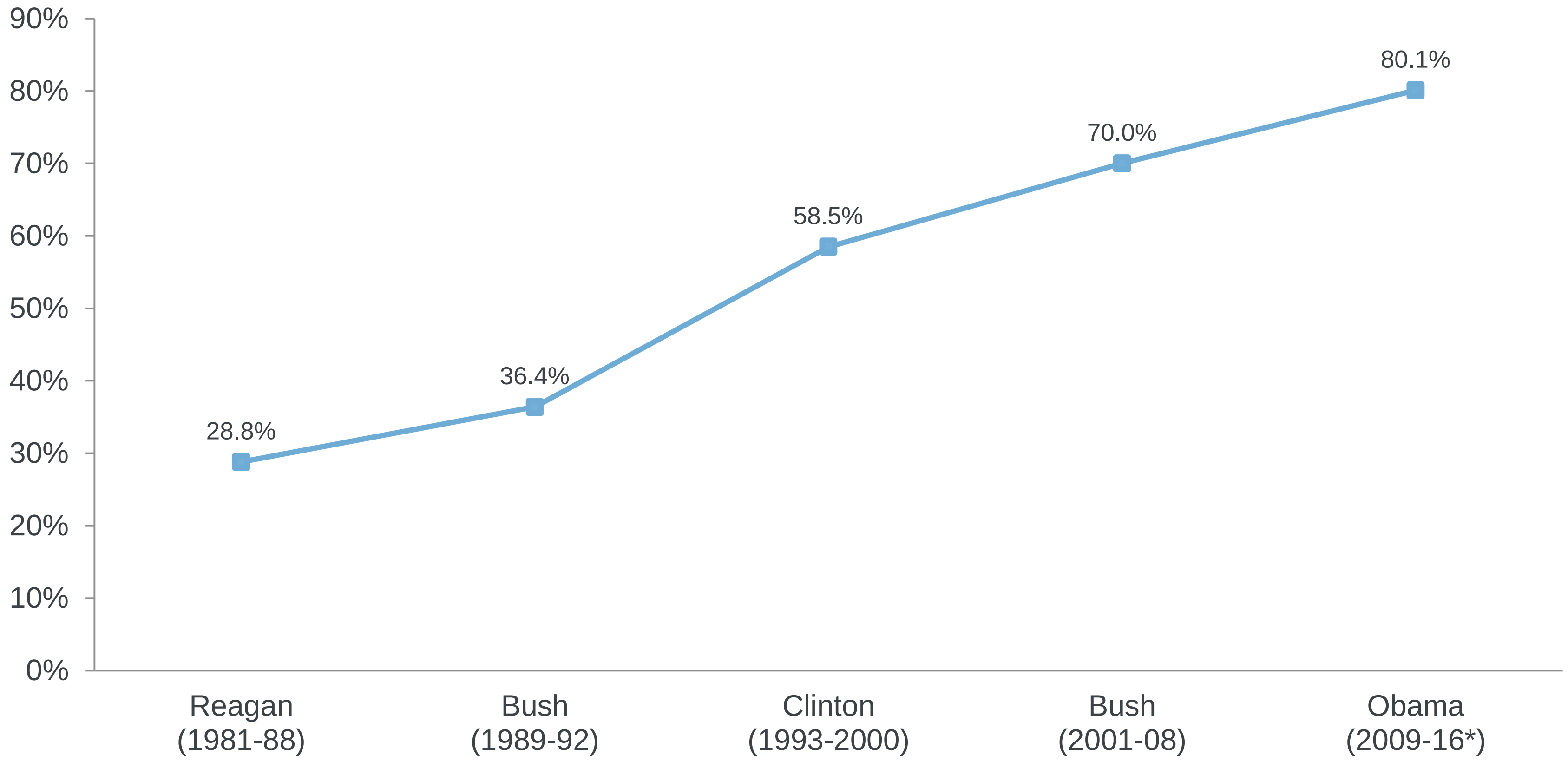
Second Requests



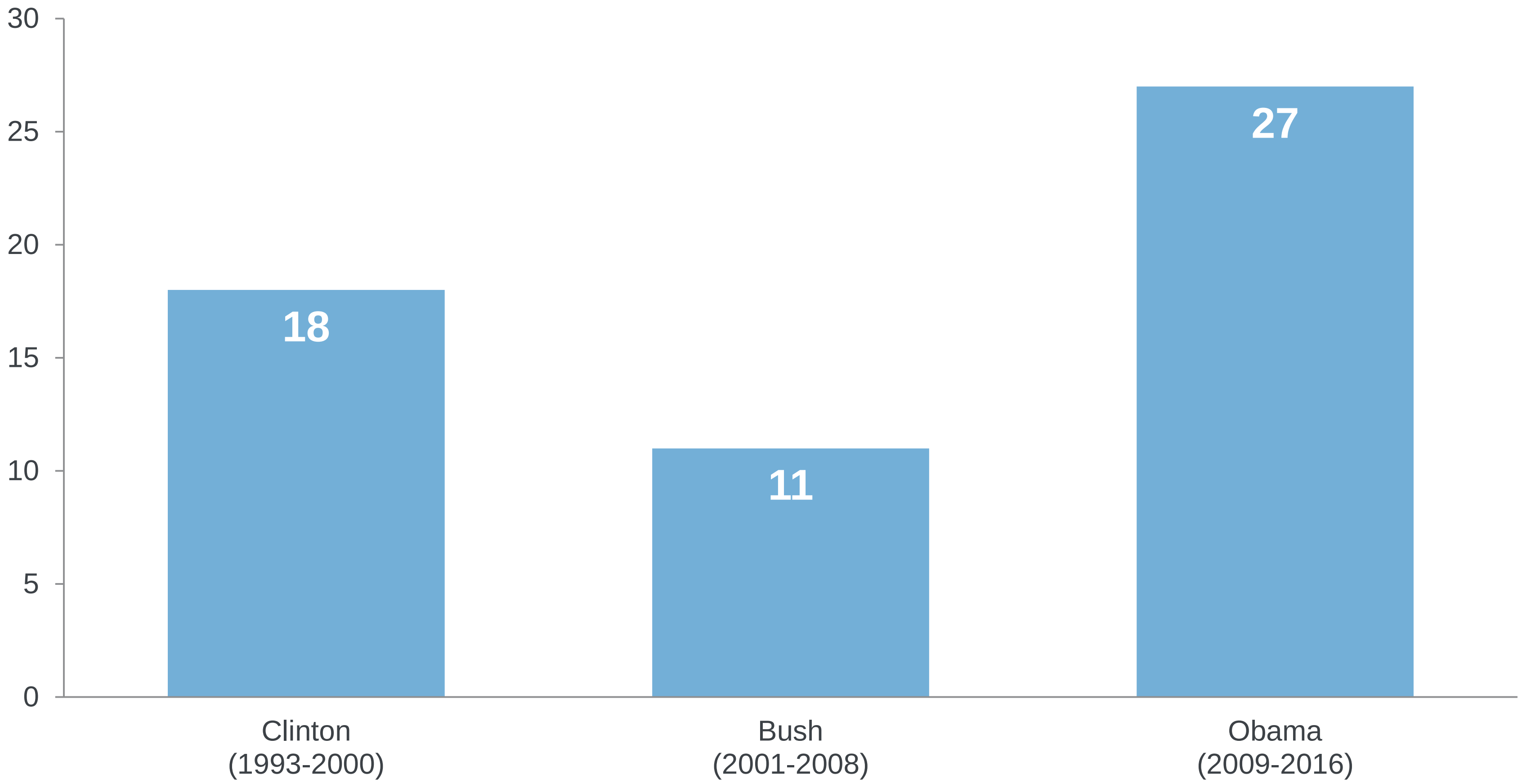
Agency Challenges to Transactions



Ratio of Challenges (including settlements) to Second Requests



Merger Enforcement Trials



Has All That Enforcement Somehow Missed the Target?

- Have enforcers missed key markets?
  - Major investigations of digital platforms and challenges to mergers in key sectors suggest otherwise
- Have merger remedies failed?
  - Some make that claim, but the evidence is mixed
- False positives and false negatives?
  - Have enforcers gone after the wrong cases, or missed cases they should have brought?
- Or, are mergers not really responsible for the problems critics have identified?

Two Key Questions

- Despite active merger enforcement, all of the above factors may be partly true, which raises two questions:
  1. How can merger enforcement become more effective, and remain relevant in the modern global economy?
  2. Should antitrust policy take a broader view of social welfare and try to advance policy goals beyond those related to efficiency?

More Effective Merger Enforcement

- Of greater importance than bringing *more* cases is to bring *better* cases. To achieve this goal, agencies should develop:
  - Models and analytical tools that are both more rigorous and more practical
  - A more consistent approach to merger efficiencies
  - Clearer guidelines for merger remedies
  - Better coordination across agencies and more attention to due process for parties

Making the Economics More Rigorous—And More Practical

- Economics are central to merger analysis, but the economics have at times been criticized for being either too simplistic, too hard, or too manipulable
  - Strong structural presumptions based on market shares are too simplistic to capture real harms
  - Elaborate econometric models and simulations of market power are too hard for courts to sort out
  - Game theoretic approaches to coordinated effects look simple at first but quickly grow complicated
  - Results of vertical effects models vary heavily with theoretical assumptions

(Economic tools, cont’d)

- The economic framework for mergers is sometimes also indirect, or too limited:
  - Market shares are an indirect measure of unilateral market power or ability to coordinate
  - Collusion is a narrow framework for predicting coordinated effects
  - Vertical efficiencies miss consumer welfare losses that can nonetheless result from foreclosure, and vice versa

More modern tools can be more rigorous, and more practical

- Unilateral effects and upward pricing pressure (UPP): the calculation of "GUPPIs" can more directly address market power based on margin, price, and diversion data commonly available in merger reviews
- Downward (or upward) innovation pressure can at times also be calculated from such data
- "Vertical arithmetic" allows use of empirical evidence to assess post-merger profitability, and therefore incentive, to foreclose against downstream competitors

A Better Approach to Efficiencies: As Effects Evidence and not just as Defense

- Mergers can yield genuine efficiencies, but agencies rarely accept efficiency defenses
  - High burden of proof for efficiencies
  - Binary accept/reject approach to efficiencies
  - Refusal to accept “out of market” efficiencies
- Agencies should be more willing to accept efficiencies evidence where:
  - The parties have a track record of achieving them in past mergers
  - There is evidence of net consumer benefit from a merger
- Agencies today probably undercount efficiencies
  - An approach that more carefully assesses efficiencies could lead to fewer unnecessary remedies, and better allocation of agency resources to more harmful transactions

A Better Approach to Remedies

- Clearer guidelines on what kind of remedies are acceptable for what kinds of harms
- More retrospective review of remedies to determine what works and what does not
- Remedies should directly address effects of the merger, not be used to achieve unrelated policy goals

Should Antitrust Protect More Than Efficiency?

- Modern antitrust focuses on prices, output levels, and related issues like quality and innovation—all to foster economic efficiency
- Some have argued that antitrust should take into account broader policy goals such as:
  - Jobs
  - Market access for small businesses
  - Income inequality an “fairness”
  - Environmental protection
  - Protection of domestic industry

Antitrust Should Focus on Efficiency—Let Other Policies Achieve Other Goals

- Bringing broader policy goals into antitrust will require competition agencies to choose between competing objectives, for example:
  - Lower prices versus cleaner production processes
  - Higher output versus better work conditions
  - Consumer welfare versus survival of small firms
  - Jobs versus production efficiencies
- Those goals are all important for society: <u>but competition agencies are not the right institutions to choose among them</u>
- Competition agencies should stick to their expertise—efficiency—and society should make broader policy tradeoffs through more appropriate legislative institutions

Conclusions

- The modern global economy brings both great benefits and troubling economic trends
- These trends of income inequality and reduced economic opportunity have occurred alongside the rise of large dominant firms, and rising market concentration
- Merger enforcement has stayed strong all through these developments
- Even if not responsible for the troubling trends, merger policy can be improved
- Merger policy should not, however, be held responsible for, or be used to solve, all problems related to modern market developments.