**Invited Submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law**

**by**

**Maurice E. Stucke**[*]

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[*] Douglas A. Blaze Distinguished Professor of Law, University of Tennessee.

Thank you for soliciting my views on potential areas of antitrust reform, especially in light of the challenges and benefits posed by the digital platform economy.

America has a market power problem.[1] The emerging evidence points to less competition in many key markets, higher markups, greater concentration, and widening wealth and income inequality. The current state of competition law benefits the select few—at the expense of nearly everyone else.

America's failing antitrust system is, in large part, to blame for our market power problem.[2] Our antitrust laws are supposed to deal with concentrated economic power. The problem is that the laws have been hijacked in two ways. First, ideologues narrowed the substance of antitrust from addressing a variety of goals to focusing solely on the concept of consumer welfare—namely, that harm to competition within the legal meaning of the antitrust laws consists solely of harm to consumers and their welfare, as measured almost exclusively by price and quantity effects in output markets. Second, some courts and enforcers went even further, declining to find antitrust liability in conduct that harms consumers on the theory that it carries other benefits, like long-run economic growth.

Lax antitrust enforcement and the courts' deviation from the legislative design of the Sherman,[3] Clayton[4] and Federal Trade Commission[5] Acts have allowed troubling trends like corporate consolidation to remain unchallenged, further embedding our skewed economy. Recent U.S. Supreme Court decisions, including *Ohio v. American Express Co.*,[6] and the recent lower courts' decisions to allow the AT&T/Time Warner merger[7] and T-

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[1] Part of these comments are derived from the following papers, which discuss the issues in greater detail: Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust* (November 29, 2018). University of Chicago Law Review, Forthcoming; University of Tennessee Legal Studies Research Paper No. 367. Available at SSRN: https://ssrn.com/abstract=3293187; Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, Roosevelt Institute (September 2018), https://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf; Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARVARD BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.
[2] *See, e.g.*, *Lina Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 252 (2017); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1-28 (2015).
[3] 26 Stat. 209 (1890), codified as amended at 15 U.S.C. §§ 1–7.
[4] 38 Stat. 730 (1914), codified as amended in various sections of Title 15 and Title 29.
[5] 38 Stat. 717 (1914), codified as amended in 15 U.S.C. §§ 41-58.
[6] 138 S. Ct. 2274 (2018).
[7] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 253–54 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).

Mobile/Sprint merger[8] illustrate how antitrust, under the prevailing consumer welfare standard, has been weakened and distorted beyond all recognition. Courts have elevated the burden of proof on the government and private plaintiffs to such an extent that the Sherman and Clayton Antitrust Acts have become unenforceable for many anticompetitive practices, other than cartels.

In today's highly concentrated markets, individuals have limited choice and little power to pick their price, quality, or provider for the goods and services they need; workers are met with powerful employers and have little agency to shop around or bargain for competitive wages and benefits; and suppliers can't reach the market without paying powerful intermediaries or succumbing to acquisition.

If the United States continues with a light-if-any-touch antitrust review of mergers and turns a blind eye to abuses by dominant firms, concentration and crony capitalism will likely increase, competition and our well-being will decrease further, and power and profits will continue to fall into fewer hands. Startups, small and midsize firms, and Americans more broadly—as workers, consumers, and democratic citizens—will be left to the beneficence or spite of a few powerful, but arbitrary, corporations.

This trend is reversible if Congress, the courts, and enforcers restore antitrust as a guarantor of effective competition. Congress must do several things:

1. Fix the antitrust laws, by clearing the Supreme Court's dicta and holdings that have choked antitrust enforcement (and contributed to the market power problem);
2. Address the political, social, and economic risks posed by today's powerful digital platforms – Google, Amazon, Facebook, and Apple (or GAFA for short); and
3. Identify when competition is the problem (rather than the cure) of society's ailments.

## I. Clearing the Bramble of Bad Law and Dicta

The Supreme Court once hewed to the legislative design and aims of the federal antitrust laws. In *Brown Shoe Co. v. United States*[9] and *United States v. Philadelphia National Bank*,[10] the Court observed the "dominant theme pervading congressional

[8] *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499, at *1 (S.D.N.Y. Feb. 11, 2020).
[9] 370 U.S. 294, 315 (1962).
[10] 374 U.S. 321, 362–63 (1963).

consideration of the 1950 amendments [to section 7 of the Clayton Act] was a fear of what was considered to be a rising tide of economic concentration in the American economy." The Court noted how this "intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects."[11] The Court, in staying true to the Congressional aim of preventing industries from becoming highly concentrated, sought rules and presumptions that were easy for lawyers to explain to their clients, for the federal and state agencies to enforce, and for the courts to apply. For example, in *Philadelphia National Bank*, the Court, relying on the statute's design, created a strong presumption of illegality for mergers that produce "a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market." which was certainly met when the firm controlled a 30 percent share.[12] As the Court noted,

> *unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. . . . So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. . . . And so in any case in which it is possible, without doing violence to the congressional objective embodied in section 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.*[13]

Without administrable legal presumptions, the lower courts would ramble through the wilds of economic theory, a misadventure that would benefit powerful firms, their lobbyists, lawyers, and expert economists, but not entrepreneurs, smaller firms, farmers, workers, and citizens. The Court in *United States v. Topco Assocs., Inc.* made this clear:

> *Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.*[14]

[11] *Philadelphia Nat. Bank*, 374 U.S. at 363.
[12] *Id*.
[13] *Id*. at 362.
[14] 405 U.S. 596, 610 n. 10 (1972).

Thus, during the 1940s–late-1970s, antitrust came to represent the Magna Carta of free enterprise – it was seen as the key to preserving economic and political freedom. At the time, competition was seen largely as an antidote to fascism, and antitrust as the enabler of that competition. Jeffry Frieden recounts in his book *Global Capitalism* how the fascist economic order spread during the 1930s throughout Europe and Middle East, and much of Asia and Africa. Under the fascist economic order, the government, directly or through state-owned holding companies, largely controlled the economy. The *competition ideal* -- which was the belief, in line with democratic principles, in dispersing economic and political power from the hands of a few, to foster greater opportunities to compete, improve, and win -- was perceived to be under attack. At one point during WWII, the U.S. and U.K. were its last major supporters.

One prominent advocate of the competition ideal, F. A. Hayek, discussed in his seminal 1944 book, *The Road to Serfdom*, the significant role private enterprise can play and its superiority over a planned economy controlled by arbitrary government. The economist, however, rejected a "dogmatic laissez faire attitude." Instead, Hayek advanced the liberal argument of making the most out of the competitive process. The competition ideal is based on the convictions that "where effective competition can be created, it is a better way of guiding individual efforts than any other" and that "in order that competition should work beneficially, a carefully thought-out legal framework is required."[15] If, however, it is impossible to *create* the *conditions* necessary to make competition effective, then, as F. A. Hayek recognized, we must resort to other methods of guiding economic activity.

Thus, between the 1940s and late-1970s, robust antitrust policy was a central condition necessary for effective competition. Antitrust was bipartisan – without much change between Democratic and Republican administrations. To create those conditions, enforcers relied on the tools given to them by Congress, and the Court's administrable legal presumptions and per se rules. In that era, Congress had seen the process of concentration in American business as a dynamic force; so, the Clayton Act, as amended in 1950, gave the agencies and courts "the power to brake this force at its outset and before it gathered momentum."[16] The Sherman Act enabled the Department of Justice to criminally and civilly prosecute unreasonable restraints of trade and monopolistic abuses. This 1890 statute "was designed to be a comprehensive charter of economic liberty aimed at

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[15] F. A. HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS: THE DEFINITIVE EDITION 86 (Routledge 2008).
[16] *Brown Shoe*, 370 U.S. at 317-18.

preserving free and unfettered competition as the rule of trade," noted the Court in 1958.[17] "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions."[18] U.S. antitrust, as part of this competition ideal, was rediscovering the key laws from an earlier era and shaking off the inactivity that had characterized the early New Deal period. This approach was successfully exported after World War II to Europe and Japan to help decentralize economic power and promote an effective competitive process.

That changed in the late 1970s. Adopting the then Chicago School's assumptions of self-correcting markets, composed of rational, self-interested market participants, and the Harvard School's own reasons for doubting the efficacy of robust antitrust enforcement—namely, that it was improperly aimed at moral or political goals and that antitrust intervention might serve to inflict more harm than good on the efficient operation of the economy—some courts and enforcers sacrificed important political, social, and moral values to promote certain economic beliefs.[19] Competition, for them, was innately effective. Thus, there was no need for robust antitrust enforcement to *create* or *maintain* the *conditions* necessary to make competition effective. Market forces could naturally correct the episodic instances of market power, and could do so far better than the messes caused by government intervention. The competition authorities and courts began accepting the increased risks from concentrated telecommunications, financial, and radio industries, among others, for the prospect of future efficiencies and innovation.

Over the past forty years, the antitrust enforcers increasingly viewed the political and moral cases for antitrust as insufficiently rigorous and somehow diluting antitrust policy. Antitrust's increased technicality and the use of unappealing, abstract neo-classical economic concepts broadened the gap between antitrust enforcement and public concern. Antitrust's noneconomic goals were jettisoned for an amorphous "consumer welfare" standard.[20] The Supreme Court jettisoned its legal presumptions and per se rules for its amorphous rule of reason standard.[21] Also discarded was the historic concern about halting

[17] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).
[18] *Id*.
[19] For a critical assessment see Thomas J. Horton, *The Coming Extinction of* Homo Economicus *and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469, 510 (2011).
[20] This is explored further in Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 BOSTON COLLEGE L. REV. 551 (2012).
[21] *See, e.g.*, *Cont'l T.V., Inc. v. GTE Sylvania, Inc*., 433 U.S. 36, 49 (1977) (overturning its per se rule for vertical, nonprice restraints); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (overturning its per se rule for

the momentum toward concentration in an industry, in order to arrest the economic, political, and social harms from concentrated economic power in their incipiency.

The Court, of late, states that its rule of reason is the "prevailing,"[22] "usual," and "accepted standard"[23] for evaluating conduct under the antitrust laws. But then the Court uses the infirmities of its rule of reason — e.g., high discovery costs and inconsistent outcomes — to restrict, or increase the costs of, antitrust enforcers and private plaintiffs' access to the courts.

Not surprisingly, antitrust enforcement declined from the late-1970s onward. By the Obama administration, the United States had neither a popular antitrust *movement* nor many significant antitrust prosecutions. Under the Supreme Court's current consumer welfare standard, monopolies, like Google, Facebook, and Amazon, have little to fear, as the Court has significantly limited their potential liability for their anticompetitive behavior. Predatory pricing cases have all but disappeared.[24] Courts at times opine that monopolies have no duty to deal. And for all of these anticompetitive actions, courts must entertain "efficiency" defenses—as though otherwise illegal conduct, like fraud, might somehow be rectified by some larger benefit to society, a standard that exists in no other area of law.[25] Only cartel enforcement, which still operates under the Court's per se illegal standard has remained robust over the past 40 years, with the enforcers never publicly inquiring whether the trend toward concentration in so many markets was contributing to the collusion.

To restore and promote effective competition, Congress can correct the Supreme Court's errant dicta and holdings that undermined antitrust's effectiveness. Below are five examples.

1. **Congress should do away with the Court's ill-defined consumer welfare standard.**

The Court and lower courts state that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[26] This assertion, of course, never came from Congress.

vertical, maximum price restraints); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overturning its per se rule for resale price maintenance).
[22] *Sylvania*, 433 U.S. at 49.
[23] *Leegin*, 551 U.S. at 885.
[24] The DOJ, for example, brought its last predation case in 1999, which it lost. See *United States v. AMR Corp.*, 335 F.3d 1109, 1121 (10th Cir. 2003).
[25] *United States v. Microsoft Corp.*, 253 F.3d 34, 59, 77 (D.C. Cir. 2001).
[26] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)); *Energy Conversion Devices Liquidation Tr. v. Trina*

Instead, it came from a Chicago School jurist,[27] whose claim has been condemned by historians and legal scholars alike.[28] The infirmities of a "consumer welfare" standard would be less alarming if the welfare of consumers actually increased over the past forty years. If that were the case, one could quibble that their welfare might have increased a little more under a better antitrust standard, but it would be a question of degree. The sad reality, however, is that competition, under the consumer welfare standard, has diminished significantly in many markets. The consumer welfare standard, it turns out, benefited neither consumers nor their welfare.

As Marshall Steinbaum and I explain, the Court's "consumer welfare" standard is problematic for many reasons, including:

- It is hard to reconcile with plainly anticompetitive restraints that do not affect consumers and instead affect only upstream sellers and workers. One egregious example is when employers agree not to poach each other employees.[29] Another example is powerful buyers who depress wages or the prices paid to farmers.
- The consumer welfare standard has not fostered convergence – either in the U.S. or globally. The term "consumer welfare" means different things to different competition agencies around the world.[30] Given the varying definitions of consumer welfare that exist, it is not surprising that courts have reached inconsistent results based on their own conceptions of consumer welfare.[31]
- Rather than an objective standard, the consumer welfare standard invites considerable subjectivity—and, more to the point, tolerance of anticompetitive practices. After all, under this standard, the courts allow firms, either

*Solar Ltd.*, 833 F.3d 680, 689 (6th Cir. 2016); *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559, 571 (6th Cir. 2014); *Conklin v. Univ. of Washington Med.*, No. C18-0090RSL, 2018 WL 5895352, at *2 (W.D. Wash. Nov. 9, 2018).

[27] *Reiter*, 442 U.S. at 343 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)).

[28] *See, e.g.*, Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013); Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879, 882-83 (1990); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 889-94 (1999).

[29] Department of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[30] Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 571-73 (2012) (collecting sources).

[31] *Compare Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1033-34 (N.D. Cal. 2001) (stating that antitrust laws in promoting consumer welfare do not protect rivalry to obtain a monopoly), *with Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986) (stating that the Sherman Act protects rivalry to obtain monopoly).

individually or collectively, to reduce competition up to the point where consumer welfare is reduced.[32]

- No longer is the concern over the political, social, and economic consequences of concentrated industries and monopolies. Instead, antitrust devolves into proof over the extent to which the merger or challenged practices will cause prices to significantly increase, a metric that is woefully irrelevant in the digital platform economy, where the product or service is ostensibly free, and the price we pay is lost innovation created by the data-opolies' kill zones, and our data, privacy, and autonomy.[33]

Consequently, the consumer welfare standard provides little guidance as an antitrust goal. There remains no consensus on what the term actually means or who the consumers are. Under any of the current definitions, there remains "no easy, non-contestable method for quantifying harm to consumer welfare that will work for all cases."[34] Under this standard, antitrust has contributed to, rather than prevented, America's current market power problem.

Congress should clearly state that the purpose of the antitrust laws is not exclusively the promotion of consumer welfare, but is to protect and promote an effective competitive process, which as Marshall Steinbaum and I discuss, means,

> *Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the federal antitrust laws.*[35]
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> *"Preservation of competitive market structures"*: This recognizes that competition is not a natural state, nor can it be ensured by focusing on

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[32] *See, e.g., Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare.").

[33] Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J. FORUM 980, 982 (2018) (" . . .consumer welfare embodies an impoverished understanding of corporate power. Monopolies, oligopolies, and cartels do exercise great power over consumers, but the effects of corporate power are not limited to purchasers of goods and services. Large businesses exercise power over us in our capacities as consumers, entrepreneurs, workers, and citizens.").

[34] Int'l Competition Network, Competition Enforcement and Consumer Welfare--Setting the Agenda 88 (2011).

[35] Steinbaum & Stucke, *The Effective Competition Standard: A New Standard for Antitrust, supra*.

consumer surplus. Horizontal and vertical consolidation should be viewed with suspicion given the failure of the current antitrust regime that has been credulous about their ostensible benefits.

*"Protect individuals, purchasers, consumers, and producers"*: Antitrust law protects both the resiliency of the supply chain itself and market participants throughout the supply chain—including individuals, consumers, workers, and upstream suppliers.

*"Preserve opportunities for competitors"*: It is a fundamental value to have competition at every level of the supply chain and for upstream firms to have access to the market without coercion, interference, exclusion, or discrimination by powerful and potentially vertically integrated middlemen.

*"Promote individual autonomy and well-being"*: Courts have historically interpreted the antitrust laws as "the Magna Carta of free enterprise" and as "important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[36] Competition policy can foster an inclusive economy that promotes important values, including autonomy and overall well-being.[37] This is especially important with respect to buyer power—and particularly when that power is exercised in labor markets. "Men are not free," wrote Justice Louis Brandeis, "if dependent industrially on the arbitrary will of another."[38] The Clayton Act's language that labor is not a commodity reflects this wisdom.[39] Most individuals rely on their labor to earn their living. In economic terms, that supply by individual workers is highly inelastic. As a result, workers can often be exposed to coercion by powerful employers. Preventing this coercion is an end in itself.

*"Disperse private power"*: Economic power often translates into political power—not simply in the formal political system, but in everyday relations between employers and workers, between concentrated buyers and diffuse

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[36] *United States v. Topco Associates, Inc*., 405 U.S. 596, 610 (1972).
[37] See generally Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575 (2013).
[38] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 40 (Columbia Global Reports 2018).
[39] See Clayton Act § 6, 38 Stat. at 731, codified at 15 U.S.C. § 17 ("[T]he labor of a human being is not a commodity or article of commerce.").

> suppliers, and in channeling and directing the flow of information across social media platforms. A fundamental aim of antitrust is to prevent anticompetitive, antidemocratic pressures that arise from concentrated economic power and to ensure an inclusive, equitable distribution of power throughout the economy, including throughout supply chains and within firms. As free markets operate within (rather than outside) our legal, ethical, moral, political, and social framework, the competitive process, if properly designed and maintained, should both limit the ability of shareholders and managers to exploit other stakeholders and prevent historically disadvantaged groups from being excluded or marginalized from the economy.[40]

2. **Congress should state that the purpose of the antitrust laws is to promote both inter- and intra-brand competition, not just inter-brand competition**.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court justified eliminating its long prohibition against vertical price-fixing by opining that the antitrust laws' primary purpose is to protect inter-brand competition, not intra-band competition.[41] In dismissing the United States' and several states' evidence of anticompetitive harm from American Express's anti-steering rule, the Court repeated that the promotion of inter-brand competition "is the primary purpose of the antitrust laws."[42]

Here again, the Court's policy statement never came from the text of the Sherman or Clayton Acts or their legislative history. Rather it came from a footnote in *Continental T.V., Inc. v. GTE Sylvania Inc.*, in which the Court stated that "[i]nterbrand competition is the competition among the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law."[43] While true for generic products, this is not true for brand-differentiated goods. Try, for example, negotiating a better price for a BMW with the price of a Cadillac, Audi, or Mercedes (inter-brand competition) versus the price of that same BMW offered by another dealer (intra-brand competition).

[40] See, for example, Wu, *Curse of Bigness*, *supra*, at 54–58 (discussing how the more concentrated the industry, the more corrupted we can expect the political process); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051–52 (1979) ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws," and any antitrust policy that excluded such political values "would be unresponsive to the will of Congress."); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076 (1979) ("[P]utative economic gains should not be the exclusive or decisive factor in resolving antitrust controversies.").
[41] 551 U.S. 877, 890 (2007).
[42] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018).
[43] 433 U.S. 36, 52 n. 19 (1977).

And here again Americans paid the price. As the antitrust scholar Jonathan Baker observed, the recent economic findings, post-*Leegin*, "are consistent with the view that anticompetitive explanations for resale price maintenance tend to predominate over procompetitive explanations."[44] Thus, in pruning this dictum, Congress can restore competition by creating a strong presumption against price and nonprice vertical restraints.

3. **Contrary to the dicta in *Amex*, for either vertical or horizontal restraints, Congress should clarify that antitrust plaintiffs can prove market power and anticompetitive effects with both direct and circumstantial evidence.**

As any trial lawyer knows, one can prove an element of the offence with direct or circumstantial evidence. It would be quite odd if the Supreme Court dictated that the prosecutor must prove the elements of a crime with circumstantial evidence, and not solely with direct evidence.

But the Court did precisely that in *American Express*.[45] The government plaintiffs argued that they need not define the relevant market because they had actual evidence of adverse effects on competition—namely, increased merchant fees. The Court disagreed. It distinguished the cases the plaintiffs cited as involving horizontal restraints. As the Court opined, "Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the [c]ourt first defines the relevant market."[46]

But it is axiomatic that market power can be proven with direct or circumstantial evidence. So, it makes little sense to require plaintiffs with direct evidence of market power to also prove market power with circumstantial evidence.

As a result of the Court's latest perplexing requirement in cases involving vertical restraints, plaintiffs will have to define a relevant market (often a costly, time-consuming endeavor, using antitrust's price-centric tools), calculate the defendant's market share in that market, and *then* show that the market share is high enough to infer the defendant's market power, even when plaintiffs have strong evidence of the restraint's anticompetitive effects.

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[44] JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 89 (Harvard University Press 2019).
[45] *Am. Express Co.*, 138 S. Ct. at 2285 n. 7.
[46] *Id*.

Rather than establishing one criterion for market power—a high market share in an antitrust market—the courts should allow direct and circumstantial evidence of market power. As many scholars have argued, high market shares are dispositive neither in favor of nor against market power, and therefore a broader range of indicia are necessary. Indeed, as the economic evidence reflects, firms with low market shares nonetheless can, at times, exercise significant market power upstream against suppliers and workers.[47]

Moreover, Congress should clarify that market power, especially in the digital platform economy, can take different forms. Powerful digital platforms, instead of raising price, can depress privacy protection below competitive levels. Companies, antitrust authorities increasingly recognize, can compete on privacy and protecting data. But without competition, Google and Facebook face less pressure. They can depress privacy protection below competitive levels and collect personal data above competitive levels. The collection of too much personal data can be the equivalent of charging an excessive price. These data-opolies can also fail to disclose what data they collect and how they will use the data. They face little competitive pressure to change their opaque privacy policies. Even if a data-opoly improves its privacy statement, so what? The current notice-and-consent regime is meaningless when there are no viable competitive alternatives and the bargaining power is so unequal.

Powerful companies can also exercise their market upstream, by depressing wages or material benefits and worsening contract or service terms below competitive levels.

Basically, if the enforcers and private plaintiffs present evidence of coercion – this is, the firm is forcing or coercing buyers, sellers, or individuals to do something that they would not ordinarily do in a competitive market – then that should suffice to prove market power.[48] There is no need for the time-consuming, often contentious, and exceedingly costly economic exercise of defining a relevant market when there is ample direct evidence of market power and economic harm.[49]

[47] See, for example, PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE 65–78 (Edward Elgar 2017); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L. J. 1509, 1533–40 (2013).

[48] The Supreme Court earlier found that underlying market power is coercion, namely "the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Eastman Kodak Co. v. Image Technical Servs., Inc*., 504 U.S. 451, 464 (1992) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)).

[49] Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 440 (2010).

### 4. Congress should reject the Supreme Court's praise of monopoly pricing and hierarchy of antitrust harms.

In *Trinko*, the Supreme Court opined that competitors who fix prices or allocate markets are more culpable than monopolists engaging in anticompetitive practices.[50] A cartel "presents greater anticompetitive concerns" than monopolistic behavior and is the "supreme evil of antitrust."[51] The Court's view on monopolies, on the other hand, was forgiving. It surmised for the first time that charging monopoly prices is "an important element of the free-market system," and that monopoly pricing serves as an inducement to "attract[] 'business acumen' in the first place" and engage in "risk taking that produces innovation and economic growth."[52]

Again, the Court's dicta did not come from the law. After all, the Clayton Act expressly forbids mergers and certain restraints whose effect is to "tend to create a monopoly." Nor is the Court's praise of monopolies reconcilable with Congress' and Americans' political, social and economic concerns about concentrated economic power. Nor does the Court have any empirical basis for asserting that monopoly pricing (or dreams of monopoly) fuel innovation or that cartels are inherently worse than monopolies.[53] While one can easily dismiss these statements, the lower courts have frequently and favorably cited these dicta when assessing the antitrust claims.[54]

The Court in its recent decision *Apple Inc. v. Pepper* was more critical of monopoly pricing,[55] relying on Congressional intent.[56] Nonetheless, Congress should reiterate that the antitrust laws are *anti*-monopoly statutes. Enforcers and courts should not strike down monopolies that achieve and maintain their power through internal growth, business acumen, or a better product or service. But nor should they countenance firms who abuse their dominance by engaging in unfair, deceptive, or exploitative practices that harm the competitive process.

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[50] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 n.3 (2004).
[51] *Id*. at 407.
[52] *Id.*
[53] See Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 UNIVERSITY OF ILLINOIS L. REV. 497 (2009).
[54] At least 38 federal court decisions, according to a February 22, 2020 Westlaw search, cite *Trinko* for the proposition the "mere possession of monopoly power ... is not only not unlawful; it is an important element of the free-market system."
[55] 139 S. Ct. 1514, 1519 (2019) ("A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim.").
[56] *Apple*, 139 S. Ct. at 1525 ("Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, 'protecting consumers from monopoly prices' has been 'the central concern of antitrust.'") (quoting 2A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 345, at 179 (4th ed. 2014)).

**5. Congress should stop the Court subverting its congressional intent by permitting a too-broad economic investigation under the Court's rule-of-reason standard and instead simplify the test of illegality with legal presumptions and per se rules.**

One paradox is that, over the past two decades, the Supreme Court has complained about the state of federal antitrust law (e.g., the interminable litigation, inevitably costly and protracted discovery phase, and its fear over the unusually high risk of inconsistent results by antitrust courts).[57]

But it was the Court that has created this predicament. Since the late 1970s, the Court increasingly relied on its own fact-specific weighing standard, the rule of reason,[58]

[57] *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (complaining that antitrust's per se illegal standard might increase litigation costs by promoting "frivolous" suits); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007) (fearing "unusually" high risk of inconsistent results by antitrust courts); *Bell Ad. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007) (indicating that antitrust's "inevitably costly and protracted discovery phase" is hopelessly beyond effective judicial supervision (quoting *Asahi Glass Co. v. Pentech Pharm., Inc*., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003))); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 414 (2004) (decrying antitrust's "interminable litigation").

[58] For some of the criticisms of the rule of reason standard, see Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. FORUM 960, 973 (2018) ("Although the heightened role of economic expertise is justified as bringing greater certainty and objectivity to the law, the rule-of-reason regime has rendered the law unpredictable and indeterminate."); Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 47 (2017) ("the intensively fact-bound nature of the Rule of Reason inquiry, particularly its emphasis on anticompetitive effects rather than unlawful conduct, makes antitrust outcomes less predictable. Analysis under the Rule of Reason is largely an ex post exercise. Parties will not know if their conduct is illegal until after they engage in it."); Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic,* 14 U.N.H.L. REV. 303, 367 (2016) ("the nebulous legal standards of modern antitrust law confer broad discretion on the antitrust agencies and allow for greater subjectivity in enforcement"); Jesse W. Markham, Jr., *Sailing A Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 594 (2012) ("Indeed, the rule of reason is no rule at all, but rather a set of vague and inconsistent objectives that a court should set for itself in evaluating conduct under an antitrust challenge."); Theodore Voorhees, Jr., *Reasoning Through the Rule of Reason for RPM*, ANTITRUST, Fall 2013, at 58, 62 ("generalities about 'weighing' or 'balancing' or discerning ultimate 'net' directional effect, or even providing a 'structured' approach using burden-shifting do not provide highly specific guidance on how the assessment process is actually to be performed in real cases involving countervailing factors that are not easily reduced to quantifiable metrics"); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2569 (2013) ("The problem is that if the rule of reason is the default standard, and if you then conclude that courts cannot administer these types of cases, there is nothing left to antitrust except governmental challenges to the most naked price fixing arrangements. This requires a conscious political decision never contemplated, let alone endorsed, by Congress. Few argue in such stark terms, but technocratic antitrust short-circuits the political process and can lead down a path to laissez-faire."); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009); AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION

which even several Justices have criticized as "amorphous,"[59] and a vague economic goal (consumer welfare) that accommodated different personal values and interpretation and often pointed to no particular course of action.

Indeed, the Court in *Amex* made its rule of reason standard even more unwieldly, less predictable, more subjective, and more error prone. The Court noted that the lower courts "usually cannot properly apply the rule of reason without an accurate definition of the relevant market."[60] But after *Amex,* market definition in the digital platform economy will be even more confusing. The lower courts must struggle in distinguishing between "transactional" platforms and other platforms, with the former requiring the relevant market to include both sides of the platform and the court assessing the restraint's impact on all sides of the platform.

So, the Court has knowingly veered the federal and state enforcers, and private litigants further into what it has recognized as an "'elaborate inquiry' [that] produces

REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 202 (2008) (noting "surprising dearth of either judicial or agency guidance on how a rule of reason analysis should be conducted, particularly with respect to the actual balancing of procompetitive benefits against anticompetitive effects or risks"); John J. Flynn, *The Role of Rules in Antitrust Analysis*, 2006 UTAH L. REV. 605, 634; ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 5 (1999) ("Commentators have long criticized the breadth of Brandeis' statement in *Board of Trade* [*of Chi. v. United States*, 246 U.S. 231 (1918)] as 'legitimiz[ing] the 'big case' in antitrust.'" (citation omitted)); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 44 (1993) (noting that Brandeis advocated "deviant rule of reason"); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 255 (3d ed. 2005) ("Brandeis' statement of the rule of reason . . . has been one of the most damaging in the annals of antitrust" as it "has suggested to many courts that . . . nearly everything is relevant."). *See generally,* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 346 (2000) (arguing that Brandeis's opinion "made things worse"); Peter C. Carstensen*, The Content of the Hollow Core of Antitrust: The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RES. L. & ECON. 1, 4 (1992) ("[O]pen-ended listing of possibly relevant factors is hardly illuminating as to their analytic interrelationship, nor does it inform a decision maker of what weights to ascribe to different factual conclusions."); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14 (1977) (noting that content of rule of reason is largely unknown and, in practice, is little more than euphemism for nonliability). The rule of reason, with respect to section 2 monopolization claims, has also been attacked. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255, 257 (2003) (describing monopolizations standards as "not just vague but vacuous"); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147-48 & n.4 (2005) ("Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined."); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1624 (2005) (stating that rule of reason "has been a source of puzzlement to lawyers, judges and scholars").

[59] *F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 160 (2013) (Roberts, C.J., dissenting); *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 398 (2015) (Scalia, J., dissenting).

[60] *Ohio v. Am. Express Co*., 138 S. Ct. 2274, 2285 (2018).

notoriously high litigation costs and unpredictable results."[61] In the digital platform economy, the unwieldy amorphous rule of reason will further insulate powerful platforms, like Google, Amazon, Facebook and Apple, from antitrust scrutiny.[62]

Thus, Congress should reorient antitrust to ensure its effectiveness and relevance in modern digital markets, with a standard rooted in antitrust's historical concerns and legal presumptions that are simple enough for lawyers to explain to their clients, for companies to incorporate, and for courts to apply.[63] In addition to the per se illegal standard that the courts employ currently to horizontal restraints, such as price-fixing, bid rigging, and market allocation, as well as tying arrangements and group boycotts, Congress should amend the antitrust laws to employ legal presumptions of anticompetitive harm and per se illegal rules. This would include prohibiting:

- no-poach agreements, including those by franchise agreements;[64]

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[61] *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015); *see also* Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 51 (2019) (criticizing the Court's analysis in *Amex* as "regressive, given the significant work in economics that both weakens the case for traditional market definition and improves upon econometric methodologies for measuring market power more directly").

[62] *See, e.g.*, Sandeep Vaheesan & Frank Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 ANN. REV. L. & SOC. SCI. 309, 318 (2018) (internal citations omitted):

> *As with other prevailing forms of cost-benefit analysis, the rule of reason is comparatively good at measuring short-term and quantifiable costs and benefits and deficient in, or even incapable of, measuring longer-term and more qualitative benefits and costs. In antitrust cases against mergers or monopolies, the rule of reason means that the plaintiff loses unless it can show actual or likely short-term price effects from the defendant's conduct. Dynamic and other more qualitative harms from, for example, a merger or monopoly are either discounted or disregarded.*

[63] For legislative proposals see Steinbaum & Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, Roosevelt Institute Paper, *supra*.

[64] Two economists studied the role of covenants in franchise contracts that restrict the recruitment and hiring of employees from other units within the same franchise chain. The provisions, for example, effectively prohibit employees from moving among restaurants of the same corporate chain—prohibiting one Little Caesars employee from accepting employment from another Little Caesars franchise location for higher pay. They found that "no-poaching of workers agreements" were included in a surprising 58 percent of major franchisors' contracts, including McDonald's, Burger King, Jiffy Lube, and H&R Block. Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (Sept. 2017), http://arks.princeton.edu/ark:/88435/dsp014f16c547g. Thereafter, several states have targeted no-poach provisions that appear in lengthy franchise agreements that owners of franchises sign with corporate headquarters. Employees were generally unaware the provisions even existed. See Washington State Office of the Attorney General, Press Release, AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

- non-compete agreements by firms that individually or collectively have significant market power;
- otherwise illegal or tortious anticompetitive behavior, including deceptive behavior, by a monopolist, when that conduct appears reasonably capable of helping the monopoly attain, maintain, or extend its power; and
- predatory pricing by a monopoly, which would mean pricing below average variable cost (even if there is not a dangerous probability of recouping the investment in below-cost prices) or below total cost if there is evidence of anti-competitive intent.

To reduce the "crystal ball" exercise of merger review where agencies' and parties' economic experts attempt to predict the anticompetitive effects of mergers, based on economic models predicated on consumers and market participants behaving like rational profit maximizers with perfect willpower, Congress instead should create a strong legal presumption against (i) mergers and acquisitions in already highly concentrated industries, (ii) mergers that would lead to high concentration, and (iii) acquisitions by already dominant firms.

## II. Address the Political, Social, and Economic Risks Posed by Today's Powerful Digital Platforms

Sen. Dick Durbin (D-Ill.) made the point of asking Facebook's CEO to share some personal information:

> "Would you be comfortable sharing with us the name of the hotel you stayed in last night?"
>
> "Um" Mark Zuckerberg said before a long pause, "No."[65]

The point, of course, is that Facebook and a few other powerful platforms know a lot about us. Facebook's CEO, within a few minutes, could learn more about our personality, political attitudes, physical health, and any substance abuse, according to one study, than what our co-workers, friends, parents, or even spouses know.[66] But we still

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[65] *Live coverage: Facebook's Zuckerberg faces grilling in Congress*, THE HILL, Apr. 10, 2018, WL 1730371.
[66] Michal Kosinski, David Stillwell, and Thore Graepel, *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, PNAS 110, no. 15 (April 9, 2013): 5802-5805; https://doi.org/10.1073/pnas.1218772110.

know relatively little about what data Facebook collects, how it uses that data, and with whom it shares that data.

We are at the frontiers of the Panopticon, an architectural design conceived by the father of utilitarianism, Jeremy Bentham. Imagine a round tower lined with cells. In its center is the watchman. While the cells have transparent glass, the watchtower's glass is tinted so that a single guard can watch any of the factory workers or inmates, without them knowing they are being monitored. Today, television sets can monitor what we watch.[67] Google and Facebook track us across the Web.[68] With the rise of digital personal assistants and smart appliances, many devices will hear and see what we are doing.[69]

Understandably, legal scholars, regulators, and policy maker are increasingly concerned about today's powerful digital platforms and their influence. That influence comes in part from personal data. Facebook, Apple, Google, Amazon, and similar companies are "data-opolies," in that they control a key platform, which, like a coral reef, attracts to its ecosystem users, sellers, advertisers, and software, app, and accessory developers.[70] As the U.S. Congressional Research Service recently noted,

> *Over the past decade, Google, Amazon, Facebook, and Apple—collectively known as the "Big Four" or "Big Tech"—have revolutionized the internet economy and affected the daily lives of billions of people worldwide. Google*

[67] Complaint for Permanent Injunction and Other Equitable and Monetary Relief, FTC v. VIZIO, Inc., No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017).

[68] Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry -- Final Report*, at 11 (June 2019), https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf (estimating that more than 70 percent of websites have a Google tracker and more than 20 percent of websites have a Facebook tracker. It is also estimated that of the apps available on the Google Play store, 88 percent send user data back to Google and 43 percent send user data back to Facebook).

[69] Maurice E. Stucke & Ariel Ezrachi, *How Digital Assistants Can Harm Our Economy, Privacy, and Democracy*, 32 BERKELEY TECHNOLOGY L. J. 1239 (2017).

[70] Democracy Under Threat: Risks And Solutions In the Era of Disinformation and Data Monopoly -- Report of Canada's House of Commons, Standing Committee on Access to Information, Privacy and Ethics, Bob Zimmer, Chair (Dec. 2018); Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 GEORGETOWN LAW TECHNOLOGY REV. 275 (2018); Maurice E. Stucke, *Here Are All the Reasons It's a Bad Idea to Let a Few Tech Companies Monopolize Our Data*, HARVARD BUS. REV., March 2018; see also *Unlocking Digital Competition*, Report of the UK Digital Competition Expert Panel, at 31 (March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (Furman Report) (noting how online search is dominated by Google, with some competition from Microsoft (Bing), social media is dominated by Facebook or services it owns, with some competition from Twitter and Snapchat, digital advertising revenues are dominated by Google and Facebook, the mobile app downloads market is a duopoly between Apple (App Store) and Google (Google Play), and e-commerce through online marketplaces is dominated by Amazon, with eBay providing some competition).

> *operates a search engine that processes over 3.5 billion searches a day (Google Search), runs the biggest online video platform (YouTube), licenses the world's most popular mobile operating system (Android), and is the largest seller of online advertising. Amazon is a major online marketplace, retailer, logistics network, cloud-storage host, and television and film producer. Facebook boasts 2.4 billion monthly active users worldwide, meaning more people use the social network than follow any single world religion. Apple popularized the smartphone, making the device so ubiquitous that consumers have grown accustomed to carrying a supercomputer in their pocket. Collectively, the Big Four generated over $690 billion in revenue in 2018—a sum larger than the annual GDPs of most national economies.*[71]

My earlier submission with Ariel Ezrachi examines (i) the centrality of personal data in the digital platform economy, (ii) how the multiple network effects can tip markets and lead to winner-takes-all-or-most, (iii) how leading firms can use anticompetitive actions to attain, maintain, and extend their dominance, (iv) how data-opolies can be far more durable than past monopolies, and (v) the multiple political, social, and economic risks posed by these powerful digital platforms.[72]

Thus, data-opolies can impose multiple negative externalities on others, and market forces are not correcting (or deterring) these abuses.[73] What then can Congress do?

Fortunately, over the past few years policy makers around the globe have studied the complexity and risks of digital platform markets, and discussed the need to recalibrate current antitrust, privacy, and consumer protection tools and fashion new ones to mitigate these risks. Among the key reports and studies are the *OECD Roundtable on Big Data,*[74] *OECD Roundtable on Algorithms and Collusion,*[75] *EU Commission Special Advisors*

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[71] U.S. Congressional Research Service, *Antitrust and "Big Tech"* at 1 (Sept. 2019) (internal footnotes omitted).

[72] Written Statement for the Record by Maurice E. Stucke and Ariel Ezrachi for a hearing before the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law titled Online Platforms and Market Power, Part III: The Role of Data and Privacy in Competition (Oct. 18, 2019).

[73] Yan Carrière-Swallow & Vikram Haksar, *The Economics and Implications of Data: An Integrated Perspective*, No. 19/16, International Monetary Fund, Strategy, Policy, and Review Department, at 14 (Sept. 2019).

[74] OECD, Big Data: Bringing Competition Policy to the Digital Era, https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm

[75] OECD, Algorithms and Collusion, https://www.oecd.org/competition/algorithms-and-collusion.htm.

*Report on Competition Policy for the Digital Era,*[76] *French Competition Authority's 2018 Report on the Online Advertising Sector*,[77] *UK Expert Panel Report - Unlocking Digital Competition,*[78] *the ACCC Digital Platforms Inquiry,*[79] *Canada's House of Commons Standing Committee on Access to Information, Privacy and Ethics,*[80] *UN World Economic and Social Survey 2018-Frontier Technologies for Sustainable Development,*[81] *University of Chicago Committee for the Study of Digital Platforms 2019 Report*,[82] and the *UK Online Platforms and Digital Advertising Market Study Interim Report.*[83]

A survey of the remedies proposed thus far in these reports can be categorized as follows:

(i) greater need for proactive antitrust review of dominant platforms[84] (which we are already witnessing with the announcement of task forces in 2019 by the U.S. Department of Justice and Federal Trade Commission; investigations by numerous state attorneys general, investigations in the EU by the European

[76] *Competition Policy for the Digital Era*, A report for the European Commission by Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer (2019), http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[77] Autorité de la concurrence, Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3133&lang=en

[78] *Unlocking Digital Competition*, Report of the UK Digital Competition Expert Panel (March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (Furman Report).

[79] ACCC Digital Platforms Inquiry -- Final Report (June 2019), https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.

[80] Canada, House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Democracy under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly* (Dec. 2018), http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-17/page-141#37.

[81] United Nations, *World Economic And Social Survey 2018: Frontier Technologies For Sustainable Development* (Oct. 8, 2018), https://www.un.org/development/desa/dpad/publication/world-economic-and-social-survey-2018-frontier-technologies-for-sustainable-development/.

[82] George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee, Report (July 1, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.

[83] UK Competition and Markets Authority, *Online Platforms and Digital Advertising Market Study Interim Report* (Dec. 18, 2019), https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#interim-report.

[84] *See, e.g.,* ACCC Final Report at 13 ("the opacity and complexity of these markets make it difficult to detect issues and can limit the effectiveness of the broad principles. As a result, the ACCC considers that existing investigative tools under competition and consumer law should be supplemented with additional proactive investigation, monitoring and enforcement powers to achieve better outcomes for Australian businesses and consumers.").

Commission and member States, and investigations by competition authorities in Australia, India, Argentina, Brazil, and Korea);

(ii) greater antitrust scrutiny of data-driven and platform-related mergers and acquisitions, [85] including changes to the appraisal of conglomerate transactions,[86] changes to the burden of proof, and lowering of the reporting thresholds for pre-merger review;[87]

(iii) the need for regulation, ex ante codes of conduct, and an independent ombudsman to better regulate the behavior of these data-opolies, given their superior bargaining position with respect to advertisers, website publishers, app developers, news organizations, and individuals, and mechanisms to quickly resolve disputes;[88]

(iv) policies to increase transparency in the online advertising markets;[89]

(v) reducing the regulatory imbalance in how the traditional news media is treated versus the digital platforms;[90]

(vi) undertaking measures to improve the flow of data, including promoting multi-homing by users (e.g., targeting data-opolies' using users' default bias to entrench their market power, [91] such as Google paying Apple $12 billion to be

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[85] *See, e.g.,* Furman Report at 12 ("Merger assessment in digital markets needs a reset. The CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition, supported by changes to legislation where necessary.").

[86] *See, e.g.,* ACCC Final Report at 30, 105 (recommend amending merger law to incorporate in the agency's assessment "(i) the likelihood that the acquisition would result in the removal from the market of a potential competitor; and (ii) the nature and significance of assets, including data and technology, being acquired directly or through the body corporate").

[87] *See, e.g.,* ACCC Final Report at 10 ("the large digital platforms should each agree to a protocol to notify the ACCC of proposed acquisitions that may impact competition in Australia") & 109.

[88] *See, e.g.*, CMA Interim Report at 21-22 (proposing to adopt Furman Report recommendations); Furman Report at 61 (proposing the establishment of a Digital Markets Unit which will enact codes that "ensure that business users are provided with access to designated platforms on a fair, consistent and transparent basis; provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis; and not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market"); ACCC Final Report at 37 (amending the law so that unfair contract terms are identified and prohibited (not just voidable), and impose civil pecuniary penalties when they are used in any standard form consumer or small business contract); University of Chicago Report at 9 (proposing a similar initiative, calling for the creation of a specialist US regulator, the Digital Authority, tasked with creating general conditions conducive to competition). In June 2019, the European Council of the European Union adopted a regulation that seeks to improve relationships between digital platforms and businesses, by providing businesses with a more transparent, fair and predictable online business environment, as well as an efficient system for seeking redress. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN.

[89] *See, e.g.*, CMA Interim Report at 24; ACCC Final Report at 12.

[90] *See, e.g.*, ACCC Final Report at 32.

[91] *See, e.g.*, CMA Interim Report at 23 (requiring a "default 'opt-in' to personalised advertising rather than the current default opt-out").

the default search engine on Safari[92]), reducing switching costs (such as improving data portability and interoperability),[93] and imposing, at times, a duty for data-opolies to share data with rivals, while safeguarding individuals' privacy interests;

(vii) improved privacy protections;[94]

(viii) specialized task force to focus on digital platforms;[95] and

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[92] *See, e.g*., ACCC Final Report at 10, 30 (recommending changes to search engine and internet browser defaults so that Google provides Australian users of Android devices with the same options being rolled out to existing Android users in Europe: the ability to choose their default search engine and default internet browser from a number of options).

[93] *See, e.g*., Furman Report at 9-10 (recommending that its proposed digital markets unit should pursue personal data mobility and systems with open standards where these will deliver greater competition and innovation).

[94] *See, e.g.,* CMA Interim Report at 23. Looking at the European Union, note for example the General Data Protection Regulation (GDPR), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016; EU Platform-to-Business Regulation, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services PE/56/2019/REV/1 OJ L 186, 11.7.2019; the proposed EU ePrivacy Regulation. "Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC. In the US, note the California Consumer Privacy Act, which took effect on January 1, 2020. Intended to give California consumers "an effective way to control their personal information," the act guarantees consumers the right to, among other things: know the types of personal information companies collect from them; know whether their personal information is sold or disclosed and to whom; prevent the sale of their personal information; have access to their personal information; and receive equal service and price, which prohibits discrimination against those who exercise their privacy rights under the statute. See also ACCC Final Report at 34-35 (recommend updating definition of personal information to capture potential online identifiers of individuals; strengthening privacy notifications and consent requirements with pro-consumer privacy defaults; enable the erasure of personal information; private causes of action for privacy violations; and higher penalties under the privacy statute).

[95] *See, e.g*., ACCC Final Report at 13, 142 (recommending the creation of a specialist digital platforms branch within the agency "to build on and develop expertise in digital markets and the use of algorithms, with the purpose of: proactively monitoring and investigating instances of potentially anti-competitive conduct and conduct causing consumer harm by digital platforms, which impact consumers, advertisers or other business users (including news media businesses); taking action to enforce competition and consumer laws relating to the conduct of digital platforms; conducting inquiries and making recommendations to Government to address consumer harm and impediments to the efficient and effective operation of the markets in which digital platforms operate, caused by market failure"); Federal Trade Commission, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets, 26 February 2019, (announcing the creation of a task force dedicated to monitoring competition in US technology markets, investigating any potential anti-competitive conduct in those markets, and taking enforcement actions when warranted); Competition Bureau of Canada, Building Trust to Advance Competition in the Marketplace – The Competition Bureau of Canada 2018-2019 Annual Plan, May 30, 2018, https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04371.html (creating a Chief Digital Enforcement Officer and building capacity in the digital enforcement, given the "increasing risks of anti-competitive behaviour that may not be easily detected using traditional methods" and prioritizing digital economy investigations with high-impact and consumer focus).

(ix) increased cross-agency collaboration (between competition agencies and the various regulators across jurisdictions) to prevent a race to the bottom where jurisdictions compete to attract data-opolies by degrading privacy protection.[96]

Each of the above nine proposals is a necessary, but not sufficient step, in addressing some of the risks posed by these data-opolies.

A key priority is to promote privacy and data protection. The law has not kept up with the data-driven technologies that impact our privacy. This was not the first time. The same year Congress enacted the Sherman Antitrust Act, Samuel Warren and Louis Brandeis called in their seminal law review article for greater privacy protection: "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.'"[97]

Congress must protect the fundamental rights and freedoms, and personal data, of U.S. citizens, and clarify our rights in our data and ability to prevent its appropriation without our meaningful consent. In particular, one would hope for greater protection with respect for private life, confidentiality of communications, and the protection of personal data in the digital economy. Robust privacy and data protection policies, can, as the ACCC Final Report points out, address:

- the current imbalance in bargaining power between the individual and these powerful platforms,
- the asymmetry in knowledge under the current notice-and-consent model used in the U.S. and elsewhere,
- how data-opolies and others operating within their advertising ecosystem often behave contrary to users' privacy interests – i.e., their personal data is

[96] ACCC Final Report at 29 ("Coordination across national borders is critical to address is mirrors the example of jurisdictions such as Canada, which announced the creation of the role of Chief Digital Enforcement Officer within its Competition Bureau, and an aim to commence 10 digital economy investigations in 2018-2019.competition and consumer concerns that arise from the conduct of the leading digital platforms, given their global operations. It is intended that the digital platforms branch within the ACCC, proposed under Recommendation 4, will work closely with equivalent teams at overseas competition agencies and overseas consumer agencies. This coordination will enable competition and consumer agencies to learn from each other, enhance cross-border enforcement and, where appropriate, share information and align their approaches to meet the same objectives."); Carrière-Swallow & Haksar, *supra*, at 5 (arguing "that international coordination is needed to achieve the minimum data policy principles that are compatible with productive cross-border data economies").

[97] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193, 195 (1890).

increasingly being harvested about them, but not for them, and
- how personal data represents a key source of the data-opolies' power.

In terms of data flow, the key juncture is the initial capture of personal data, or as Shoshana Zuboff describes in her 2018 book *The Age of Surveillance Capitalism*: *The Fight for a Human Future at the New Frontier of Power*, the capture of behavioral surplus.

To improve privacy protection, Congress can take several complementary routes. First is to **increase privacy competition.** Privacy can be an important non-price component of competition once the incentives of market participants are aligned with our interests. So, privacy laws can provide the guardrails in channeling the competition among market participants. The laws will help insure that when the firms collect and use our personal data, that their interests will be aligned with our interests. Privacy laws also prevent companies from outcompeting with one other to degrade our privacy, as they currently do.

Second is **stronger privacy and data regulations**. One approach worth considering is Sen. Joshua Hawley's proposed "Do Not Track Act," which allows users to easily opt out of being tracked.[98] Once the individuals opt out, the company can collect and process their personal data only if it is "necessary for the operation of the website, service, or application." But the proposed legislation specifically carves out "behavioral advertising" from qualifying as "necessary." This looks like an elegant, yet simple, solution to address some of the more egregious abuses by the data-opolies. Indeed, we are seeing similar proposals in the U.K.[99] and Germany.[100]

[98] S.1578 - Do Not Track Act, 116th Congress (2019-2020).
[99] CMA Interim Report at 23 (considering a rule "that all platforms should be required to give consumers an option to use their services without requiring in return the use of consumers' data for personalised advertising").
[100] The Bundeskartellamt's proposed remedy in its case against Facebook included giving users the right to use Facebook without having to share their data – basically the agency determined that the data-opoly's processing in question was not objectively necessary for the performance of a contract with a data subject, or the processing must be objectively necessary in order to take pre-contractual steps at the request of a data subject. Bundeskartellamt, Case Summary: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (15 February 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4. On appeal, the Düsseldorf Higher Regional Court suspended the decision, criticizing the agency for not conducting a counterfactual analysis to establish the exploitative abuse, nor the effect data gathering may have had on market entry of rivals. The Bundeskartellamt is appealing that decision.

As Congress found in enacting the Privacy Act, "the right to privacy is a personal and fundamental right protected by the Constitution of the United States."[101] It also found forty-five years ago how "the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information."[102] Strengthened privacy and data protection, besides safeguarding a fundamental, inalienable right, can also "build trust in online markets"[103] and "empower consumers to make more informed choices about how their data is processed."[104] Thus, privacy and competition can be, at times, complementary in addressing "sources of market inefficiencies such as information asymmetries and bargaining power imbalances."[105]

A third policy avenue is to **promote privacy innovations.** Policies can be designed to encourage technologies that promote our privacy. Stronger privacy and data protections, such as the proposed "Do Not Track Act" or privacy policies modelled on Europe's General Data Protection Regulation "may also encourage the emergence of alternative business models that generate value for, and from, consumers in other ways."[106]

## III. Identify When Competition Is the Problem (Rather than the Cure) of Societal Ailments

To correct today's market power problem, more competition is needed. But as our new book *Competition Overdose* explores, policy makers cannot assume that competition is the elixir for whatever ails society.[107] Competition, as Ariel Ezrachi and I discuss, often delivers. But, at times, increasing competition can be toxic to everyone involved.

Although Congress may want to unleash competition, it must recognize that under certain conditions, competition itself can be toxic – leading to a race to the bottom that brings out our worst rather than our best. Thus, our book contains multiple specific policy proposals to reorient competition from toxic to noble. Here I will summarize two things Congress can do to prevent toxic competition: *first*, use a variety of legal strategies and

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[101] Section 2(a) of the Privacy Act of 1974, Pub. L. No. 93–579, § 2(a), 88 Stat. 1896, 1896.
[102] *Id*.
[103] ACCC Final Report at 5.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] MAURICE E. STUCKE & ARIEL EZRACHI, COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS (2020).

regulatory guardrails to ensure that the competitors' incentives are aligned with our incentives; and *second*, step in to provide what competition and markets, at times, cannot deliver.

One potential trap is when policy makers and government officials assume self-correcting markets, in which the collective self-interest of all the competitors eliminates the need for any regulation. Few markets, if any, match this simplistic vision of perfect competition, where fully informed, self-interested buyers and sellers interact, with few, if any, transaction costs.

As a result, nearly every market is regulated—either by the market participants themselves, a few powerful firms, or the government. For example, the closest thing we have to perfect competition—the stock market—is also one of the most heavily regulated, precisely because regulations are needed to provide guardrails to prevent competition from turning toxic. Without the safeguards imposed by the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, and self-regulatory organizations like the New York Stock Exchange, investors would be exploited by all kinds of unethical strategies, like insider trading, Ponzi schemes, and accounting fraud.

Germane for your Subcommittee here is the curb on behavioral advertising. One of the witnesses in your hearings, David Heinemeier Hansson, the CTO & Cofounder of Basecamp, eloquently described such toxic competition:

> *But choosing to opt out of targeted advertisement on the internet is like competing with one arm behind your back. It is very clear why most companies feel compelled to do this kind of advertisement, even if it's a violation of their ethics. If their competitors are doing it, they're at a significant disadvantage if they don't. And the same is true for us. We have undoubtedly given up growth to competitors because we've refrained from pursuing targeted ads.*
>
> *It feels very much like operating an industrial company in a world without any environmental regulations. . . . When businesses do not have to account for the negative externalities they cause, it's a race to the bottom.*[108]

[108] Written Testimony of David Heinemeier Hansson, CTO & Cofounder, Basecamp, before the Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law U.S. House of Representatives Hearing on Online Platforms and Market Power, Part 5: Competitors in the Digital Economy (January 17, 2020).

Besides the classic arms race/race-to-the-bottom, our book identifies three other categories when competition can be toxic. One category involves safety and quality. In areas where the competitive pressure is intense, companies may seek to escape this pressure by skimping on the quality and safety of the products, the conditions under which laborers perform their work, and the health of consumers, passengers, and users of the product or service. Thus, regulations, and not competition, will ensure that our lasagna actually contains beef, rather than horsemeat, that workers are not exploited, and that our rivers and air are not polluted. Only the vigilant enforcement of these regulatory safeguards will reduce the competitors' incentive and ability to skimp on safety, and ensure that we are safely getting what is promised.

In addition, as the 2008 financial crisis exposed, companies can compete to better exploit our behavioral weaknesses, rather than help us. So, to promote healthy competition, Congress must ensure that we have adequate guardrails, that is restrictions or bans on exploitative practices, like drip pricing. Congress can also increase the costs of engaging in exploitive behavior by defining more areas where consumers are in need of protection—such as personal privacy, which the powerful platforms, Google and Facebook, have so radically invaded—and guaranteeing those protections with the full force of the law.

Finally, Congress should critically examine what competition or markets cannot offer. After the Second World War, UN representatives "with different legal and cultural backgrounds from all regions of the world" drafted the Universal Declaration of Human Rights, which was to serve as a "common standard . . . for all peoples and all nations." Among the fundamental human rights to be universally protected is "the right [of everyone] to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[109]

Even in correcting the antitrust tools to address the market power problem, Congress must ensure that an adequate safety net exists to help those who competed vigorously and fairly, but through no fault of their own, nonetheless came up short.

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[109] https://www.un.org/en/universal-declaration-human-rights/index.html.